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An examination of the inadequacy of the wording of the damage claim provisions of the Oil Pollution Act of 1990, resulting in interpretative legal difficulties as revealed by claims stemming from the Deepwater Horizon Oil Spill

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INTRODUCTION

I INTRODUCTION
The United States Oil Pollution Act 1990 (OPA), contains a provision, s1002(b)(2), that sets out six categories or kinds of damage that may be recovered from a ‘responsible party’ liable for losses resulting from damage caused by the discharge of oil in United States (US) waters. The provision was drafted with the purpose of facilitating a predictable and just outcome for claimants against such a responsible party. The central argument of this dissertation is that the intended purpose is undermined by difficulties in interpreting certain of these provisions, and that, if these provisions are to achieve their objective, they require legislative amendment and that such reform is urgent.

The BP Spill highlighted the issue of the lack of clarity in the claims provisions of the OPA as well as revealing the potentially catastrophic and widespread effect that a spill of this magnitude can have.

II THE BP SPILL
The explosion which occurred on 20 April 2010 on the BP oil rig Deepwater Horizon, engaged in off-shore mining in the Gulf of Mexico (the BP Spill), resulted in the largest oil spill in history. The BP Spill caused extensive, long-term damage to both the sensitive marine ecosystem and also to the entire commercial sector in the area which depends on its

1 OPA, s1002(b)(2):
A. ‘Natural Resources – Damages for injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by the United States trustee, a trustee, an Indian tribe trustee, or a foreign trustee.
B. Real or personal property – Damages for injury to, or economic losses resulting from destruction of real or personal property, which shall be recoverable by a claimant who owns or leases that property.
C. Subsistence use – Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.
D. Revenues – Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.
E. Profits and earning capacity – Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property or natural resources, which shall be recoverable by any claimant.
F. Public services – Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health standards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a state.’
marine resources. From a legal perspective, the BP Spill highlighted the pre-existing problem that the damage claim provisions of the OPA are fraught with interpretative difficulties.

Given the potential for very extensive claims resulting from damage caused as a result of the growth of offshore drilling enterprises in US waters, which increases the likelihood of future spills, this legal difficulty must be addressed urgently through the amendment of the relevant provision.

III OBJECTIVE

This dissertation will show that a lack of clarity exists: (1) about whether the compensation that can be claimed for under these provisions is restricted to compensation for losses proximately caused by the pollution or not; (2) whether the conflicting common law principle in Robins Dry Dock v Flint applies in respect of claims for pure economic loss under the OPA; and (3) about the meaning of the word ‘use’ in the context of the natural resource damage claims. These interpretative difficulties, inherent in the relevant damage claim provisions, will be shown to be insoluble simply by statutory interpretation and are in need of legislative reform, which it will be argued is urgent.

IV THE PRACTICAL CASE FOR URGENT LEGISLATIVE REFORM

It is clear from US investment and current policy that the US desires to exploit its own oil resources, and this depends largely on the mining of the seabed within US territory. Owing to the energy needs of the US, the moratorium on deep seabed mining was lifted a mere six months after the BP Spill. In addition to this exploitation, a US congressional census (2009)

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5 An example of the variety of claims resulting from this incident is evident from the Report by the Claims Administrator of the Deepwater Horizon Economic and Property Damages Settlement Agreement on the Status of Claims Review. United States District Court Eastern District of Louisiana, In Re: oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, Status Report No. 15 (MDL No. 2179) Report by the Claims Administrator of the Deepwater Horizon Economic and Property Damages Settlement Agreement on the Status of Claims Review (November 25, 2013) 6-7.


showed that more than 100,000 commercial vessels were navigating in US waters, and 12.2 million barrels of oil were being imported into the US daily.\textsuperscript{10} Along with the pollution from deep seabed mining, pollution caused by the transportation of oil will continue to exacerbate the problem. The only way in which those affected by marine oil pollution can be assured practically of effective compensation is to ensure that a clear and effective legal framework exists. As funds for compensation are limited, each claim will need to be dealt with in terms of clear legal principles. For this reason, the matter needs to be revisited by the legislature.

V STRUCTURE OF THE DISSERTATION

(a) \textit{Chapter 2 – Statutory interpretation}

As the objective of this dissertation is to reveal the interpretative difficulties inherent in certain of the damage claim provisions of the OPA, it is logical that an introduction to the general ‘principles’ of statutory interpretation be provided and certain terminology relative to statutory interpretation be explained. This is done in this chapter.

(b) \textit{Chapter 3 – Proximate cause provided or excluded – the Goldberg approach}

‘Profits and earning capacity – Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property or natural resources, which shall be recoverable by any claimant’.\textsuperscript{11}

The inclusion of the phrase ‘due to’ in this clause creates an interpretative conundrum. It is uncertain from the text whether the phrase ‘due to’ implies some sort of causative link requirement. Confusion exists as to the nature of this link, whether the doctrine of proximate causation is applicable, or whether it suffices that the pollution is the factual cause of the claimable loss.

The key question is the distance along the economic chain that can be included in the provision made by the OPA for the purposes of validating causes cited for claims.\textsuperscript{12} General principles of statutory interpretation will be employed to establish whether any limits of the cause-effect chain can be read into the section at issue. Harvard Law School Professor Goldberg has formulated a 17-point hypothetical claim scenario to guide the administrators of

\textsuperscript{10} Robert H Urwellen \textit{Oil Spill Costs and Impacts} (2009) 3.
\textsuperscript{11} OPA, s1002(b)(2)(E).
\textsuperscript{12} Andrew B Davis ‘Pure Economic Loss Claims Under the Oil Pollution Act: Combining Policy and Congressional Intent’ (2011) \textit{45 Colum JL & Soc Probs} 1 at 4.
the claims fund in interpreting section 1002(b)(2)(E).

The Goldberg hypothetical model and the consequent academic debate will be examined in this chapter.

(c) Chapter 4 – Conflicting law – The Robins Rule v the OPA

This chapter continues to examine the economic loss provision of the OPA to illustrate interpretative difficulties, highlighting the existence of confusion owing to inconsistent applications by the courts and a conflict of law regarding recovery for economic loss in tort claims relating to existing admiralty law (the common law) as in Robins Dry Dock and Repair Co v Flint and section 1002(b)(2)(E) of the OPA.

Before the enactment of the OPA, the decision of the Supreme Court in the matter of Robins Dry Dock and Repair Co v Flint set the common law principle for determining when damages based on economic losses could be claimed under admiralty law (‘The Robins rule’). This case held that purely economic losses were not recoverable in admiralty and tort actions unless physical harm had been caused to a proprietary interest. This ruling is in conflict with the wording of section 1002(b)(2)(E) of OPA which extends the validity of claimants beyond those with proprietary interest to those suffering loss of profits and earning capacity, as well as to injured parties who have no proprietary interest.

The matter at issue in this chapter is the extent to which the Robins rule applies to the BP Spill and what effect it will have on the validation of economic loss claims.

(d) Chapter 5 — The lack of linguistic accuracy: the meaning of the term ‘use’ in the natural resource damage claim provisions.

‘Natural Resources – Damages for injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by the United States trustee, a trustee, an Indian tribe trustee, or a foreign trustee’.

The third difficulty relates to confusion about the exact legal meaning of the term ‘use’ in the natural resource damage claim provisions in that ‘use’ is not defined in the OPA. A clear

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14 OPA, s1002(b)(2)(E).
16 275 US 303(1927), 309.
17 275 US 303(1927), 309.
18 OPA, s1002(b)(2)(A); emphasis added by writer.
meaning of this term is essential as it will impact on what types of natural resource claims will be recoverable.

By employing the tools of statutory interpretation, it is clear that the exact legal meaning of the term 'use' remains inconsistent.

(e) Conclusion
The conclusion drawn from the legal analysis presented in Chapters 3 to 5 has shown the interpretative difficulties in the damage claim provision of the OPA necessitating amendment and also shows that, given the increase in off-shore mining in US waters so increasing the probabilities of further spills of some magnitude, reform is urgent.

VI CONCLUSION
When it was enacted, the OPA was described as ‘addressing the many shortcomings of the existing patchwork of laws on oil spills’ and as ‘a tremendous step forward’.19 A more considered version of this enthusiastic reception, however, is that OPA was simply a consolidation of a previous ‘patchwork’ of existing laws20 and that, specifically, the damage claim provisions need greater precision. It was only after the BP Spill that the OPA damage claim provisions could be seen to be inadequate, fragile, and unclear.

CHAPTER 2
STATUTORY INTERPRETATION

I  INTRODUCTION
To provide the basis for the analysis of the interpretative difficulties of this US statutory provision, it is necessary to start by providing a brief survey of the legal principles of statutory interpretation in American law applicable to the interpretation of American legislation.

II  STATUTORY INTERPRETATION
‘There is no presumption that every statute answers every question, if only we could find or invent the answer. Some statutes simply do not address the problem. The novelty of a question suggests that the legislature did not answer it. To claim to find an answer by “interpretation” – when the legislature neither gave the answer nor authorized judges to create a common law – is to play games with the meaning of words like “interpretation”’. 21

This dissertation will explore whether the damage claim provisions of the OPA do ‘answer’ every ‘question’ relevant to understanding the exact meaning of provisions. If they do not, it will also be shown that the application of the tools of statutory interpretation to the provision does not provide sufficient answers either.

Different approaches to statutory interpretation do exist. 22 Justice Holmes summarises the dominant theory of legal interpretation as follows, ‘We do not inquire what the legislature meant; we ask only what the statute means’. 23 This supports the view that such methods must be consulted only if the answer is not in the formulation of the statute. The generally accepted steps taken to gain clarity about the meaning of a legal formulation are, firstly, to examine the legislative history; does the ‘agency’ provide clarity or guidance to overcome the interpretive obstacle?

22 Frank H Easterbrook ‘The Role of Original Intent in Statutory Construction’ (1988) 11 Harv JL & Pub Pol’y 59; Oliver W Holmes ‘The theory of legal interpretation’ (1899) 12 Harv L Rev 419; Felix Frankfurter ‘Some reflections on the reading of statutes’ (1947) 47 Colum L Rev 527; Richard A Posner ‘Legal formalism, legal realism, and the interpretation of statutes and the constitution’ (1986-1987) 37 Case W Res L Rev 179. It is important to note that not just one approach is acceptable or carries more weight than another. As different approaches can have different outcomes it is best to redraft contentious legislation to provide legal certainty.
23 Oliver W Holmes ‘The theory of legal interpretation’ (1899) 12 Harv L Rev 419.
Then one considers whether the undergirding values of the statute provide clarity, or, equally, whether a hypothetical question would give an answer to overcome this interpretive difficulty. A consultation of case law to determine how judges have interpreted certain statutory provisions may also shed interpretive light, especially if, as US Court of Appeals Judge Posner observes, ‘the only test of correctness in such cases is the test of time’, and, further a propos of difficult cases of interpretation, ‘The importance of the test of time is that it offers a method of verifying decisions that when rendered cannot be adjudged more than probably correct or probably incorrect.’ Finally, consulting the work of academics who debate these issues through their research may also be useful. An overview will now be given of some of the apposite tools of interpretation that will be treated in subsequent chapters.

(a) The text

If a text is unclear it calls for interpretation. A text is not clear if a majority of persons having the same linguistic competence expected of the drafters disagrees on the exact meaning of the text. The first step towards overcoming interpretive difficulty is to look at the text itself, to ponder the actual verbal formulation of the text. A judge should be led sufficiently by the language used in a statute to decide what the statute, or a certain provision, means. When dealing with a problematic word in a statute the definitions clause should first be consulted. If clarity is not forthcoming from this obvious source, the next source to be consulted would be the dictionary. The possible meanings given in the dictionary would have to be sifted to decide which, if any, of them would be appropriate in the context concerned. The test is not what the legislature meant by using the relevant formulation but rather how the targeted English speaker would interpret it.

