RECOVERING ECONOMIC DAMAGES: CAN A SALTWATER TAFFY SHOP MAKE ITS CASE STICK OR DOES *ROBINS DRY DOCK & REPAIR CO. V. FLINT* ADD SALT TO INJURY?

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I. INTRODUCTION

In the wake of the *Deepwater Horizon* Oil Spill, claimants from all over the United States tried to recover losses that resulted from the ensuing environmental catastrophe.[1] The claimants represented all types of industries—ranging from real estate workers[2] to fishermen.[3] Unfortunately, one year later, only an estimated forty-four percent of claims had actually been paid out by British Petroleum (BP).[4] The delay in pay-outs[5]

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1. Jim Snyder, *BP Facing Oil Spill in All 50 States*, AL.COM (Aug. 16, 2010, 4:02 PM), http://blog.al.com/live/2010/08/bp_facing_oil_spill_claims_in.html.

2. Dan Murtaugh, *Real Estate Workers Eligible for Claims Facility*, AL.COM (Mar. 4, 2011, 12:40 PM), http://blog.al.com/press-register-business/2011/03/real_estate_workers_eligible_f.html.

3. Steve Phillips, *Frustrated Fishermen: Gotta Lawyer Up!*, WLOX ABC 13 (Mar. 22, 2011, 7:43 PM), http://www.wlox.com/Global/story.asp?S=14298536.

4. Karen Nelson, *BP Says It Has Processed—Not Paid—54% of Oil Spill Claims*, MIAMI HERALD, Mar. 18, 2011, http://www.miamiherald.com/2011/03/18/2121784/bp-says-it-has-processed-not-paid.html.

5. Harry R. Weber, *Few Taking Final Offers to Settle Oil Spill Claims*, ABC NEWS (Mar. 1, 2011), http://abcnews.go.com/Business/wireStory?id= 13032288.

created nightmares for hundreds of individuals and businesses.[6] Suppose, for example, there was a small saltwater taffy store in a local beach community that relies heavily on tourism. It would have to close if recovery was not granted in a timely manner. Sadly, based on the current state of law, the local taffy shop and hundreds of other businesses would not be able to collect funds in court because they have only suffered pure economic losses but no physical damages. Therefore, this Note proposes a three-prong test that will allow deserving claimants to keep their doors open.

This Note analyzes prior case law, statutes, and previous recoveries for businesses that have suffered a loss of commercial opportunity due to an environmental calamity.[7] Its purpose is to thoroughly evaluate when a leisure resort business is too remote from the environmental catastrophe to receive compensation from the culprit of the disaster. Part III of this Note discusses federal admiralty jurisdiction and maritime torts to determine which court will decide these kinds of cases. The two-prong test for federal admiralty jurisdiction, consisting of locality and maritime nexus requirements, decides if a wrongdoing is considered a maritime tort. Part IV examines a 1927 United States Supreme Court holding that a party must endure physical injury before it can recover. This controversial case is compared and contrasted to later decisions made by several district and circuit courts. Part V discusses the principles of foreseeability and proximate cause. Part VI discusses the Oil Pollution Act of 1990 (OPA) and other statutes that govern oil spill liability and prevention. Part VII provides information regarding the current and proposed recovery techniques for the *Deepwater Horizon* Oil Spill, particularly the Gulf Coast Claims Facility (GCCF).It further discusses the overwhelming amount of claims that have

6. Melissa McKinney, *Months Later Alabamians Wait for BP Money*, WSFA 12 NEWS (Mar. 21, 2011, 11:26 PM), http://www.wsfa.com/Global/story.asp?S=14294963 (Condo owners lost approximately $7,000 because tourists stayed away from Gulf Shores); Phillips, *supra* note 3 (Fishermen fear they might lose their homes and boats. Some state that "they're on the brink of having to abandon their livelihood.").

