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Damages: Economic Losses Due to an Unintentional Maritime Tort Are Not Compensable Where There is No Damage to Plaintiff's Property

American Petroleum and Transport, Inc., v. City of New York Dep't of Transportation, 12-4505-cv (2d Cir. Dec. 6, 2013).

American Petroleum and Transport Inc. (American), is in the business of transporting petroleum products. In March of 2012 American was moving a load of petroleum up the Hutchinson River in New York. To do so it requested that New York City open the Pelham Parkway Drawbridge, which the City did. Thereafter, the barge and tug requested the City reopen the drawbridge so it could move downstream. A mechanical dysfunction besieged the bridge and the New York City Department of Transportation was unable to open the bridge, leaving the tug and barge stranded for two and a half days. American alleged the malfunction was the result of negligence, and that such negligence cost it $28,828 in economic losses. The company suffered no property damage.

In May 2012 American sued the city for negligence and for violating 33 U.S.C. § 494, a federal law requiring that drawbridges over navigable water "be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft."

In October 2012 the District Court for the Southern District of New York, based on *Robbins Dry Dock v. Flint*, 275 U.S. 303 (1927), granted the City's motion to dismiss because, based on the way *Robbins Dry Dock* has been interpreted by circuit courts, including the Second Circuit, there can be no recovery for economic losses caused by an unintentional maritime tort absent physical damage to the property in which the victim had a proprietary interest. American appealed to the Second Circuit.

HELD: The Second Circuit held that, although it agreed with American's argument that *Robbins Dry Dock* had been too broadly interpreted historically, the rule has been so consistently applied since its inception that it should continue to be applied in its current incarnation unless changed by Congress or the Supreme Court.

DISCUSSION: In *Robbins Dry Dock* a dry docking company caring for a steamship damaged a propeller, rendering the ship unusable for two weeks. The charterer – the company that hired the ship from its owner and whom in maritime law has all essential property interest rights during the chartering – sued the dry dock to recover the profits it lost while the ship was unusable. The Supreme Court made two holdings in the case, a narrow and a broad rule. The first, was that a charterer is not considered a third-party beneficiary of the contract between the vessel's owner and the dry docker, and the second, was that a charterer in a contract with a vessel owner has no right of recovery when the owner's property is damaged in an unintentional tort. The Second Circuit, after reciting these two rules from the case, stated that both these holdings "seem to have no relevance to the pending case," as American's claim is not grounded in a claim related to the contract between operator of the drawbridge (New York City) and the owner of the vessel it chartered. It then went on to note that the Supreme Court's *Robbins* opinion itself does not appear to have any other holdings in it, and that maritime law treatise "candidly" acknowledge that no such rule as that espoused by the District Court is found in *Robbins.* Moreover, since ruling in *Robbins* the Supreme Court has cited it three times without ever illuminating its meaning.

As to where the rule that there is no recovery for economic losses caused by an unintentional maritime tort absent physical damage to the property came from, the Second Circuit pointed to a Fifth Circuit en banc case, *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1022 (5th Cir. 1985). The rule was contrived to prevent recovery for losses thought to be too remote from a defendant's negligence to allow recovery. Next, the Court visited a case decided by then-Judge Breyer, in which he, after surveying the history of the rule, embraced the rule from *Robbins* based on "pragmatic [and] practical administrative consideration," including the number of plaintiffs that suffer economic losses versus those suffering physical losses and the fact that the typical victim of financial loss will have first-party insurance. Lastly, the Court noted that the Second Circuit itself as well as other circuits, including the Ninth, Third, and Eleventh Circuits, have found the broad *Robbins* rule persuasive and adopted it.

As a result, the Second Circuit stated it "now explicitly" adopts the rule, attributed through this meandering path, to *Robbins* that economic losses are not recoverable for an unintentional maritime tort in the absence of physical injury. It did so for four reasons: 1) the rule has been accepted by a consensus of courts, 2) Congress has the authority to legislate on maritime matters and the wherewithal to know such a rule has been accepted for some time, but has not endeavored to change it, 3) the rule "has the virtue of certainty," and 4) financial losses in commercial shipping are commonly covered by widely available first-party insurance.

As a final point, it is noteworthy that the court closed its opinion by stating it was "not unsympathetic" to American in this case because in foreseeable cases like this – that a vessel that has travelled up a river will need to get down it – fact-specific exceptions are oftentimes suitable and because a municipality has the ability to spread the cost of the negligence among the taxpayers. It said these issues "give [the Court] pause." Nonetheless, it ultimately concluded that the costs of instituting an exception in a case like this are outweighed by the benefits of adhering to a general rule with the advantage of certainty.

http://www.ca2.uscourts.gov/decisions/isysquery/ebec432a-2471-4a17-975b-df22182999a4/1/doc/12-4505_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/ebec432a-2471-4a17-975b-df22182999a4/1/hilite/ (Last accessed Jan. 8, 2014)

Employment: Discharged Police Officer Who Received Disability Benefits Is Not Barred From Also Asserting ADA Claims

Hoback v. City of Chattanooga, No. 12-6171 (6th Cir. Dec. 20, 2013)

The Sixth Circuit has found that receipt of disability benefits (ostensibly because the recipient is physically or mentally unable to work) does not bar the recipient from also asserting ADA claims (ostensibly because the recipient was able to work but the employer failed to provide a reasonable accommodation).

Mickel Hoback was a Chattanooga police officer from July 2000 until his employment was terminated in June 2009. After joining the Chattanooga police force Hoback enlisted in the military and served in Iraq. When he returned from active duty, he was diagnosed with Post-Traumatic Stress Disorder (PTSD) and he received medication and counseling through the Veterans Administration (VA).

In April 2009, Hoback complained to his therapist about a number of symptoms. The therapist made an appointment for Hoback to meet with a doctor to change his medication. When that doctor asked him if he ever thought about dying and he answered that he thought about getting shot, the doctor filled out a Certificate of Need for Involuntary Commitment, indicating that Hoback was suicidal. However, Hoback was not involuntarily committed and instead, he drove himself to a hospital, stayed overnight and was released the next day.

After learning of the incident, the City placed Hoback on administrative leave and asked him to take a psychological fitness for duty test. Hoback met with the City's doctor, who reviewed the Certificate for Need for Involuntary Commitment and concluded that he was not fit for duty due to his PTSD. After receiving the doctor's report, the City informed Hoback that he had to either accept a new position or take leave under the Family Medical Leave Act. Hoback requested a second opinion and was reevaluated by a new doctor, who concluded that Hoback was fit for duty, but that the City might want to consider putting Hoback in a position where the administration could monitor him as he returned to work.

Nonetheless, the police chief fired Hoback on June 21, 2009, after his administrative leave was exhausted, basing his decision on the first doctor's report. Hoback appealed to the City council which upheld the police chief's decision. After he was terminated, Hoback requested and received a third evaluation and that doctor also concluded that Hoback was fit for duty.

Hoback sued the City for violations of the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973. The discrimination claim went to a jury, which found in his favor. The district court denied the City's motions for a new trial and in the alternative for judgment as a matter of law. The City appealed.