28 Felix Frankfurter ‘Some reflections on the reading of statutes’ (1947) 47 Colum L Rev 527 at 535.
30 Oliver W Holmes ‘The theory of legal interpretation’ (1899) 12 Harv L Rev 417 at 419; Frank H Easterbrook ‘The Role of Original Intent in Statutory Construction’ (1988) 11 Harv JL & Pub Pol’y 59 at 61: ‘Original meaning is derived from words and structure, and perhaps from identifying the sort of problem the legislature was trying to address...Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem’.
31 Oliver W Holmes ‘The theory of legal interpretation’ (1899) 12 Harv L Rev 417 at 419.
(b) **Legislative history**

When legal clarity cannot be gleaned from a linguistic interpretation in the immediate sense, the drafters’ intent must be established by examining the legislative history of the statute in general and the specific provision in particular.\(^{32}\) A subjective evaluation of intent is permissible if the legislative history of the provision is clear, well documented, and reliable.\(^{33}\) There are many schools of thought regarding the approach of original intent.\(^{34}\) Hatch holds that legislative history, properly applied, is of immense value in statutory interpretation, given that ‘text without context often invites confusion and judicial adventurism’.\(^{35}\) Furthermore, ‘Authoritative legislative history can serve to focus the general words of a statute to the specific harms it is meant to correct’.\(^{36}\) Thus legislative history is a helpful tool that, when used circumspectly, can assist the judge to determine the meaning of a word in the light of its context.\(^{37}\)

(c) **The ‘Agency’**

If an examination of legislative intent fails to overcome the interpretive obstacle, the next step is to examine whether the ‘agency’ addresses this issue. A statute may explicitly grant powers of judicial review of that statute, or powers to perform other functions of oversight and implementation in accordance with the statute,\(^{38}\) to a species of government agency created in the belief that such agencies would provide a valuable contribution towards legislative clarity.\(^{39}\) There are both proponents and opponents of the concept of vesting such powers in such agencies. Judge Posner is such a critic.\(^{40}\) He deems it unrealistic to expect the court to regard agency interpretations of legislation to be of much influence. ‘...the mere fact

\[^{33}\text{Orrin Hatch ‘Legislative history: Tool of construction or destruction’ (1988) 11 Harv JL & Pub Pol’y 43.}\]
\[^{35}\text{Orrin Hatch ‘Legislative history: Tool of construction or destruction’ (1988) 11 Harv JL & Pub Pol’y 43.}\]
\[^{36}\text{Orrin Hatch ‘Legislative history: Tool of construction or destruction’ (1988) 11 Harv JL & Pub Pol’y 43 at 47.}\]
\[^{37}\text{Orrin Hatch ‘Legislative history: Tool of construction or destruction’ (1988) 11 Harv JL & Pub Pol’y 43 at 49.}\]
\[^{39}\text{Harlan F Stone ‘The Common Law in the United States’ (1936-1937) 50 Harv L Rev 4.}\]
\[^{40}\text{Richard A Posner ‘Statutory Interpretation – in the Classroom and in the Courtroom’ (1983) 50 U Chi L Rev 800 at 802.}\]
that it is the current agency interpretation does not entitle it to any particular weight’.

It is worth considering, however, that agencies would probably be capable of offering constructive interpretive guidance if they were afforded the opportunity of taking a collaborative hand in drafting the statutory text containing the provisions under which they were given the powers of oversight.

In *Chevron USA Inc v Natural Resources Defence Council Inc* the court devised the so-called two-step test to determine whether an agency interpretation of a statutory provision was permissible. The first step consisted of establishing whether the statute or determination of the relevant congressional intent clarified the issue at hand, in which case it would be incumbent on the agency and the court to make a concerted declaration as to the meaning at issue, followed by court action to implement the meaning. Secondly, if the issue at hand remains unresolved and ambiguous, the agency’s interpretation is countenanced if it is based on a reasonable construction of the statute. Considering *INS v Cardoza-Fonseca* in *Union of Concerned Scientists v Nuclear Regulatory Commission*, the circuit court held that the *Chevron* test applied only:

‘...in circumstances in which an agency is required to apply a legal standard to a particular set of facts.’ In all other cases in which an agency interprets an ambiguous provision in the statute that grants the agency its legal power, the court’s role is ‘to use traditional tools of statutory construction to ascertain congressional intent’.

The *Chevron* test should, thus, be applied when the specific statute in contention allows the agency to interpret or expand on certain provisions, provided that permission for such intervention is granted only if traditional tools have failed to provide clarity.

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41 Richard A Posner ‘Statutory Interpretation – in the Classroom and in the Courtroom’ (1983) 50 *U Chi L Rev* 800 at 802.
42 Jefferson B Fordham and J Russel Leach ‘Interpretation of statutes in derogation of the common law’ (1950) 3 *Vand L Rev* 438 at 455.
47 824 F2d 108 (DC Cir 1987), 113.
(d) Common law

The US has a common law system that rests to a large extent on judicial decisions in the sense that such decisions form part of common law. This fact necessitates an explanation of the essential difference between statutes and common law in the US, namely that common law is made by judges who effectively act as ‘legislatures’, while statutes such as the OPA are drafted by the legislature and passed by Congress.\(^49\) Common law can be described as ‘conceptual’ and not ‘textual’, ‘unwritten law in a profound sense’.\(^50\) Judge Posner objects to the notion that words are always the first consideration in addressing the interpretation of legislation.\(^51\) He claims that ‘the good judge as well as the bad judge – in fact begins somewhere else’, often by consulting case law, a procedure that is not without merit as it will provide context.\(^52\) Some judges only consult case law and never return to the statutory language.\(^53\) Case law (common law) may serve as a valuable interpretive tool. There is no legally binding source prescribing systematic steps of inquiry that take precedence over others in interpreting legislation.\(^54\)

Common law may be at variance, however, with a statutory provision dealing with the same legal principle. There are approaches which can help to resolve such a conflict of laws, but these are merely theoretical approaches, and they do differ.\(^55\) Such a conflict of common and statutory law exists in the damage provisions of the OPA and will be treated in Chapter 5.

III METHODOLOGY DERIVED TO DECONSTRUCT THE RELEVANT DAMAGE PROVISIONS OF THE OPA

As a range of interpretive obstacles are dealt with in the following chapters, the interpretive principle to be adopted with respect to the contentious provision concerned in each case will

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\(^{51}\) Richard A Posner ‘Statutory Interpretation – in the Classroom and in the Courtroom’ (1983) 50 U Chi L Rev 800 at 808.

\(^{52}\) Richard A Posner ‘Statutory Interpretation – in the Classroom and in the Courtroom’ (1983) 50 U Chi L Rev 800 at 808.

\(^{53}\) Richard A Posner ‘Statutory Interpretation – in the Classroom and in the Courtroom’ (1983) 50 U Chi L Rev 800 at 808.

\(^{54}\) Richard A Posner ‘Statutory Interpretation – in the Classroom and in the Courtroom’ (1983) 50 U Chi L Rev 800 at 801.

be announced at the beginning of each of the chapters, and these will, therefore, be structured accordingly.

IV CONCLUSION

‘When we study law we are not studying a mystery but a well-known profession. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of their incidence of the public force through the instrumentality of the courts... Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system’. 56

The claimants suffering in the aftermath of the BP Spill need legal certainty in order to have recourse to swift and effective justice. A statute riddled with interpretive difficulties that prove stubbornly resistant to resolution even with the aid of the explicatory remedies that can be provided in such cases needs to be redrafted. As the basic concepts of legal interpretation have been explained, the interpretive inadequacies of certain of the damage provisions of the OPA will be highlighted and the call for urgent reform of these provisions to insure predictable outcomes for claimants will be shown to be justified.

56 Oliver W Holmes ‘The Path to the Law’ (1896-1897) 10 Harv L Rev 457.
CHAPTER 3
PROXIMATE CAUSATION IMPLIED OR EXCLUDED? – THE GOLDBERG APPROACH

I INTRODUCTION
Claims under OPA, s1002(b)(2)(E), concerning claimable economic loss have attracted more debate than those under any other sub-section in the damage provision of the OPA, and they far exceed the combined value of all other types of claims submitted after the BP spill. The April 2012 Status Report of the Gulf Coast Claims Facility stated that it had paid out a total of $6,316,458,256, and that about 96% of that amount – $ 6,053,660,113,42 – had been paid to settle claims brought under the economic loss provision.

Confusion concerning claims of this magnitude needs to be addressed and the interpretative difficulty with regard to the provision facilitating these claims examined.

II INTERPRETATIVE DIFFICULTY
OPA, s1002(b)(2)(E) reads:

‘Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.’

Confusion exists as to what exactly is meant by the words ‘due to’ in this provision. The question is whether the expression refers to causation in the sense of proximate causation as encapsulated in the phrase ‘proximately due to’ or whether they imply that proximate causation can be excluded. The possibility, therefore, exists of a narrow interpretation whereby only claims arising proximately due to the spill would be admissible, whilst a broader interpretation would allow that all claims arising from the spill, whether proximately or not, will be admissible. This issue of causation cuts across all the damage provisions of the OPA. OPA, s1002(b)(2)(E) will be utilised, however, in an attempt to resolve these issues or

57 ‘Profits and earning capacity – Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property or natural resources, which shall be recoverable by any claimant’.
60 Writer’s own emphasis.
to show that the exact meaning remains indeterminate, reflecting the amount of scholarly
attention this section has received.

In Anderson v Wilson 289 US 20, 27 (1933), Judge Cordoza commented on the task
of the judiciary in interpreting legislative provisions:

‘We do not pause to consider whether a statute differently conceived and framed would
yield results more consonant with fairness and reason. We take this statute as we find
it’. 61

Felix Frankfurter, Justice of the United States Supreme Court, adopted a similar approach:

‘An omission at the time of enactment, whether careless or calculated, cannot be
judicially supplied however much later wisdom may recommend the inclusion’. 62

It is arguable that proximate causation cannot be implied by the text if it is not included in the
provision; moreover a textual examination will not shed light on the matter as ‘due to’ can
have several legal meanings. The legislation has to be interpreted as it is written. As none of
the text, the context, or the agency approaches to interpretation has resolved the question at
hand, this chapter will examine whether the remaining tools of statutory interpretation,
judicial decisions, and hypothetical questions may shed some light on determining the exact
scope of what claims will be admissible and to what extent they will be in accordance with
the wording ‘due to’. Professor Goldberg was requested by Kenneth Feinburg, Administrator
of the BP Plc Fund, to assist by constructing a hypothetical model to determine the exact
meaning of this provision.

This chapter will provide a short introduction indicating the urgency of a clear
understanding of the provision at issue. This will be followed by a discussion of the validity
of claimants as this is closely related to the ‘due to’ requirement. An explanation of the
concept of ‘proximate cause’ and the US position on the doctrine of proximate causation,
with due reference to case law, will then be examined63, after which the hypothetical
question/case study presented by Professor Goldberg will be considered to determine
whether definitive light is shed on the expression ‘due to’. Finally, the actions of the judiciary
in the matter of the BP Spill will be examined to see whether the ruling in that matter

61 Felix Frankfurter ‘Some reflections on the reading of statutes’ (1947) 47 Colum L Rev 527 at 534.
62 Felix Frankfurter ‘Some reflections on the reading of statutes’ (1947) 47 Colum L Rev 527 at 534.
63 Roscoe Pound ‘Common Law and Legislation’ (1908) 6 Harv LR 383 at 400: ‘The surest construction of a
statute is by the rule and reason of the common law.’ In other words, it should be construed so as to fit into the
legal system of which it is a part. Statute and common law should be construed together just as statute and
statute must be.’
conformed to the hypothetical model, whether the interpretive difficulty encumbering the matter had been resolved in the process, or whether urgent legislative reform still required urgent attention in this regard. A conclusion will be drawn arguing for such reform.