7. Inspiration for the structure of this Note came from Matthew Chalker, Note, *A Line Drawn in the Sand That Should be Washed Away: Recovery for Pure Economic Loss in Maritime Cases and the Reliance on* Robins Dry Dock v. Flint,15 U. Balt. J. Envtl. L. 151 (2008).

been submitted and proposed legislation to prevent an oil spill of this caliber from recurring. Last, Part VIII proposes a three-prong test that should be used to determine whether claimants ought to be entitled to recovery. Instead of rigidly applying the rule in *Robins Dry Dock & Repair Co. v. Flint*,[8] the proposed test will allow a business to recover so long as it meets three criteria intended to achieve, more fairly, the goals that *Robins* pursued too starkly—geographic dependency, water dependency, and calculable damages. The analysis begins with how an oil spill catastrophe case would be treated today.

II. SALT WATER TAFFY SHOP MIGHT GET CHEWED UP UNDER CURRENT LAW

Imagine a small saltwater taffy store that has been located in the same beach community for the past forty years. In fact, this store was opened by a grandfather, passed to his son, and now lies in the hands of the family's third generation. This saltwater taffy shop sits two streets back from the beach and has primarily served tourists ever since it opened. Eighty-five percent of the store's annual sales comes from tourists; therefore, one can easily see the devastating impact it would face if tourists stop visiting the area. What if the store is in Florida, a state where tourism is a key economic driver and brings in 60 billion dollars from at least 80 million visitors a year?[9]

Now imagine a devastating ecological disaster that brings tourism to a standstill. This is exactly what happened to several cities along the Gulf of Mexico in 2010. This situation is made worse when certain businesses, other than those like the taffy shop, are able to recover damages.[10] Unfortunately, common law

8. 275 U.S. 303, 309 (1927). The *Robins* rule states that physical injury must be incurred in order to collect damages. Pure economic loss is not recoverable. *Id*.

9. *Factbox: Gulf Oil Spill Impacts Fisheries, Wildlife, Tourism*, REUTERS (May 30, 2010, 3:40 PM), http://www.reuters.com/article/idUSTRE64T23R20100530.mj99 [hereinafter *Factbox*].

10. *Compare* Carbone v. Ursich, 209 F.2d 178, 182 (9th Cir. 1953) (creating the fishermen exception allowing fishermen to collect damages because it is foreseeable that an oil spill will have a negative effect on their livelihood), *with* Masonite Corp. v. Steede, 21 So. 2d 463, 464 (Miss. 1945) (holding a fishing

and current statutes typically will not grant recovery to this taffy shop. When vacationers stop visiting the area due to an environmental catastrophe (such as the *Deepwater Horizon* Oil Spill), business will halt at the local taffy shop. Unless the shop owner can recover damages from a claim, its doors will be forced to close. Because taffy shops and fishermen both confront the same type of financial catastrophe, a remedy, similar to the one fishermen enjoy, must be devised to help the taffy shop remain afloat until tourism resumes. Recovery will only be granted if the business is not too remote or distant from the actual catastrophic event. For instance, the location of the business and its dependence on the natural resource will need to be examined.

The largest marine oil spill in the world's history started April 20, 2010 when the *Deepwater Horizon* offshore platform exploded, eventually sinking five thousand feet by April 22, 2010.[11] It was not until eighty-six days later, the leak was finally plugged and oil stopped flowing into the Gulf of Mexico.[12] Approximately 4.9 million barrels of oil were released into the Gulf of Mexico, and the oil slick was estimated to cover 28,958 square miles.[13] As of May 2011, BP was deemed the responsible party, and investigations are still being conducted to determine whether or not BP was legally negligent.[14] It has already been discovered that BP drillers did not strictly comply with all regulations, and that the regulators charged with monitoring that compliance did not have sufficient disaster recovery preparations in place nor did they independently monitor the mobile oil drilling unit (MODU).[15] In fact, evidence shows that warning signs of possible failure were present before the

resort owner cannot collect damages because there was no reasonable certainty that her business declined due to the killing of the fish).

11. Cutler J. Cleveland, Deepwater Horizon *Oil Spill*, THE ENCYCLOPEDIA OF EARTH (Feb. 10, 2011, 12:21 PM), http://www.eoearth.org/article/Deepwater_Horizon_oil_spill.

12. *Id*.

13. *Id*.

14. *Id*. This Note does not discuss BP's negligence. Instead, it analyzes when a party is entitled to recover damages from a negligent party that created an environmental catastrophe.