(a) The text

The vital interpretative consideration of deciding which claims are admissible is the ‘due to’ requirement which presents a vexed question to scholars since it is not defined in the OPA, nor is it used elsewhere in the text of that document, so deduction of the meaning is prevented by contextual comparison of instances of its usage.⁶⁴

Professor Goldberg is of the opinion that the inclusion of the phrase ‘due to’ entails that ‘[b]y its plain terms, OPA limits the universe of valid claims for lost profits and impaired earning capacity to those “due to” the injury, loss or destruction of property or resources’.⁶⁵ According to Professor Goldberg, the inclusion of the phrase ‘due to’ implies that, ‘A claimant relying on these sections must prove damage to, or loss of, property or natural resources that “result(s) from” a discharge and lost profits or impaired earning capacity “due to” that damage or loss’.⁶⁶ The respected scholar, Andrew B Davis, comes to a similar conclusion as he asserts that the ‘due to’ phrase requires at least some link between economic loss and physical property damage.⁶⁷

(b) Legislative History and the Agency

Neither Congress nor the Agency provides an opinion on this issue.⁶⁸

Scholars, however, are debating the interpretation of the ‘due to’ requirement in relation to the legislative history of the OPA. Professor Goldberg explains that it is a fundamental tenet of statutory construction that terms used in that type of context are definitely relevant and necessary to convey the intended statutory meaning; it follows, therefore, that ‘due to’ sets an additional requirement for recovery for economic loss under

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the OPA.\textsuperscript{69} A narrow reading of this provision is encouraged in the Goldberg Report.\textsuperscript{70} In contrast, Davis turns to the legislative history of the OPA and notes that it was written in the immediate aftermath of the Exxon Valdez Spill.\textsuperscript{71} He is of the view that the historical context of the Act and the available legislative history reinforce a reading allowing for a broader recovery and that courts have been left with the task of fashioning some interpretation of the ‘due to’ requirement that gives force to the available historical and congressional guidance.\textsuperscript{72} It seems apposite to conclude that Professor Goldberg’s argument that the inclusion of the phrase ‘due to’ is a definite indication that the proximity and causation principles as encapsulated in general and maritime tort law apply to provide a narrow reading of the category of claims for damages incurred as a result of economic loss, the object of doing so being the limitation of the chain of recovery.\textsuperscript{73}

\textbf{(c) Case law}

The interpretation of the meaning of the phrase ‘due to’ is central to determining whether the doctrine of proximate causation, originating from the benchmark United Kingdom (UK) case \textit{Leyland Shipping}\textsuperscript{74}, is implied or excluded in this provision.\textsuperscript{75} In the UK, the doctrine of proximate causation is applied consistently; this, however, is not the case in the US.\textsuperscript{76} The basic requirements for the successful recovery of economic loss in US tort law are that the claimant must prove either proximate cause or that damages suffered are a direct consequence\textsuperscript{77} of the injury as well as foreseeability, meaning that a reasonable person should have been able to foresee that such damage could occur.\textsuperscript{78} In his dissenting judgement in the

\begin{footnotesize}
\begin{itemize}
    \item[71] Andrew B Davis ‘Pure Economic Loss Claims Under the Oil Pollution Act’ (2011) 45(1) Colum J L & Soc Probs 1 at 25.
    \item[73] Andrew B Davis ‘Pure Economic Loss Claims Under the Oil Pollution Act’ (2011) 45(1) Colum J L & Soc Probs 1 at 22.
    \item[74] Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd AC 350 HL (1918).
    \item[75] The court held that the test of proximate causation basically entails which event caused the loss. See Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd AC 350 HL (1918), 453-454.
    \item[76] Anthony J Saunders ‘Proximate Cause in Insurance Law – Before and After Derksen’ 32 Advoc Q 1.
    \item[77] In \textit{In Re Polimis} 1921 KB 3 560 (1921) Warrington LJ defined proximate cause as follows: ‘The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are or are not the direct consequence of the act’.
\end{itemize}
\end{footnotesize}
Testbank Case,\textsuperscript{79} Justice Wisdom suggests that the conventional tort principles of foreseeability and proximate cause should apply to limit economic damage claims resulting from pollution incidents.\textsuperscript{80} His rationale is as follows:

‘The resulting bar for claims of economic loss unaccompanied by any physical damage conflicts with conventional tort principles of foreseeability and proximate cause. I would analyse the plaintiffs’ claims under these principles, using the “particular damage” requirement of public nuisance law as an additional means of limiting claims. Although this approach requires a case-by-case analysis, it comports with the fundamental idea of fairness that innocent plaintiffs should receive compensation and negligent defendants should bear the cost of their tortuous acts. Such a result is worth the additional costs of adjudicating these claims, and this rule of liability appears to be more economically efficient’.\textsuperscript{81}

In \textit{In Re Deepwater Horizon},\textsuperscript{82} the courts referred to general tort law when analysing the requirement of causation in determining whether an economic damage claim was fictitious or valid.

Without a loss, a claimant has suffered no injury. Unless a claimant can legally assert a loss, it lacks standing.\textsuperscript{83} Similarly, if a claimant has suffered a loss, but it has no legal claim that the loss was caused by the spill, it also lacks standing and cannot state a claim.\textsuperscript{84} It lacks standing because it cannot allege ‘a causal connection’ between its loss and the spill.\textsuperscript{85}

The fact that causation was examined in \textit{In Re Deepwater Horizon}\textsuperscript{86} suggests that there is, indeed, such a requirement owing to the inclusion of the phrase ‘due to’. The court’s reliance on tort law and admiralty tort law is permissible, as the OPA does not pre-empt general admiralty or tort law.

An analysis of \textit{Gaitlin Oil},\textsuperscript{87} in \textit{In Re Taira Lynn}\textsuperscript{88}, shows that causation is a requirement for a claim to be admissible under the economic damage claims section. In this regard two proximate cause requirements can be isolated in an oil spill case: (1) Any property damage or natural resource damage must result directly from the oil spill; and (2) economic

\textsuperscript{79} \textit{State of LA Ex Rel Guste v m/v Testbank} 752 F2d 1019 (1985), 1035.
\textsuperscript{80} 752 F2d 1019 (1985), 1035.
\textsuperscript{81} 752 F2d 1019 (1985), 1035.
\textsuperscript{82} \textit{In Re Deepwater Horizon Case} 13-30315 (2013), 25-26.
\textsuperscript{83} \textit{Lujan v Defenders of Wildlife} 504 US 55 (1992), 560; \textit{Jobe v ATR Mktg Inc} 87 F3d 751(1996), 753.
\textsuperscript{87} \textit{Gaitlin Oil Inc v USA} 169 F3d (1999), 210-211.
\textsuperscript{88} \textit{In re Taira Lynn Marine Ltd} No 5 LLC 444 F3d 371 (2006), 383.
loss must result directly from the property damage. In *Kinsman II*, the court pronounced in favour of foreseeability as the definitive criterion by which to determine whether claims are cognizable in maritime tort, and, in this regard, the court commented as follows on the limit of foreseeability and proximity, ‘Yet...somewhere a point will be reached when courts will agree that the link has become too tenuous.’ When deciding *Secko Energy*, in which an economic claim was lodged by virtue of section 1002(b)(2)(E) of the OPA, the court relied on the *Kinsman* ruling, finding that ‘OPA shifts toward a case-by-case, “foreseeability” and “proximate cause analysis”’. The concept of proximate cause was clarified in *Weller & Co v Foot and Mouth Disease Research Institute*:

‘Damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision’.

The conclusion can be drawn from case law that the ‘due to’ requirement does, in fact, suggest that the principles of foreseeability and proximate causation apply in terms of the OPA where economic damage claims are concerned.

Different scholars have different views regarding the so-called second requirement or higher threshold set by the ‘due to’ requirement. As Mr Feinberg pursues his subject from the point of view of the Goldberg report, it may be that, until further clarification by the courts and follow-up by the claims facility, the answer will be that ‘any claimants’ should be read as waiving a prerequisite ownership or leasing interest in a property in order to recover for pure economic loss. Inclusion of the ‘due to’ wording also indicates that not all claimants will be permitted to recover despite such a waiver.

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89 *Petition of Kinsman Transit Company* 388 F2d (1964), 824.
90 388 F2d (1964), 1026.
91 *Secko Energy Inc v m/v Margaret Chouest* 820F Supp 1008 (1993), 1011.
93 *Weller v Foot and Mouth Disease Research Institute* 1 QB 569 (Adm) (1966).
(d) Hypothetical Claims

Kenneth Feinberg was appointed to manage the $20-billion oil-spill damages fund of BP plc.\(^6\) Mr Feinberg and The Gulf Coast Claims Facility appointed Professor John Goldberg to prepare a paper interpreting the economic loss provisions contained in the OPA. This report serves as guidance to Mr Feinberg and his associates in determining the scope of section 1002(b)(2)(E). In order to explain section 1002(b)(2)(E), Professor Goldberg used a ‘hypothetical range of claimants who might claim’ to which he refers as ‘The Universe of Potential Pure Economic Loss Claimants’.\(^7\) Categorisation of claims helps to conceptualise the typical scenarios that lead to claims for pure economic loss.\(^8\) The range of hypothetical claimants is as follows:

A. C is a commercial fisherman who relies on fishing in the Gulf of Mexico for his business. C claims that oil from a spill for which Oil. Co. is responsible has polluted the waters in which he fishes, and that he has been, and will be, unable to fish for a period of time, resulting in lost profits.

B. H owns and operates a beachfront hotel in the Gulf area. Oil from the Oil Co. spill has not yet reached the beachfront that is owned by H and is reserved for use by guests at H’s hotel. Oil has, however, been found in the immediate vicinity of H’s hotel, including waters that H’s guests frequently use and neighbouring beaches that H’s guests routinely visit. H claims to have suffered a loss of business because tourists, in light of the effects of the spill on the immediate area in which his hotel is situated, have decided to vacation elsewhere.

C. E is an employee at H’s hotel. Because the hotel has lost business its managers have reduced staff hours by 25%, with the result that E has suffered and will suffer a 25% reduction in his wages for a certain period.

D. B owns a barge that is used to haul equipment and supplies up and down a small navigable river that runs to the Gulf. Oil from the spill reaches the river, threatening migratory birds that live there. Authorities close the river to boat traffic for three weeks to allow clean-up. B is unable to operate his barge during this time and seeks recovery of profits he would have made.


\(^7\) John C P Goldberg ‘Liability for Economic Loss in Connection with the Deepwater Horizon Spill’ available at http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438, accessed on 3 July 2013.

\(^8\) Andrew B Davis ‘Pure Economic Loss Claims under the Oil Pollution Act’ (2011) 45(1) Colum JL & Soc Probs 1 at 16.
E. R operates a dockside restaurant located in a Gulf seaport. Its regular customers are dockworkers, fishermen, and others whose jobs are connected with maritime commerce. R claims that the restaurant has lost profits because of the spill because many of the restaurant’s regular customers have not been frequenting it.

F. A is a real estate agent whose listings are made up primarily of beachfront properties in an area of the Gulf that has been contaminated by the spill. She claims that the market for property sales and rentals has collapsed because of the spill, depriving her of the commissions she otherwise would have made.

G. W is a woodworker who owns a small furniture store located three miles inland in a town that relies on beach tourism as a major source of revenue. W claims that because some of the town’s beaches have been polluted by the spill, orders for his furniture are down and he has lost profits.

H. O owns a beachfront inn located on the Gulf. No oil from the spill has come within 100 miles of the waters or the stretch of coastline on which the inn is situated, and in that location the spill has had no discernible adverse physical effects (such as noxious odours). Given prevailing currents and winds, however, government officials and scientists have concluded that oil might reach those waters and beaches within a month. O claims to have suffered from cancelled reservations and lost profits because of the threat of oil pollution to the water and beaches adjacent to the inn.

I. F owns and operates a fireworks store that is situated along the main interstate highway that leads to a set of Gulf beaches and 150 miles north of those beaches. F relies on tourists travelling to and from the beaches for much of his business. F claims to have lost profits because of reduced tourist traffic resulting from the Oil Co. spill.

J. T runs a tour boat that takes passengers along the scenic Gulf shoreline. No oil from the spill has come, or threatened to come, within 400 miles of the area in which T’s tours take place. T claims that the spill has depressed tourism in the entire Gulf region because of popular misconceptions about the scope of the spill, with the result that has lost business and profits.

K. D owns an amusement park in a landlocked portion of central Florida. Many of D’s patrons are families who combine a trip to D’s park with a beach vacation on Florida’s Atlantic Coast which was never at risk of pollution from the spill. D claims that he has lost profits as a result of the spill because it has engendered consumer unease among the public about travelling to Florida.
L. N owns and operates a resort in Nevada. Each year for the past decade an association of Gulf-area fishermen have held their annual meeting at N’s facility. N claims that the economic effects of the spill have caused the association to cancel its plans to hold their convention at his facility, thus resulting in lost profits.

M. M, a company incorporated and operated in Hartford, Connecticut, imports snorkelling equipment manufactured in China. M claims lost profits because sales of snorkelling equipment have been depressed by the spill.

N. S runs a seafood restaurant in Phoenix, Arizona. Although the seafood it serves is not from the Gulf, S claims that it has lost profits because of general consumer fears about contaminated seafood caused by the spill.

O. G owns a gas station in Boise, Idaho that sells Oil Co-brand gasoline. Although G owns and operates the station as an independent franchise, his station becomes the target of a boycott by a local environmental group demanding greater corporate accountability. G claims lost income resulting from the boycott.

P. L runs a catering company based in New York City, which is also the location of Oil Co’s US headquarters. L claims that a substantial portion of her profits had previously come from catering events at Oil Co headquarters, but that she has lost revenues because Oil Co has cut back considerably on catered events in the aftermath of the spill.99

The above is a clear illustration of the chain reaction of claims which can arise in the aftermath of an oil spill. The Goldberg hypothesis paints a realistic picture as each claimant who suffers an economic setback as a result of the spill will probably pass on a portion of that setback to other persons and businesses.100 This concatenation effect can be illustrated as follows: commercial fishermen suffer a loss occasioned by depleted fish stocks after the spill; the fishermen, in turn, do not support the local retailers who provide them with fishing gear; the local retailers suffer economically and, in turn, make far smaller purchases from the wholesalers; the impact is felt by the wholesalers, and they cut the hours and wages of their employees owing to the significant loss of business.101 Goldberg pinpoints the key question as follows, ‘The key question is how far OPA means for liability to extend along this sort of

100 John C P Goldberg ‘Liability for Economic Loss in Connection with the Deepwater Horizon Spill’ http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438, accessed on 3 July 2013.
economic chain reaction’.\textsuperscript{102} The fact that the economic loss provision is not clear on how strong the cause-effect link between spill and loss must be, or how courts should limit recoverability for these types of claims, causes confusion among scholars, claimants, and fund administrators alike.\textsuperscript{103} Basically this means that there is no clarity about how far-reaching this chain reaction of claimants may be, and the courts have not yet come to a conclusion on this matter.

Goldberg’s hypothesis, and those of his critics, will now be explored in order to highlight the uncertainties and probabilities with regard to the correct interpretation of this section of the OPA.

Professor Goldberg divided the hypothetical claimants set out above into three categories: (1) those for whom the right to recover under OPA is clear (assuming they have adequate proof of damages and actual causation); (2) those for whom there is clearly no right to recover; and (3) those for whom there is properly no right to recover, but who could be deemed eligible to recover based on a broad interpretation of the OPA.\textsuperscript{104}

Falling into category 1 of Professor Goldberg’s analysis are claimants C, H and E, the commercial fisherman, the owner of the hotel situated on neighbouring beaches, and the employee of that hotel who was losing his wages.\textsuperscript{105} His reasoning behind this conclusion is that these claims are based on loss of, or damage to, property or resources to which the claimant has a right of access or use and on which right the claimant’s economic well-being depends.\textsuperscript{106} He further argues that these claimants are specifically accounted for in the drafting history of the OPA.\textsuperscript{107}

While Davis acknowledges that the legislative history of the OPA included the principle that ‘an employee at a coastal motel may have standing to make a claim for damages even though the employee owns no property which has been injured as a result of an oil spill’, he is of the opinion that, when applying the proximate cause analysis, such a claim

\begin{footnotes}
\textsuperscript{102} John C P Goldberg ‘Liability for Economic Loss in Connection with the Deepwater Horizon Spill’ http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438, accessed on 3 July 2013.
\textsuperscript{103} John C P Goldberg ‘Liability for Economic Loss in Connection with the Deepwater Horizon Spill’ http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438, accessed on 3 July 2013.
\textsuperscript{104} John C P Goldberg ‘Liability for Economic Loss in Connection with the Deepwater Horizon Spill’ http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438, accessed on 3 July 2013.
\textsuperscript{105} John C P Goldberg ‘Liability for Economic Loss in Connection with the Deepwater Horizon Spill’ http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438, accessed on 3 July 2013.
\textsuperscript{106} John C P Goldberg ‘Liability for Economic Loss in Connection with the Deepwater Horizon Spill’ http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438, accessed on 3 July 2013.
\textsuperscript{107} John C P Goldberg ‘Liability for Economic Loss in Connection with the Deepwater Horizon Spill’ http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438, accessed on 3 July 2013.
\end{footnotes}
will not be successful. He is of the view that the best way of understanding this section is to require economic injury to satisfy a tight chain of causation. Excessive preoccupation with such a chain of causation is counterproductive because it discourages constructive results in that it proceeds from the premise that only direct economic injuries are claimable. ‘Direct economic injury’ refers to ‘pecuniary harm resulting from direct use of, or the inability to use directly, a physically injured resource or property, where “direct use” means that the resource is not or would not have been passed through a conduit before reaching the claimant’. In the light of this position, Davis considers that, although seaboard hotels are certainly reliant on the oceanic resource because of tourists’ predilection for aquatic recreational activities, the hotels are rarely directly dependent on coastal waters to the extent that they are affected by their condition as a physically injured resource. Hotels and their employees suffering economic loss should, thus, be excluded from claiming under this provision. In virtue of the ‘direct economic loss rule’, however, claims by fishermen under this provision would be legitimate, given their direct use of the resource. A further critic is Robertson who contends that only fisherman C would satisfy the commercial-use requirement and that Goldberg’s inclusion of the Hotel Owner and Employee is not justifiable because it would hinge on the commercial-use requirement, which is relaxed in this instance without explanation.

Goldberg further holds that the claim of barge owner B may also be countenanced since he has been denied access to the river. He is not classified as a strong claimant,

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108 Andrew B Davis ‘Pure Economic Loss Claims under the Oil Pollution Act’ (2011) 45(1) Colum JL & Soc Probs 1 at 16.
109 Andrew B Davis ‘Pure Economic Loss Claims under the Oil Pollution Act’ (2011) 45(1) Colum JL & Soc Probs 1 at 23.
110 Andrew B Davis ‘Pure Economic Loss Claims under the Oil Pollution Act’ (2011) 45(1) Colum JL & Soc Probs 1 at 37.
111 Andrew B Davis ‘Pure Economic Loss Claims under the Oil Pollution Act’ (2011) 45(1) Colum JL & Soc Probs 1 at 37.
112 Andrew B Davis ‘Pure Economic Loss Claims under the Oil Pollution Act’ (2011) 45(1) Colum JL & Soc Probs 1 at 38.
113 Andrew B Davis ‘Pure Economic Loss Claims under the Oil Pollution Act’ (2011) 45(1) Colum JL & Soc Probs 1 at 38.
114 Andrew B Davis ‘Pure Economic Loss Claims under the Oil Pollution Act’ (2011) 45(1) Colum JL & Soc Probs 1 at 38.
however, because his type of claim is not specifically included in the drafting history. The river is, in essence, ‘water’ which is a natural resource. The facts alleged by the barge operator revealed that the business would probably have been unaffected in the absence of the spill, which, therefore, implies that his claim should be successful.

Professor Goldberg places claimants R, A and W (the restaurant owner, the real estate agent, and the furniture store operator), whose businesses are located in the immediate vicinity of the spill, in category 3, and claims that, regardless of compliance with the ‘due to’ argument, the claimants’ commercial activities are closely bound up with local economies in any case, the closeness varying only to the extent that the resources are affected and the relevant property damaged. He further explains that, in drafting the OPA after the Exxon Valdez disaster, Congress aimed to achieve maximum protection to combat adverse economic effects visited upon shoreline communities who happen to be in the way of oil spills, which premise argues that a broader interpretation of the OPA may be in order.

Claimants O through L (listed as claims i to q above) fall into category 2, those who are clearly ineligible for recovery under the economic loss provisions. Goldberg’s reasoning is that they cannot satisfy the ‘due to’ second-tier test to justify their claim because, whether they can prove economic loss occasioned by the spill or not, they cannot present a valid legal argument to prove that the hypothetical spill has made inroads into their right and ability to put certain property or resources to commercial use.

II RECENT DEVELOPMENTS IN BP SPILL LITIGATION
Recent rulings by Judge Barbier, based on the class action against BP in In re: Deepwater Horizon, have shed new light on the interpretation of the economic loss damage claim provision section 1002(b)(2)(E) of the OPA.

The Economic and Property Damage Claims Class Agreement specifically includes and excludes certain categories of claims. Of course, excluded claimants may attempt to claim economic loss damage from BP in their personal capacity. The structure of the class action agreement, is, however, a clear indication of undisputed claim categories under section 1002(b)(2)(E) of the OPA as both the litigation team of BP and the US Attorneys agreed on these categories based on their analysis of the OPA.

Of further significance is the geographical limits imposed on the claims. Only claims resulting within the geographic area referred to as the Gulf Coast Area will be admissible in terms of the settlement agreement. This clearly suggests a geographical limit to the chain of claims allowed, indicative of the fact that the tort law principle of proximity was considered and included. As the pre-agreement documentation remains classified, there is no certainty as to the arguments advanced to include this geographical claim limitation but it is in line with a reading of a second tier requirement of proximity owing to the inclusion of the phrase ‘due to’. As in In re Deepwater Horizon, parties agreed with, and negotiated on, the class action to ensure swift and effective justice, taking cognisance of the basic principles of tort and admiralty law as well as the OPA.

The economic loss or property damage claims categories specifically included in the class settlement are: Seafood Compensation; Economic Damage; Loss of Subsistence; Vessel of Opportunity and Charter Payment; Vessel Physical Damage; Coastal Real Property Damage; Wetlands Real Property Damage; and Real Property sales damage.

The seafood compensation category will be examined briefly to highlight that the principles of proximity and a causal link were taken into account when adjudicating these matters. Regarding the claims of individuals and businesses who suffered economic loss owing to injury to natural resources (seafood) as per section 1002(b)(2)(E) of the OPA, two claim categories exist based on the distribution chain, namely the primary seafood industry and the secondary seafood industry. All of these claims are limited geographically and the

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agreement was designed to limit the chain reaction of claims that can result in consequence of such a spill. The agreement also provides clear definitions of who may claim within this class. For example, the following individuals may recover, commercial fishermen and seafood crew only if they are within the geographical area. An example of the limitation of claims based on causation and proximity is:

‘Commercial wholesale or Retail Dealer A shall be defined as an entity or Natural Person that holds a commercial wholesale or retail dealer license issued by the State(s) of Alabama, Florida, Louisiana, Mississippi and/or Texas for which 75% or more of the 2009 cost or weight in pounds of the product it purchases constitutes Seafood purchased directly from Commercial Fisherman or Landing site and re-sells to Primary Seafood Processors, Seafood Distributors, Seafood Wholesalers and Seafood Retailers’. This would suggest that a commercial wholesaler based in New York who sources its seafood from the Gulf will not be allowed to claim under this provision as he is too far off in the chain.

Certain categories of possible economic damage claims have specifically been excluded by the class action agreement. The Report by the Claims Administrator of the Deepwater Horizon Economic and Property Damages Settlement Agreement on the status of Claims Review no’s 1 to 15, furthermore, issued by Judge Barbier, indicates that the United States District Court (Eastern District of Louisiana) has rejected many claims brought under the excluded class actions, even from individuals. This is a safe indication that the court deems these claims to be unacceptable and not compliant with the principles of admiralty tort law or the ‘due to’ requirement of the OPA. The excluded categories of claims are: bodily injury; BP Shareholder; Oil and Gas industry; BP-branded Fuel Entity; Gaming Industry; and Real Estate Developer.

Judge Barbier made a further significant order regarding three categories of claims, “Pure Stigma, BP Dealer, and Recreation Claims”. Relevant to the damage claim provisions

131 The drafters should take cognisance of this agreement for future amendments to the OPA as this will surely curtail unnecessary claims.
135 In re Oil Spill by the Oil Rig “Deepwater horizon” in the Gulf of Mex on April 20 2010 MDL No 2179 2012 WL 4610381.
are the “Pure Stigma and BP Dealer Claims”. The court defined Pure Stigma Claims as follows:

“Pure Stigma Claims” means claims alleging a reduction in the value of real property caused by the oil spill or other contaminant even though (1) the property was not physically touched by oil and (2) the property was not sold... “Pure Stigma Claims” do not include claims by a person who earns a living selling property.

Pure Stigma Claims, based on section 1002(b)(2)(E) of the OPA, were rejected because ‘claims for unrealized diminution of real property value... concern neither a ‘loss of profits’ nor ‘impairment of earning capacity’ within the meaning of the quoted... terms’.

Regarding the BP Dealer Claims, the court gave this definition:

“BP Dealer Claims”...mean[s] only those plaintiffs whose claims for economic loss are based solely on consumers’ decisions not to purchase fuel or goods from BP fuel stations and convenience stores following the explosion and oil spill, i.e. claims solely based on consumer animosity toward BP. For clarity, a BP Dealer Claim is distinguished from, for example, a hypothetical claim by a BP franchisee whose gas station is located near the Gulf Coast... alleging lost profits for reasons other than or in addition to consumer animosity toward BP, such as an area-wide decline in tourism.

BP Dealer Claims based on the OPA were dismissed under s 1002(b)(2)(E) as claimants could not plausibly allege physical harm to physical property as the brand is intangible property. The court here reasoned that intangible property is not susceptible to physical injury. Claims under s 1002(b)(2)(E) were, furthermore, dismissed as claimants could not plausibly allege ‘that the existence of ‘injury, destruction, or loss’ of resources or property played any causal role in producing these damages’. In this instance, the court based its analogy on the requirement of causation as a requirement that should be read into the OPA provision.

In the light of these recent judicial developments, what claims will be successful under the Goldberg model will now be evaluated.