15. *Id*.

explosion.[16]

This tragic event is considered by most to be the "largest marine oil spill in history."[17] The National Oceanic and Atmospheric Administration (NOAA) called it a "fishery disaster," making fishermen "eligible for federal funds to offset the [devastating] impact" on their livelihoods, even though seventy-five percent of the Gulf of Mexico was still open for fishing.[18] Luckily, fishermen have the government's support to keep them afloat, but what about the local shops that no longer have customers due to the sudden drop in tourism? Why did the government take a special interest in one group's livelihood and not another's?

III. JURISDICTION OVER THE HORIZON AND TORTS ON THE HIGH SEAS

Before discussing case law and statutes, federal admiralty jurisdiction must be first understood. The rules regarding this type of jurisdiction will determine which court will hear the case and which laws will apply. The United States Constitution extends federal judicial power to "all Cases of admiralty and maritime Jurisdiction."[19] If federal admiralty law is applied, *Robins* is triggered, thereby creating an analytical defect. In order to determine if the wrongdoing is a maritime tort, thus falling under federal admiralty jurisdiction, the following two-prong test is applied: (1) locality and (2) maritime nexus.[20] The locality requirement insists "that the wrong must have occurred on the high seas or navigable waters."[21] In addition, the maritime nexus requirement demands "a significant relationship to traditional maritime activity."[22] Further, even if the injury

16. *Id*.

17. *Id*.

18. *Factbox*, *supra* note 9.

19. U.S. CONST. art. III, § 2, cl. 1.

20. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 863–64 (1986).

21. *Id*.

22. *Id*. at 864 (quoting Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972)).

occurs on land, the Admiralty Extension Act[23] will extend admiralty jurisdiction so long as the damage was caused by a vessel.[24]

The decision in *Benefiel v. Exxon Corp.*[25] is illustrative of this inquiry. There, plaintiffs filed suit in state court seeking to recover damages from increased gasoline prices that resulted from the *Exxon Valdez* Oil Spill.[26] Even though the plaintiffs' damages were felt on land, admiralty jurisdiction applied because the disaster occurred at sea.[27] Likewise, *In re* Exxon Valdez upheld admiralty jurisdiction because the vessel that created the oil spill was "grounded in navigable waters," thus meeting the locality requirement.[28] Further, the vessel was engaging in maritime commerce, specifically oil transportation; thereby meeting the maritime nexus requirement.[29]

Based on the two-prong test and case precedent, federal admiralty jurisdiction should extend to our fictional local taffy shop. The locality requirement is satisfied because the oil spill occurred in the Gulf of Mexico. The maritime nexus requirement is met because the oil company was participating in maritime commerce.

IV. HEADWATERS OF CONFUSION: *ROBINS DRY DOCK*

Robins Dry Dock & Repair Co. v. Flint,[30] a case decided almost one hundred years ago, is still considered the landmark case to determine if a party is entitled to recover for a tort that

23. 46 U.S.C § 30101 (2006).

24. *Id*. § 30101(a).

25. 959 F.2d 805 (9th Cir. 1992).

26. *Id*. at 806.

27. *Id*.

28. 767 F. Supp. 1509, 1511 (D. Alaska 1991).

29. *Id*. at 1512. *Compare* Slaven v. BP Am., Inc., 786 F. Supp. 853, 856–57 (C.D. Cal. 1992) (stating that admiralty jurisdiction was met because injury resulted from a vessel that was "engaging in maritime commerce"), *with Exec. Jet Aviation*, 409 U.S. at 270–71 (denying admiralty jurisdiction because a plane crash into Lake Erie did not have a significant relationship to traditional maritime activity).

30. 275 U.S. 303 (1927).

occurred on the high seas or navigable waters.[31] *Robins* established the bright-line rule: plaintiffs who suffer only pure economic loss, without physical injury, cannot recover damages.[32] Since 1927, courts have accepted, critiqued, analyzed, and modified its holding.[33] Also, some courts have distinguished it from several maritime cases finding *Robins* was based on contract law, not tort law.[34] The battle between contract law and tort law in *Robins* has created confusion in courtrooms throughout the nation.[35] Although not expressly mentioned in the opinion, most courts read *Robins* as to have relied on contract law. However, many other courts have found that the remedy in *Robins* would have been different if no contractual agreement existed. Below is a thorough analysis of *Robins* and its effect on other decisions. In addition to the rigid rulings that *Robins* has brought about, the court system has created an exception for fishermen.