Claim A, the commercial fishermen who relies on fishing in the Gulf of Mexico, will be allowed with certainty. He has been included in the Seafood Class Settlement agreement under the definition of Commercial Fisherman and has satisfied the geographical

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136 Andrew B Davis ‘Recent Developments’ (2013) 37 Tul Mar LJ 401 at 555.
137 In re Oil Spill by the Oil Rig “Deepwater horizon” in the Gulf of Mex on April 20 2010 MDL No 2179 2012 WL 4610381, 4.
138 Andrew B Davis ‘Recent Developments’ (2013) 37 Tul Mar LJ 401 at 556.
139 Andrew B Davis ‘Recent Developments’ (2013) 37 Tul Mar LJ 401 at 556.
140 Andrew B Davis ‘Recent Developments’ (2013) 37 Tul Mar LJ 401 at 557.
requirement. As per *Union Oil Co v Oppen*[^141], furthermore, commercial fishermen are included under the economic damage claims section.

Claims B and C relate to the hotel located on the beach with oil found in the immediate vicinity and the employee suffering loss of income. This claim will be successful as it falls within the Economic Damage section of the class action and satisfies the ‘gulf coast areas’ geographical requirement.[^142] In *In Re Deepwater Horizon*,[^143] BP appealed against the court for allowing claims in this section to businesses which could not in a case-by-case basis satisfy the causation requirement, and it called these ‘fictitious claims’.[^144] BP relied on *Lujan v Defenders of Wildlife*[^145] which summarised tort law, ‘Absent a loss, a claimant has suffered no injury. Unless a claimant can colorably assert a loss, it lacks standing’. Concurring Judge Leslie H Southwick asserted that BP had agreed to the terms of the class agreement and could not disagree with the terms in the aftermath.[^146]

As noted already, causation was addressed by the parties in Exhibit 4B of the Settlement agreement. BEL claimants within a defined geographic region closest to the Gulf do not need to present any evidence of factual causation.

The appeal was dismissed, and the court affirmed the district court’s dismissal of BP’s suit against the Claims Administrator.[^147] From this judgement, it is clear that this claim will be successful and that the claimant need not offer evidence of factual causation. Even if a class agreement had not existed, the application of the proximity rule as *per* the Goldberg model would have provided that this claim is admissible.

Claims D, G, H and E would be admissible based on the same analogy as employed for claims B and C.

Claim F relates to the real estate agent. In this case the proximity requirement will be satisfied. Regarding claimant F, furthermore, the claim falls within the class action category of ‘Real Property Sales Damage’. The court also specifically stated that the exclusion of ‘stigma claims’ does not apply to real estate agent claims. The claimant will be successful.

[^143]: Case 13-30315 (2013), 25.
[^144]: Case 13-30315 (2013), 25.
[^147]: Case 13-30315 (2013), 36.
Claimants I, J, K, L, M and P are clearly excluded in concurrence with the Goldberg analogy and also owing to the fact that they will not be able to prove proximate causation successfully. The origins of these claims also fall outside the geographical area indicated by the claims facilitator.

Claim O, by the gas station operator suffering a loss as he shares the brand of the responsible party, will not be allowed when applying the court’s analogy as per In Re Deepwater Horizon discussed previously.

Claim N by the seafood restaurant does not meet the proximity requirement, and restaurants were not included under the term ‘secondary seafood industry’ as per the Seafood Claim Class settlement agreement.

The above analogy shows slight differences when compared with the Goldberg model and those of his critics. These developments, through a process of illumination, aid us in establishing ‘what may be claimed’. The discrepancy between the analysis of this section of the OPA by academics, the courts, and the claim facility shows a clear need for legislative amendments. From the analogy, it seems obvious that, although not expressly stated in the wording of provision 1002(b)(2)(E), proximity and causation are requirements, and this at least provides some sort of interpretative guidance.

III CONCLUSION

This analysis has shown that the traditional tools of legal interpretation have not provided legal certainty as to the inclusion or exclusion of proximate causation.

The Goldberg model, though of some help, is nonetheless itself a cause of difficulty and uncertainty and it is criticised by scholars. A purely linguistic analysis of this provision provides for much broader claims than those envisioned by Goldberg and shows that his narrow approach will be to the detriment of claimants. This implies that the OPA should be amended as a matter of urgency to provide clarity as an unequivocal system for prioritising groups of claims that will greatly ease the processing of claims submitted under the act.
CHAPTER 4
CONFLICTING LAW – THE ROBINS RULE V THE OPA

‘A claimant without a proprietary interest in an item of property allegedly damaged cannot make a claim for economic damages as the result of the negligence of a tortfeasor against such property’. 148

The Robins rule

I HISTORY
Before the passing of the OPA, economic-loss claims were adjudicated by applying the ruling made by Judge Holmes in Robins Dry Dock and Repair Co v Flint.149 Pronouncements resulting from the application of general admiralty tort law in conjunction with the Robins rule when determining economic loss resulting from accidents at sea have not been overruled by any court, even since the enactment of the OPA.150 The principle in Robins is still applicable in conjunction with the OPA. The Robins rule and the OPA, however, adjudicate economic loss differently. The question is whether the OPA superseded the Robins rule, or whether the latter still applies and can, in fact, lead to a narrower application of the economic loss provision in the OPA. The applicability of the Robins rule needs to be addressed in the OPA itself to rule out any legal anomaly, given that, despite the passing of the OPA, the said rule was applied as recently as 2009 in the case of Settoon Towing LLC, 2009 WL 4730969.151

II RULES OF INTERPRETATION
Common law has been summarised as ‘judge-made law’.152 It has also been described as an ‘arsenal of sound common sense principles’.153 Justice Harlon Stone captured the essence of common law as follows:

149 275 US 303(1927), 308-309.
‘Distinguishing characteristics are its development of law by a system of judicial precedent, its use of the jury to decide issues of fact, and its all-pervading doctrine of the supremacy of law - that the agencies of government are not more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by courts’.\textsuperscript{154}

The Robins rule forms part of this body of law. Judge Posner stated that the only ‘test of correctness in such cases is the test of time... judicial decisions that are overruled or ignored flunk the test of time...’\textsuperscript{155} This chapter will show that the Robins rule has, indeed, stood the test of time, mainly because apposite case law applying the precedent created in this case was consulted. The analysis in this chapter will for this reason be structured according to a time line. Firstly, the case itself will be reviewed. Then relevant case law will be considered, firstly with reference to instances where this precedent was applied before the enactment of the OPA, and then with reference to instances after such enactment, the purpose being to determine how courts have dealt with a possible conflict between the damage claim provision of the OPA and that of the Robins rule. Finally, an overview will be provided of adjudication post BP Spill.

As noted, the Robins rule has stood the test of time; the interpretive problem that now arises is how to resolve the conflict of laws between the Robins rule and the OPA. Uncertainty exists as to the approach to adopt in the event of a conflict of laws between legislation and common law.\textsuperscript{156} Some academics take the view that a statute in derogation of common law should be applied without qualification;\textsuperscript{157} the contention, however, also exists that common law takes precedence over state law.\textsuperscript{158} Reference to the case law dealing with economic damage claims arising from oil spills after enactment of the OPA will show that a conflict of law still prevails.
III THE ROBINS DRY DOCK CASE

(a) The facts

Mr Flint time chartered the steamship Bjornefjord.\textsuperscript{159} The propeller of that vessel was damaged in Robins Dry Dock to the extent that the time charters lost the use of the steamer for 14 days.\textsuperscript{160} Mr Flint brought a claim against Robins for lost revenue.\textsuperscript{161} His claim was successful in both the district court and the second circuit court of appeals until Justice Holmes of the Supreme Court overturned the ruling in a three-page judgement, stating that Flint had no claim either in tort or in contract as he did not have a proprietary interest in the steamship Bjornefjord.\textsuperscript{162}

(b) The principle set out in Robins, and the so-called bright line rule

The principle enshrined in the Robins Dry Dock case has stood the test of time and has survived critique and judicial review without alteration.\textsuperscript{163} Judge Holmes formulated a simply worded principle as follows, ‘A claimant without a proprietary interest in an item of property allegedly damaged cannot make a claim for economic damages as the result of the negligence of a tortfeasor against such property’.\textsuperscript{164} The purport of this announcement is that, apart from limited exceptions, economic-loss claims are ruled out of order in admiralty law.\textsuperscript{165} Scholars have suggested that this ruling valorises a so-called ‘bright line rule’ utilised by Justice Holmes in pronouncing on the handling of pure economic loss.\textsuperscript{166} Basically, the ‘bright line’ rule simply states that if the claimant has suffered no damage and/or has no proprietary interest in the property damaged by the tortfeasor, then that party cannot cross the ‘bright line’ into the realm of recovery.\textsuperscript{167} This principle has been confirmed in maritime tort cases

\textsuperscript{159} 275 US 303(1927), 307.
\textsuperscript{160} 275 US 303(1927), 307.
\textsuperscript{161} 275 US 303(1927), 307.
\textsuperscript{162} 275 US 303(1927), 307.
within the Fifth Circuit. In State of La Ex rel Guste v M/V Testbank, 752 F Ed 1019, it was held that, without a proprietary interest in damaged property, a plaintiff is generally foreclosed from recovering for economic losses caused by a negligent tortfeasor. The court reiterated the essence of the Robins rule in Dunham-Price Group LLC v Citgo Petroleum Corp No.2:07CV1019: ‘[w]ithout direct, physical damage to its property [the plaintiff’s] state law claims for indirect economic losses cannot stand as a matter of law’. In Re: Taira Lynn Marine Ltd No 5 LLC 444 F 3d 371, 379 confirmed this principle, as noted by the judge in pronouncing his decision, ‘[P]hysical injury to a proprietary interest is a prerequisite to recovery of economic damages in cases of unintentional maritime tort’.

The Robins rule, per se has not been restricted to rather narrow claims of contractual conjecture; instead, the decision and rule has been used to block recoveries in situations where there is no clear contractual link between the parties.

An exception to the Robins rule is allowed, however, in the case of commercial fishermen. Regardless of how strictly the Robins rule is applied, courts remain true to the exception whereby claims for purely economic loss suffered by fishermen as a result of tortuous action are admitted as valid, even if they have no proprietary interest in the damaged item or resource in question. The courts and scholarly opinion have both referred to this exception as ‘black letter law’ because not allowing for recovery by commercial fisherman would be in conflict with the older precedent that travailliers de la Mer (literally labourers of the sea, i.e. sailors) enjoy the special favour and protection of the court as a matter of principle.

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IV CASE LAW FOLLOWING ROBINS

(a) The M/V Testbank

In the case of *Louisiana ex re Guste v M/V Testbank*\(^{174}\), the Fifth Circuit Court decided to build on the decision in *Robins Dry Dock*.\(^{175}\) In the *Testbank* case, the court concluded that a ‘bright line’ rule had developed in admiralty law to the effect that, unless physical damage to a proprietary interest can be shown as a direct consequence, claims for economic loss are beyond the realm of recoverability in maritime torts.\(^{176}\) In this case, the court cited opinions from other circuits to show that the *Robins* rule had been upheld by circuits other than the Fifth.\(^{177}\)

Besides being pivotal for this dissertation in that it confirms the *Robins* rule, the importance of this case also stems from the similarity between the facts of the case and those of the BP Spill. The *Testbank* case also related to marine pollution.

The facts of the *Testbank* case are that the M/V Testbank, a bulk carrier, collided with the M/V Sea Daniel, a container ship on the Mississippi River Gulf outlet.\(^{178}\) On collision, containers carried on the M/V Testbank were damaged, and some were lost at sea.\(^{179}\) The M/V Sea Daniel spilled twelve tons of pentachlorophenol which was the largest ever spill of such a chemical at that time.\(^{180}\) This spill led to the issuing of a total ban on fishing, shrimping, and related activities affecting miles of waterways.\(^{181}\) Suits were then brought by claimants alleging that they had suffered economic loss resulting from the chemical spills.\(^{182}\) Among the claimants were shipping companies, boat rental operators, wholesale and retail seafood companies not directly engaged in fishing, seafood restaurants, recreational fishermen, shops selling tackle and bait, oystermen, shrimpers, and fishermen.\(^{183}\) The court applied the *Robins* rule strictly by rejecting economic loss claims that were unattended by physical damage to property, except where such claims were lodged by commercial

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\(^{174}\) *Louisiana ex re Guste v M/V Testbank* 752 F2d 1019 (1985).


\(^{178}\) 752 F2d 1019 (1985), 1020.

\(^{179}\) 752 F2d 1019 (1985), 1020.

\(^{180}\) 752 F2d 1019 (1985), 1020.

\(^{181}\) 752 F2d 1019 (1985), 1020.

\(^{182}\) 752 F2d 1019 (1985), 1020.

\(^{183}\) 752 F2d 1019 (1985), 1020.
fishermen, oystermen, and shrimpers who had been making commercial use of the affected waters. The court reaffirmed the exception to the Robins rule accorded to fishermen as it found that commercial fishermen deserved special protection in sympathy with that enjoyed by seamen. This ruling reaffirmed that the courts remained committed to the Robins rule.

(b) Barber Lines A/S v M/V Donau Maru

This case was brought before the First Circuit Court. In this case, heard in 1985, 58 years after the ruling by Judge Holmes in the Robins Dry Dock case, the court stated that Robins Dry Dock was still the leading ‘pure financial injury’ case, and it concluded that Robins Dry Dock was neither wrong nor out of date. The court, in its ruling, cited the Robins Dry Dock as well as the Testbank case law.

In the Barber Lines Case, the M/V Donau Maru spilled fuel into Boston Harbour. The spill caused Barber Lines A/S to incur increased costs as the vessel was prevented from docking at a nearby berth and was forced to unload cargo at another pier. These costs, which included extra labour, fuel, transport, and increased docking costs, did not relate to physical injury suffered by the claimant to a proprietary interest. The claimant sued to recover the costs mentioned, but the claim was rejected by the court as it was clearly not reconcilable with the Robins rule as confirmed in the Testbank case. The court simply ruled that ‘they refuse to hold a defendant liable for negligently caused financial harm without accompanying physical injury or other special circumstances’ of which there was no evidence in this case.

(c) Catalyst Old River Hydroelectric Ltd. Partnership v Ingram Barge Co

The Robins/Testbank test was employed in the 5th Circuit as recently as 2011. The court extended the rule, however, to include ‘acts taken in mitigation to prevent permanent physical

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184 752 F2d 1019 (1985), 1026-1027.
185 752 F2d 1019 (1985), 1026-1027.
188 764 F2d 50 (1985), 51-52.
189 764 F2d 50 (1985), 50.
190 764 F2d 50 (1985), 50.
191 764 F2d 50 (1985), 57.
192 764 F2d 50 (1985), 57.
193 764 F2d 50 (1985), 57.
194 Catalyst Old River Hydroelectric Ltd Partnership v Ingram Barge Co 639 F3d 207 2011 AMC 913 (5th Cir 2001); See Robertson David W; Sturley Michael F ‘Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits Recent Developments’ (2012) 36 Tul Mar LJ 425 at 499.
damage’ and to provide, moreover, that such inclusion be taken as the physical damage requirement according to the Robins/Testbank test.\textsuperscript{195}

The facts of this case are the following. The defendants’ barge slipped its moorings and drifted into the inlet channel of the plaintiff’s hydroelectric generating facility, where the barge grounded.\textsuperscript{196} The grounding of the barge did not result in any actual physical damage to anything belonging to the plaintiff, except that it reduced the flow of water to the facility requiring the plaintiff to reduce the production and sale of electricity, which clearly made inroads into his income from that source.\textsuperscript{197} The district court ruled that the blocking of the inlet channel was not ‘physical damage to a proprietary interest’ according to the Robins/Testbank ruling, but the fifth circuit reversed this order stating:

‘Catalyst argues that the presence of the barge in the intake channel, which is a functional component of Catalyst’s hydroelectric generating facility, interfered with the unobstructed continuous flow of water in the channel, impairing the ability of the facility to operate as designed. We agree with Catalyst that this harm qualifies as damage to its proprietary interest.’\textsuperscript{198}

This case shows that, after 83 years, the Robins rule is still the leading case in adjudicating admiralty tort claims for purely economic losses.

V CASE LAW IN CONFLICT WITH ROBINS

The Second Circuit Courts have not been consistent in their rulings on damages resulting from economic losses claimed under general maritime law. The Second Circuit deviated from the Robins rule in Petitions of Kinsman Transit Co\textsuperscript{199} where the court adopted a case-by-case approach to determine the remoteness or directness of the injury claimed as a consequence of the defendant’s negligence.\textsuperscript{200} This ruling was revisited by the same court in 2008, however, when it reversed its decision in Gas Natural SDG SA v US and concluded that

\textsuperscript{195} 639 F3d 207 2011 AMC 913 (5\textsuperscript{th} Cir 2001); See Robertson David W; Sturley Michael F ‘Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits Recent Developments’ (2012) 36 Tul Mar LJ 425 at 499.
\textsuperscript{196} 639 F3d 207, 2011 AMC 913 (5\textsuperscript{th} Cir 2001); See Robertson David W; Sturley Michael F ‘Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits Recent Developments’ (2012) 36 Tul Mar LJ 425 at 499.
\textsuperscript{197} 639 F3d 207, 2011 AMC 913 (5\textsuperscript{th} Cir 2001); See Robertson David W; Sturley Michael F ‘Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits Recent Developments’ (2012) 36 Tul Mar LJ 425 at 499.
\textsuperscript{198} 639 F3d 207, 2011 AMC 913 (5\textsuperscript{th} Cir 2001); See Robertson David W; Sturley Michael F ‘Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits Recent Developments’ (2012) 36 Tul Mar LJ 425 at 499.
\textsuperscript{199} Petition of Kinsman Transit Company 388 F2d 708 (1964).
\textsuperscript{200} 388 F2d 708, 720.
a bright line rule exists that excludes ‘recovery for economic losses caused by an unintentional maritime tort absent physical damage to property in which the victim has a proprietary interest’.\textsuperscript{201} This ruling affirmed the bright line rule as formulated by Justice Holmes in \textit{Robins Dry Dock}.

\section{APPLYING THE ROBINS RULE TO THE BP SPILL}

If the \textit{Robins} rule were strictly applied to the BP Spill claims in accordance with the restated and expanded form adopted in the \textit{Testbank} case, there would probably be no recognition of claims where only a proprietary interest in the damaged property could be proved. Such a disqualification would, therefore, preclude claims demanding compensation for economic loss submitted by tourist companies, hotels, recreational fishery companies, seafood restaurants, commercial fish wholesalers, \textit{et cetera}. The only claims that might receive a favourable hearing would be those submitted by commercial fishermen, crabbers, oystermen, and shrimpers. It is clear that the scope of claimants allowed under \textit{Robins} is much narrower than that specified in terms of s1002(b)(2)(E) of the OPA; it is also much narrower than the claims the Goldberg Report considered to be admissible.

\section{DAMAGE PROVISIONS OF THE OPA V ROBINS}

\textbf{(a) The Robins rule}

The purport of the \textit{Robins} rule is that a claimant who does not have a proprietary interest in property damaged in tort may not recover for economic loss incurred as a result of damage to that property.\textsuperscript{202} In the context of an oil pollution case, therefore, this rule would effectively bar recovery by a claimant for pollution damage to the ocean regardless of whether or not the damage caused economic harm to the claimant.\textsuperscript{203} The \textit{Robins} rule is significant in pollution claims where large numbers of potential claimants, such as beach resort owners, restaurants, and charter hire fishing boats, may sustain economic losses mainly in the form of lost profits.\textsuperscript{204} These losses are not recoverable under the \textit{Robins} rule, but may well be countenanced under s1002(b)(2)(E) of the OPA.

(b) Provision 1002(b)(2)(E) of the OPA

‘Profits and Earning Capacity – Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant’.

States are authorised, under the OPA, to allow recovery of what may be termed non-Robins damages in admiralty. This authority is inferred from the analysis in chapter 3 which showed that the wording ‘any claimant may claim’ allows claims, regardless of proprietary interest, to be countenanced with a view to recovering economic loss, and, furthermore, that this section authorises claimants other than fishermen whose claims are countenanced under the Robins rule. It is held in some quarters that the enactment of the OPA effectively abolished the essential principle of maritime law as exemplified in the Robins case.

Further confusing the issue is the admiralty’s savings provision contained in s1018 of the OPA, which provides that, failing a stipulation to the contrary, the current Act does not affect admiralty and maritime law or the jurisdiction of district courts where civil actions under maritime and admiralty jurisdiction are concerned. This does not help to solve the issue, as the OPA does not clearly state that the economic loss provision should prevail over admiralty law; rather the wording seems to imply that admiralty law will remain unaffected. On balance, therefore, the purport in this regard is that Robins will co-exist with the terms of reference of the OPA, unlike the present situation where Robins and the OPA are irreconcilable. It remains the responsibility of the legislature to clarify matters of precedence in this regard.

(c) How do the provisions facilitate the claims?

It is clear from this analysis that the Robins rule and the section of the OPA dealing with economic-damage claims cover a broader range of claimants than the exception explicitly made for fishermen in terms of the Robins rule. Given the legislative history following the Exxon Valdez spill and the difficulty faced by claimants in the aftermath of that disaster, it seems clear that the legislature did indeed wish to broaden the scope of legitimacy afforded to claimants with the result that the Robins rule was effectively altered to deal with individual spills that fall within the ambit of the OPA. It would be fair to conclude that, in the future, the

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205 OPA, s1002(b)(2)(E).
Robins rule will regulate economic-damage claims that have a wider range of origin than oil spills. This position is speculative, however, and would have to be confirmed by court decisions.

(d) Post-OPA court interpretation of the Robins rule

The purpose of this section is to elucidate how the lower courts have interpreted the OPA provision made for economic-damage claims in the light of the parallel provision of the Robins rule. These cases are confined to the lower courts, which mean that the legitimacy of the Robins rule remains intact. Four cases will be examined.

(i) In re Cleveland Tankers Inc208

This case was one of the first in which the economic-damage provision of OPA was evaluated with due cognisance of the Robins rule.

A tanker, the M/V Jupiter, was moored at a dock owned by Total Petroleum Inc.209 The tanker exploded,210 causing gasoline to spill into the river.211 The explosion caused the M/V Jupiter to break loose from its moorings, drift into the navigation channel, and partially sink.212 The wreckage of the Jupiter blocked all commercial navigation in the channel.213 This caused the channel to be closed for over a month.214

The blockage harmed the commercial interests of several parties who suffered harm to their commercial interests.215 Claims ensued for economic losses suffered in virtue of admiralty law as well as the OPA’s economic-damage provision.216 The damages claimed included increased operational costs owing to delay as well as profits lost owing to cancelled time and voyage charter contracts.217 The claimants filed these claims regardless of the fact that they had suffered no injury to a proprietary interest.218 The owners moved for dismissal of these claims relying solely on the Robins rule as it precluded recovery.219 The defendants

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208 In re Cleveland Tankers Inc 67 F3d 1200.
209 67 F3d 1200, 1202.
210 67 F3d 1200, 1202.
211 67 F3d 1200, 1202.
212 67 F3d 1200, 1202.
213 67 F3d 1200, 1202.
214 67 F3d 1200, 1202.
215 67 F3d 1200, 1202.
alleged that the claimants could not recover for these losses as they had not claimed for any injury, destruction, or loss to their property.220

The court upheld the Robins rule.221 It granted the defendants’ motion to dismiss as it found that the Robins rule barred the economic loss claims under both the OPA and general admiralty law owing to the fact that the claimants had failed to allege physical injury to a proprietary interest.222

This case is considered to be a ‘lone opinion’ as other circuit courts did not come to similar conclusions regarding the application of the Robins rule.223 There are no cases to date which have followed the decisions relative to the case of Cleveland Tankers.224 This does not mean that this interpretation of the courts was incorrect, considering that there is manifestly no clarity on the matter and the OPA itself takes cognisance of the principles of admiralty law.225 The ruling is, however, deemed to have resuscitated the Robins rule in pollution matters in the post-OPA 1990 era.226 Some writers, however, argue that the reason other cases do not follow the Cleveland Tankers decision is that that decision contradicts the drafting history of the OPA.227 The drafting history is not sufficient cause to ignore this ruling as it offers a valid interpretation of admiralty law. This judgement highlights the conflicting jurisprudence as it illustrates the lack of clarity regarding whether Robins is still applicable or has, in fact, been superseded by the OPA.

(ii) Secko Energy v M/V Margaret Chouest228

In this case, the court analysed the admissibility of an economic damage claim under the auspices of the economic-damage claim section of the OPA.229

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221 67 F3d 1200.
222 67 F3d 1200.
This case concerned a vessel towing a seismic cable into the leg of an oil platform in the Gulf of Mexico. Drilling was halted pending an investigation into the source of the spill.

The owner of the platform brought a claim under s1002(b)(2)(E) of the OPA against both the owner and charterer of the vessel for earnings lost from drilling during that timeframe. The defendants cited the Robins rule as a bar to the claim for such economic loss.