31. Michael P. Sullivan, Annotation, Robins Dry Dock *Doctrine Limiting Recovery for Economic Losses Due to Unintentional Maritime Torts*, 88 A.L.R. FED. 295 § 2(a) (1988).

32. *Id.*

33. *See, e.g.*, Emerson G.M. Diesel, Inc. v. Alaskan Enter., 732 F.2d 1468, 1474 (9th Cir. 1984) (disagreeing with *Robins* by stating: "Requiring recovery for economic loss to depend on the presence of personal injury or property damage is an arbitrary distinction leading to opposite results in cases that are virtually the same." The court further stated that economic loss should not be treated differently than physical injury.); *Slaven*, 786 F. Supp. at 862–64 (analyzing if state law allows "*nonRobins*" recovery and how TAPAA can be applied); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 982 (E.D.V.A. 1981) (stating that "*Robins* may be avoided, . . . but it cannot be ignored completely"); Fed. Commerce & Navigation Co., v. *M/V Marathonian*, 392 F. Supp. 908, 915–16 (S.D.N.Y 1975) (stating the court felt "bound by the Supreme Court's decision in *Robins*" and "that the Supreme Court should retain the exclusive privilege of overruling its own decisions . . .").

34. *Compare Pruitt*, 523 F. Supp at 981 (reiterating that *Robins* "involved questions of the law of third party contracts . . ."), *with* Louisiana *ex rel.* Guste v. *M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc) (stating *Robins* "represents more than a limit on recovery for interference with contractual rights").

35. Sullivan, *supra* note 31.

A. The *Robins* Analysis

Although decided in 1927 by the United States Supreme Court, *Robins* is still used today in most jurisdictions to determine who is entitled to recover for pure economic loss.[36] In that case, charterers leased a steamship from its owner.[37] The contract between the owner and the charterers provided that the ship should be docked every six months for service and that the lease payment would be suspended until the ship's service was complete.[38] Unfortunately, while the ship was being serviced, the propeller was damaged due to the repair company's negligence.[39] The propeller's damage caused a delay in the ship's return to the charterers, which resulted in a loss of expected profits.[40] The charterers filed suit against the repair company.[41] The Court denied the charterers a recovery, holding that only the owner of the ship was entitled to recovery because there was no contract between the charterers and the repair company.[42] The repair company was not aware of the contract between the owner and the charterers, nor were the repairs made for the benefit of the charterers.[43] The Court reasoned that the propeller's damage was only a wrong to the owner, emphasizing the fact that it would be unreasonable to hold the repair company liable to the charterers when it was unaware of the contract between the owner and the charterers.[44] In essence, the charterers could not recover for loss of commercial opportunity because they did not suffer physical harm or injury.

In multiple subsequent cases, courts have relied upon *Robins* in prohibiting recovery for plaintiffs who suffer economic loss

36. *See Fed. Commerce & Navigation Co.*, 392 F. Supp. at 915–16 (stating it "feel[s] bound by the Supreme Court's decision in *Robins* . . . [and] the Supreme Court should retain the exclusive privilege of overruling its own decisions").

37. *Robins*, 275 U.S. at 307.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 308.

without physical injury.[45] However, not all courts agree with this outcome, nor do all courts agree that *Robins* should be applied to all maritime cases. In fact, *Robins* is based on contract law, not tort law, yet the holding of this case has been applied to several tort cases throughout the past century.[46] As a result, the *Robins* decision mistakenly limited liability for tortfeasors and restricted recovery to claimants who should be entitled to be made whole again. For instance, the damages from an oil spill create profit-losses for local businesses, typically without physical loss. Not surprisingly, local businesses typically are not in contractual relationships with the vessel owners or oil rigs. Even though the situation of the local taffy shop losing profits due to an oil spill is drastically different from *Robins*,[47] based on *Robins'* misapplication, the court unfortunately would ban recovery of economic loss because the shop did not suffer any physical damage.