The court allowed this claim in light of the argument that future earnings from drilling on the outer continental shelf were exactly the sort of ‘property’ envisioned in terms of s1002(b)(2)(E) of the OPA. The court adopted the position that the owner’s proprietary interest had been affected directly by the incident and that the applicability of the Robins rule depended critically on the directness of the relationship between owner and property rather than on the nature of the damage to the physical structure, the platform itself, which had not been harmed. This position is rather at variance with the normal application of the Robins rule, which would usually have resulted in dismissal of the claim because no damage had been inflicted on the property in which the claimant did have a factual proprietary interest. The court, therefore, was not applying the Robins rule but instead advocating that the non-applicability of the Robins rule was dictated in this case by the difference in the facts at issue.

(iii) Ballard Shipping Co v Beach Shellfish

The case of Ballard Shipping Co v Beach Shellfish is critical in adjudicating economic-damage claims under s1002(b)(2)(E) as the court ruled in this instance that the Robins rule is

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not reconcilable with the nature and spirit of maritime law. Although the case under review came up before the OPA, it, nevertheless, calls for discussion under s1002(b)(2)(E) as the courts took cognisance of the similarity between the purport of the Robins rule and that of the damage provision made under the OPA. The court found the OPA to be relevant in deciding whether the Robins rule could take precedence over a statute of the US Federal Government in matters concerning recovery for purely economic losses in oil spill cases.

In the case of the 1989 World Prodigy spill, an oil tanker owned by Ballard Shipping Company ran aground in Narragansett Bay, spilling 300 000 gallons of heating oil. The bay was closed for commercial fishing for two weeks for the consequent clean-up operations. Approximately 450 claimants filed for recovery as a result of purely economic losses. Most of these claimants were shellfish dealers.

The court had to determine whether the Robins rule took precedence over the economic-loss provisions of the Rhode Island Statute. The court ruled against the possibility that the Robins rule could override a statute of the Federal Government, so implicitly legitimising claims relating to purely economic losses caused by oil spills as contemplated in terms of s1002(b)(2)(E) of the OPA. Countenanced claims were not confined to cases where a proprietary interest in the damaged property existed. The court cited the decision in Cleveland Tankers and expressly disagreed with that ruling.

(iv) In re Taira Lynn

M/V MR Barry and its tow, the T/B Kirby, ‘allided’ with Louisa Bridge in Saint Mary parish. This incident caused the cargo on the barge, a propylene/propane gas mixture, to be discharged into the atmosphere. Businesses and residences within a certain radius were
evacuated to avoid the harmful effects of atmospheric pollution. Fourteen business owners brought claims for economic loss under general maritime law, the OPA, and federal state law. The types of claims received included a loss of sales at the convenience store following the evacuation, lost charter revenues, abandoning of equipment on the island, and lost profits claimed in relation to wholesale fishing operations.

In this case, the court reaffirmed the appropriateness of the Robins rule in the adjudication of damage claims brought under general maritime law stating that ‘it is unmistakable that the law of this circuit does not allow recovery of purely economic claims absent physical injury to a proprietary interest in a maritime suit’, and that they will not relax the Robins rule or retreat from the Testbank’s physical injury requirement. The court decided, however, that the Robins rule was not applicable where claims were brought under the economic-damage claims section of the OPA and that a claimant would be entitled to recover for economic-loss damages resulting from damage to another’s property. The court cautioned, however, that such recovery was contingent upon the requirement that a claimant had to show the existence of an issue of fact as to whether his/her economic losses were incurred as a result of damage to property caused by the accidental discharge of gas. The court suggested that tests of foreseeability, a causal nexus, and remoteness would enable courts to prevent recovery. This was the minimum requirement; a proprietary interest was not necessary, but the loss had to arise from damage to property as a result of the spill.

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254 No 5 LLC 444 F3d 371 (2006), 375.
Summary

The economic-damage provision under s1002(b)(2)(E) of the OPA has been tested against the Robins rule in the circuit courts. As summarised above, the First and Fifth Circuit Courts agreed that economic damages, as set out in the 1990 version of the OPA, were not restricted by the Robins rule, and claimants could recover for damages as envisioned by this section against the property of another even if they offered different reasons for the decision to lodge a claim. No proprietary interest was necessary. The majority view is, however, encumbered by the ruling of the United States District Court for the Middle District of Michigan to the effect that provision for economic-damages claims should be subject to curtailment under the Robins rule such that only claimants who have a clear proprietary interest in the damaged property would be able to claim. The court followed the Robins rule by adopting this course.

It is important to note that the Supreme Court has not ruled on the issue of how the Robins rule and the OPA measure up against each other in terms of relative legal weight. Both, therefore, continue to exist.

VIII RECENT DEVELOPMENT INVOLVING THE ROBINS RULE AND BP SPILL LITIGATION

As the damage caused by the BP Spill is currently the subject of extensive litigation, it seems apposite that consideration be given in courts of law to recent developments concerning the Robins rule and its impact on economic damage claims. Pronouncements made by courts thus far, however, cannot be considered definitive by any means since litigation in this regard is bound to continue indefinitely, besides which rulings have been somewhat inconsistent and have been given only by lower and district courts. Despite these qualifications, however, it would be injudicious to disregard the developments concerning the Robins rule in the present context.

In In re oil spill by the accident involving the Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, Judge Barbier issued an omnibus ruling containing a sixteen item summary regarding admissible claims. The judge confirmed that admiralty jurisdiction existed and, therefore, that substantive maritime law did take precedence in addressing these claims. He also confirmed that, apart from the exception made for commercial fishermen, the Robins rule renders claims inadmissible that are not premised on, or offer evidence of, damage to a proprietary interest. Claims, thus, brought under general maritime law will be adjudicated according to the Robins rule. The judge further asserted that claims based on s1002(b)(2)(E) of the OPA are exempt from the requirement to claim for, and offer evidence of physical damage to a proprietary interest. In the light of this difference between the Robins rule and the OPA, it follows that claimants need to indicate which of the two rules is apposite in each instance. Again the conflicting outcomes of applying these two rules to the same issues without taking cognisance of the differences between them cry out for the recognition of the fact that the same claim will be admissible or not based on whether it was submitted under general maritime tort law or the OPA.

More recently, however, the Louisiana Circuit has ruled against Judge Barbier’s omnibus ruling but consistently with the ruling in Testbank. The Louisiana Circuit’s most recent order, captioned “Pure Stigma, BP Dealer, and Recreation Claims”, has led to the dismissal of several classes of claims according to the Robins rule, as well as claims submitted under general maritime law.

The Pure Stigma Claims were defined by the courts as follows:

“Pure Stigma Claims” means claims alleging a reduction in the value of real property caused by the oil spill or other contaminant even though (1) the property was not physically touched by the oil and (2) the property was not sold... “Pure Stigma Claims” do not include claims by a person who earns a living selling property.274

Pure Stigma Claims based on general maritime law were dismissed in the light of the Robins/Testbank ruling.275 Pure Stigma claims based on the OPA were also dismissed on the grounds of having the same result as applying the Robins rule.276 That is to say that, although the Robins rule was not specifically mentioned, the results were the same. The courts rejected the claims based on s1002(b)(2)(E) as ‘the statutory terms “injury to” property and “destruction of” property “require physical injury to the property”’.277 The Robins rule was, in addition, cited as grounds to dismiss BP Dealer claims based on general maritime law as well as state law, as the courts asserted that the existence of admiralty jurisdiction entailed the applicability of pre-emptive general maritime law.278

It is clear from these recent developments that the Robins rule is central to the adjudication of the BP Spill damage claims provided it is applied consistently. The OPA should be amended to determine that suit can be brought only under the OPA and not general maritime law; alternatively, claims can be lodged in terms of both, provided clarity is achieved about the relevance of the Robins rule to oil spill cases.279

IX CONCLUSION

Besides there being a clear conflict between the economic damage claims provision of the OPA and the corresponding formulation in the Robins rule, there is also dissension about how this conflict in law should be resolved. Given the differences between judicial decisions

handed down in this matter and the reasons given in them, it becomes imperative that legislative reform, determining the legal status of the Robins rule, is the only way to resolve this conflict.

This matter is urgent, as inconsistent judgements are to the detriment of claimants and because of the possibility of an avalanche of legal appeals.
CHAPTER 5
LACK OF LINGUISTIC ACCURACY–THE MEANING OF THE TERM ‘USE’ IN THE NATURAL RESOURCE DAMAGE CLAIM PROVISIONS

‘There is no longer any question whether natural resource damage claims will be made in oil spill cases. The only questions are the extent of the damage claims, the types of damages and the method of assessing damages. The courts have not to date provide answers for this’. 280

The protection of natural resources is a dominant feature of the OPA. 281 S1002(b)(2)(A) of the OPA regulates the recovery of natural resource damage claims; it reads:

‘Natural Resources – Damages incurred as a result of injury, destruction, loss, or loss of use of natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by the United States trustee, a trustee, an Indian tribe trustee, or a foreign trustee’. 282

In order to answer the question regarding the extent and type of allowable damage claims under this provision a clear understanding of the term ‘use’ is needed.

By employing the ordinary principles of statutory interpretation, it will be shown that confusion prevails regarding the legal meaning of the term ‘use’ and that legislative redraft is called for.

I STATUTORY INTERPRETATION
(a) The text

Confusion prevails over the exact meaning of the term ‘use’ in the current context as it is not defined in the definitions clause of the OPA. 283 The dictionary meaning of the term ‘use’ in the legal sense is ‘benefit’. 284 This purely linguistic analysis does not provide the answer as to whether all lost ‘benefits’ usually reaped from natural resources are claimable under this provision or not.

282 OPA s1002(b)(2)(A), the writers own italics.
(b) Legislative history

Natural resources are very broadly, but purposely, defined in the OPA to include almost any imaginable natural resource that can be affected by an oil spill.\(^{285}\) The aim, of course, is to ensure that government will be able to claim compensation for eco-systemic damage in the broadest sense.\(^{286}\) In their analysis of the legislative history of the OPA, the authors Letourneau and Welmaker conclude that ‘OPA’s unambiguous provisions do not address the recovery of passive use or non-use losses’.\(^{287}\) The authors considered Senate Report number 101-99, \textit{Ohio v State Dep’t of the Interior},\(^{288}\) and \textit{General Electric Co v United States Department of Commerce},\(^{289}\) to determine the legislative history relevant to this legal question and firmly ascertain that:

‘The choice of the term “non-use” is revealing because that term is the grammatical antithesis of what OPA allows a claimant to recover, which is the loss of use of natural resources, not the loss of so-called “non-use” damages.’\(^{290}\)

(c) The Agency

The agencies designated by the OPA to facilitate guidance in respect of natural resource damage claims are the National Oceanic and Atmospheric Administration and the Department of the Interior.\(^{291}\) Although, not officially legally defining the term ‘use’, the agency did state that it takes cognisance of ‘lost human use’ as part of claimable natural resource damages and that these types of loss or injury include recreational losses.\(^{292}\) The agency merely stated that both ‘active-use’ and ‘passive-use’ or ‘non-use’ losses could be

considered when assessing natural resource damages.\textsuperscript{293} The agency, however, did not expand on how this will be measured or whether all recreational loss claims will be allowable.\textsuperscript{294}

\textit{(d) Case law}

In \textit{Ohio v State Department of the Interior},\textsuperscript{295} the court defined ‘use values’ as the value of resources to people who are active or potential users of such resources. It also divided active uses into ‘consumptive uses’, namely uses that consume resources, such as fishing,\textsuperscript{296} and ‘non-consumptive uses’ that do not reduce the availability to others of a natural resource,\textsuperscript{297} such as bird watching or having a quiet stroll on the beach.\textsuperscript{298}

As the direct opposite of active use, passive use is divided primarily into ‘option’ and ‘existence’ values,\textsuperscript{299} the former being relevant where an individual lacks the intention, at the time in question, to use the natural resource but wishes to preserve it, or rather reserves the option to use it at an unspecified time in the future should he/she so desire.\textsuperscript{300} The expression ‘existence values’ represents the notion or basic standpoint held by the US Federal Government to the effect that natural resources enhance society in the sense that they increase or enrich the quality of life of its members.\textsuperscript{301} ‘Existence values’ mirrors the US Government’s view that the mere existence of such resources, used or not, exploitable or not, is valuable in itself and for its own sake and that society suffers a loss when such resources become rare or extinct.\textsuperscript{302}

In answering the question about the extent of the term ‘use’ in this provision, it has to be considered that the damage claimable has to be measured and valuated, and this implies that, if there is no monetary value attached to the loss, then no damage can be claimed. The

\begin{flushleft}
\textsuperscript{293} NOA\textquoteleft Final Rule 61 FR 440; See Steven R Swanson ‘OPA 90 + 10: The Oil Pollution Act of 1990 After Ten Years’ (2001) 32 \textit{J Mar L & Com} 135 at 156 for a discussion of the NOAA’s ‘Final Rule’.
\textsuperscript{294} http://www.doi.gov/deepwaterhorizon/upload/FINAL_NRDA_StatusUpdate_April2012-2.pdf, accessed on 1 May 2014.
\textsuperscript{295} 880 F2d, 444 (1989).
\textsuperscript{296} 880 F2d, 444 (1989), 134.
\textsuperscript{297} 880 F2d, 444 (1989), 134.
\textsuperscript{298} 880 F2d, 444 (1989); This case, however, interpreted CERCLA and not the OPA but reflects the court’s interpretation of the term ‘use’ in relation to natural resource damage claims.
\textsuperscript{299} Kenneth Murchison ‘Liability under the Oil Pollution Act: Current Law and Needed provisions’ (2011) 71 \textit{La L Rev} 918.
\textsuperscript{300} Kenneth Murchison ‘Liability under the Oil Pollution Act: Current Law and Needed provisions’ (2011) 71 \textit{La L Rev} 918.
\textsuperscript{301} Kenneth Murchison ‘Liability under the Oil Pollution Act: Current Law and Needed provisions’ (2011) 71 \textit{La L Rev} 918.
\end{flushleft}
court’s rulings pertaining to damage assessment of non-use values can aid us in determining whether these values should be included in the interpretation of the term ‘use’.

The method of contingent valuation used by trustees in drawing up the guidelines to measure passive or non-use values \(^{303}\) consisted in surveying a hypothetical market and asking participants to assign an estimated monetary value to the protection of a natural resource. \(^{304}\) The problem with this methodology is its inherent subjectivity; values placed on resources depend on subjective personal perceptions which fluctuate as they are swayed by circumstances (e.g. anxiety after a spill may enhance the subjective valuation of resources). \(^{305}\) The admissibility of scientific evidence depends on the use of reliable scientific methodologies by scientists, first of all, and, secondly, on the reliability of such personal analysis by specialists according to such methodologies, which clearly implies a substantial risk factor in that expert opinions ultimately have to be taken on trust alone. \(^{306}\) Consequently, the court decided, in *Idaho v Southern Refrigerated Transport*, \(^{307}\) to disallow such survey results which it considered unreliable to the point where it would effectively reduce the court’s findings to mere conjecture and speculation. \(^{308}\)

In the case of *Kumho Tire*, \(^{309}\) the court extended the application of the judgement handed down in *Daubert v Merrel Dow Pharmaceuticals Inc*. \(^{310}\) The cases concerned revolved around the admissibility of a scientific theory or technique based on its reliability. \(^{311}\) The four reliability criteria enunciated in *Daubert* are, testing, peer review, error rates, and

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\(^{305}\) Christine M Augustyniak ‘Economic Valuation of Services Provided by Natural Resources: Putting a Price on the “Priceless”’ (1993) 45 *Baylor L Rev* 389.

\(^{306}\) Craig R O’Connor ‘Natural Resource Damage Actions under the Oil Pollution Act of 1990: A Litigation Perspective’ (1993) 45 *Baylor L Rev* 441 at 447.


\(^{308}\) Jay Angle, Anna Leonenko, Katelyn Overmiller, Rebecca Ternes, Katie Wagner, and Kenneth Stark ‘Legal Developments Since the Enactment of the Oil Spill Liability Act of 1990’ (2011) 19 *Penn St Envtl L Rev* 403 at 432.


\(^{310}\) *Daubert v Merrel Dow Pharmaceuticals Inc* 509 US 579 (1993), 590.

acceptability in the relevant scientific community. These reliability criteria are now applied to all expert testimony in federal proceedings.

The upshot of *Kumho Tire* is that a trustee, relying on either contingent valuation or on other suspect economic methodologies for valuing passive loss of use of natural resources, would not qualify as a beneficiary on the assumption that it would prove to be rebuttable if challenged on the basis of *Kumho Tire*’s reliability standard, in which case the claim at issue would be dismissed.

The valuation and recovery of non-use, or passive-use, values were considered in *General Electric Co v United States Department of Commerce* relating specifically to the natural resource damage provisions of the OPA. *Industry Petitioners* argued that passive-use loss could occur only where resources were permanently lost, and that the loss of temporary passive use could never give rise to a legitimate claim and/or loss. In this case the court ruled that the question of whether the OPA allows for recovery of passive-use values or temporary losses of natural resources was not ripe for decision.

It is apparent that litigation surrounding non-use values will probably take decades to result in final resolution. If a claim falls under the non-use or passive-use paradigm it may still be dismissed on the basis of uncertainty regarding the calculation of the value of the claim. The only solution is either a valuation method which provides ‘clarity, objectivity, predictability, and simplicity’, or the exclusion of non-use value claims from the interpretation of ‘use’ in the natural resource damage provisions of the OPA. The inference can be made that non-use values were never intended to be included under these provisions as they are not calculable and, therefore, not claimable.

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318 128 F3d 767 (1997), 774.
(e) **Hypothetical question**

The *President’s Report* articulated that the goal of the natural resource damage provisions is ‘to make the environment and the public whole for injuries to natural resources and services resulting from [an oil spill]’. The hypothetical example below, will, however, illustrate that ‘making the public whole’ by allowing for non-use damage claims can result in absurd claims which could not possibly have been the intention of the legislature.

A wide variety of seabirds are indigenous to the Gulf of Mexico. These species include brown pelicans, northern gannets, and laughing gulls. A wide variety of birds following the Mississippi migration route, furthermore, used to flock to coastal Louisiana. This was a great attraction for enthusiastic birdwatchers. As the ocean and coastal estuaries were polluted by the spill, the former migration patterns were compromised. Wildlife enthusiasts, furthermore, had collected 8 183 injured or dead birds in these areas by November 2010. The option of enjoying bird-watching sometime in the future is an example of a passive or non-use value. If non-use values were included, then a claim should be admissible to claim for the loss of the option to watch and enjoy these bird species. Again the measurement of the value of such a loss will pose great difficulty as illustrated by case law. This hypothetical example illustrates that the intent of the legislature to include non-use values in these provisions remains both doubtful and unlikely.

II **CONCLUSION**

It is clear that the way in which the term ‘use’ is employed in the natural resource damage provision of the OPA lacks precision.

An examination of this provision through statutory interpretation has shown that both the inclusion and the exclusion of non-use values could be defended. Claimants or those

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charged with settling claims do not, therefore, have clear-cut criteria for providing legal satisfaction.

Examinations of hypothetical cases reveal the extent of potential claims and give urgency to the need for legislative revision of the provision.

It has been the contention of this chapter that there are two possible solutions to the current linguistic impasse with regard to the OPA. The first is that the inclusion of the phrase ‘non-use’, when interpreting ‘use’ in the damage provisions, be explicitly removed and that legitimate claims be confined to those ‘uses’ categorised as ‘consumptive use’. The second possible solution is to modify the definitions clause by including an irrefutable, practical, and acceptable definition of the term ‘use of’.
CHAPTER 6
CONCLUSION

This dissertation has argued that the damage claims provisions of the OPA were not adequately drafted as they are unclear, and none of the interpretative tools that can be employed to provide clarity is able to resolve issues of interpretation. The solution has to be that the relevant provisions have to be amended by the Legislature. This argument is complemented by the fact that such legislative redraft is a matter of urgency. This conclusion will illustrate how this argument has been pursued and provide reasons for urgency with regard to legislation, through a non-legal, subsidiary perspective.

I  ISSUES OF INTERPRETATION

‘We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it.’

Judge Cardozo

‘A problem in statutory construction can seriously bother courts only when there is a contest between a probability of meanings.’

Felix Frankfurter

This is exactly the case with regard to the damage provisions of the OPA. Whether the interpretative difficulties inherent in the damage claim provisions of the OPA could be overcome by using the generally accepted tools of statutory interpretation has been examined. The analysis of what these acceptable tools are confirm Judge Cardozo’s view that the statute as it stands is to be interpreted as it is, even if it does not provide a favoured policy or value driven outcome. This is why it is vital that statutory provisions are clear in their meaning. Specifically in the case of the OPA, the wording of the provisions dealing with the recovery of damages resulting from oil spills needs clear legal meaning as these provisions will be interpreted as they stand. They will not be interpreted in line with what is either a ‘fair’ or ‘unfair’ interpretation in favour of the claimant or the responsible party.

The following issues regarding interpretative difficulty in the damage claim provisions of the OPA have been dealt with. Firstly, the confusion relative to the lack of precision concerning the legal meaning of the term ‘due to’ within the damage claim

327 Felix Frankfurter ‘Some reflections on the reading of statutes’ (1947) 47 Colum L Rev 527 at 528.
provision with reference to the possible ripple effect of potential claims was illustrated by employing the Goldberg model to reveal the inadequacies of the economic damage claim provision in particular. Here it was argued that the provision should be redrafted so that the wording indisputably reflects whether the doctrine of proximate causation is applicable or whether ‘any’ such claims arising from a spill are to be allowed for. Legislative reform is critical as it has been shown that the law concerning the doctrine of proximate cause in the US is ‘neither uniform nor clear’.328

Secondly, the contradiction implied in the OPA compared with case law (common law) was dealt with. The essence of the problem here can be found in the conflicting legal opinion that clouds damage claims for recovery of economic loss and a consideration of the relative validity of the Robins rule vis-à-vis the provisions of the OPA. The OPA should be redrafted explicitly to include or exclude the application of the Robins rule as the economic loss damage claim provision and the common law rule cannot co-exist.

Finally, the lack of linguistic accuracy and vagueness with regard to definitions relative to the natural resource damage claim provisions was discussed, specifically with regard to the confusion existing over the exact meaning of the term ‘use’ in the natural resource damage provision. S1002(b)(2)(A) was used to illustrate the obstacles regarding valid claims that are inherent in these provisions owing to such interpretative vagueness. As the extent of ‘non-use’ values remains vague and the assessment measures unreliable, greater legal certainty will be given if this term is clearly defined not by the agency or by judicial decisions but by legislative reform.

II AN URGENT CALL FOR LEGAL REFORM

‘It is a feature of human affairs that the focus tends to become more concentrated after a particular disaster rather than before it... Media interest is intense, if not long lasting, and that engenders political action. Legal action may take the form of the court cases to resolve the latest disaster, followed by calls for legislative activity.’329

A plea for urgent legislative reform of the damage provisions of the OPA is not a matter solely of legal academic arguments concerning legislative interpretation in the aftermath of the BP Spill, but rests also on the probability of a future spill.

329 Malcom Clarke Maritime Law Evolving (2013) 64.


from offshore leases alone have been in the region of $18 billion annually, exceeded only by income taxes as a source of revenue.\textsuperscript{338}

It is clear that offshore drilling was halted only temporarily by the 2010 moratorium on drilling which followed the BP Spill. Drilling can now take place in even more environmentally vulnerable areas, such as the Arctic. Even though it is argued that the BOEM are incorporating ‘greater’ safety measures to prevent spills, such spills remain a potent threat, and legislation should be readily effective in the event of a spill. Time is of the essence.

Some may view the damage provisions of the OPA to be sufficient considering that BP has made provisional payments.\textsuperscript{339} What, however, if the responsible party had not been a multinational corporation capable of making such payments? What if a small operator’s rig had caused a similar spill? A very strict interpretation of the OPA would have to follow to decide which claimants would qualify for recovery from insufficient funds available. The damage claim provisions of the OPA is not, even now, legally sufficient.

One dare not disregard the fact that the US is still importing crude oil and that the risk of accidental spills from vessels also remains a dangerous reality. The provision of clear laws is the only safeguard in the face of such potential disasters.

\textbf{III CONCLUSION}

The physical clean-up following the worst ever oil spill may be accomplished within a reasonably foreseeable time frame.\textsuperscript{340} The legal ‘clean-up’ with regard to interpretative clarity has barely begun, and it is set to continue for decades to come.\textsuperscript{341} The only plausible way to effect a legal ‘clean-up’ in relation to future spills is by amending the damage claim provisions of the OPA.

\textsuperscript{339} Malcom Clarke \textit{Maritime Law Evolving} (2013) 69, deems that it was in ‘good fortune’ that the responsible party was a deep pocketed BP.
\textsuperscript{340} Analogy adapted from the words of author Victor P Goldberg in Victor P Goldberg ‘Recovery for Economic Loss Following the Exxon Valdez Oil Spill’ (1994) \textit{J Legal Stud} 1.
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