B. The *Robins* Progeny

District and circuit courts throughout the United States have struggled with *Robins*. Some courts have embraced it[48] while others disagree with it.[49] The following discussion analyzes courts' acceptance and frustration with *Robins*.

In *Louisiana ex rel. Guste v.* M/V Testbank,[50] decided in 1985 by the Fifth Circuit, two ships collided, spilling hydrobromic acid

45. *Compare* Emerson G.M. Diesel, Inc. v. Alaskan Enter., 732 F.2d 1468, 1474 (9th Cir. 1984) (stating there is no significant distinction between personal injury or property damage and pure economic loss without physical damage because both are "proximately caused by a defendant's conduct"), *with* Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965) (holding that the difference between economic loss and physical damage is significant).

46. *See, e.g.*, Louisiana *ex rel.* Guste v. *M/V Testbank*, 752 F.2d 1019, 1032 (5th Cir. 1985) (en banc); Global Petroleum Corp. v. Ne. Petroleum, Inc., 539 N.E.2d 1022, 1024 (Mass. 1989).

47. The major difference between the taffy shop and the plaintiffs in *Robins* is the taffy shop is not in a contractual agreement with another company.

48. *See, e.g.*, *Guste*, 752 F.2d at 1032; *Global Petroleum Corp.*, 539 N.E.2d at 1024; Burgess v. *M/V TAMANO*, 370 F. Supp. 247, 249 (D. Me. 1973).

49. *See, e.g., In re* Glacier Bay, 746 F. Supp. 1379, 1387 (D. Alaska 1990).

50. 752 F.2d 1019.

and the container's contents overboard.[51] Due to water contamination, "[t]he United States Coast Guard closed the outlet to navigation . . . and all fishing, shrimping, and related activity was temporarily suspended in the outlet . . . ."[52] Claims were filed by companies that were engaged in commercial fishing, as well as other affected enterprises such as seafood restaurants, bait and tackle shops, and recreational fishing.[53] The court held that the economic loss claims that did not involve physical damage could not be pressed.[54] The court specifically ruled that *Robins* does not solely apply to contractual cases because in *Robins* the court set aside the contract arguments and "directly addressed its effort to recover in tort."[55] The court found that "[d]enying recovery for pure economic losses is a pragmatic limitation on the doctrine of foreseeability" that is "both workable and useful."[56] Interestingly, in his concurrence, Judge Garwood agreed "with [the court's] analysis of the insufficiency of the proximate cause, foreseeability and remoteness formulations to alone provide an adequate guide for distinguishing on a normative, pre-event basis . . . ."[57]

Similar to *Guste*, the Massachusetts Supreme Judicial Court in *Global Petroleum Corp. v. Northeastern Petroleum, Inc.* held in 1989 that a plaintiff could not recover without suffering physical damage to its person or property.[58] The court based its decision on the *Robins* rule which "prohibit[s] recovery for purely economic loss."[59] In that case, the plaintiff, a terminal facility on a river, was denied relief when the defendant's retaining wall collapsed, allowing dirt and other debris to spill into the river.[60] Due to the water pollution, navigation on the river was closed for

51. *Id*. at 1020.
52. *Id*.
53. *Id*. at 1020–21.
54. *Id*. at 1032.
55. *Id*. at 1023.
56. *Id*. at 1032.
57. *Id*. at 1035 (Garwood, J., concurring).
58. 405 N.E.2d 1022, 1024 (Mass. 1989).
59. *Id*.
60. *Id*. at 1023.

over one month and the plaintiff incurred extra expenses.[61] Because the plaintiff suffered no physical damage and only filed suit to recover for interference with navigation, the court held that "recovery [was] barred under well-established principles prohibiting recovery for purely economic loss."[62]

Burgess v. M/V TAMANO[63] is also an example of strict adherence to the *Robins* rule. *Robins* is not expressly referenced in the opinion, but its application is implied in the court's analysis. In *Burgess*, an oil tanker hit a rock outcropping and discharged 100,000 gallons of oil into the water.[64] The three plaintiff classes included commercial fishermen, commercial clam diggers, and beach businesses that relied on tourism.[65] The court dismissed the beach businesses' claims, reasoning that "a private individual can recover in tort for invasion of a public right only if he has suffered damage particular to him—that is, damage different in kind . . . from that sustained by the public generally."[66] The court found that fishermen and clam diggers had an interest separate from the general public and further ruled that because of their livelihood, dependence on the water, and commercial use of their public right in which the defendant intruded, they were entitled to recovery.[67] On the contrary, the beach businesses only filed a claim for their indirect loss of customers, which did not impede their public rights.[68] The court decided that all beach businesses in that area suffered the same hindrance; therefore, this plaintiff class would not recover.[69] It is interesting to note that the court conducted a complete analysis of the rules of public and private rights.[70] If the court truly believed the *Robins* rule was a bright-line approach, then the

61. *Id.*
62. *Id.* at 1024.
63. 370 F. Supp. 247 (D. Me. 1973).
64. *Id.* at 248.
65. *Id.* at 249.
66. *Id.* at 250.
67. *Id.*
68. *Id.* at 251.
69. *Id.*
70. *Id.* at 249–51.

thorough analysis would have been unnecessary.[71]

Although there are court rulings that support *Robins*, there are existing cases where courts have refused to extend the *Robins* ruling.[72] In his *Guste* dissent, Judge Wisdom wrote that the court's application of *Robins* was incorrect, and inflicted an injustice on guiltless victims.[73] He railed, "the majority has extended the case beyond the warrant of clear necessity in requiring a *physical injury* for a recovery of economic loss . . . ."[74] In addition, he claimed the ruling did not follow the Supreme Court's reasoning in *Robins*,[75] and *Robins* was being extended to cases where a party would be able to recover under general tort law foreseeability and proximate cause doctrines.[76] Judge Wisdom proposed a test in order to grant fairer recovery that would have to be performed on a case-by-case basis: (1) the wrong must be recoverable under the tort principles of foreseeability and proximate cause, and (2) the claimant must prove "particular" damages.[77] Judge Wisdom further discussed that in order for a business to recover it must be "a vital service to the afflicted area."[78] For instance, a seafood restaurant would be too remote to recover because its loss would be no different from general economic losses suffered by the general population.[79] On the other hand, a business may recover if its livelihood was based solely upon the use of the contaminated natural resource. However, if a business hardly relied on the contaminated area, then it would not be able to recover because the business would

71. A thorough analysis of public and private rights would have been unnecessary if the court truly followed *Robins* because the bright-line rule prohibiting recovery for pure economic loss would have been applied banning recovery for the plaintiffs without having to explain and determine which rights were private or public. The *Robins* test is so straightforward and easily applied that the court should have been able to quickly determine the outcome.

72. *See* Louisiana *ex rel.* Guste v. *M/V Testbank*, 752 F.2d 1019, 1035 (5th Cir. 1985) (en banc) (Wisdom, J., dissenting).

73. *Id.*

74. *Id.* at 1039.

75. *Id.* at 1035 (claiming that *Robins'* ruling was based on contract law).

76. *Id.* at 1052.

77. *Id.* at 1052–53.

78. *Id.* at 1050.

79. *Id.*

only "sustain losses that [would] be small or even de minimis."[80]

In 1953, the Ninth Circuit decided *Carbone v. Ursich*.[81] In that case, members of the fishing crew contracted with the ship's owners to receive as compensation sixty-one percent of the profits from their catch.[82] None of these fishermen "owned any interest in the vessel," the *Western Pride*.[83] While fishing one day, another fishing boat ruined the net.[84] As a result, the fishermen lost their shares of the day's profits and the "means and opportunity for fishing" for four days.[85] The court held that *Robins* could not be applied to *Carbone* because *Robins* dealt with a different issue than a party seeking compensation for lost profits.[86] The court stated that *Robins* seemed to assume that the charterers would have later been reimbursed by the owners of the steamship, and that "no injustice would be done to allow the [charterers] to recover their share."[87] In the event that the service was delayed and the charterers lost business, "the owners would have been trustees for the [charterers] to the extent of the [charterers'] share."[88] With the Ninth Circuit's interpretation of *Robins*, the fishermen in *Carbone*, who were contracted to receive a percentage of the fishing profits, were granted recovery for pure economic loss.[89] According to *Carbone,* the *Robins* rule does not ban pure economic recovery because, in *Robins*, the court assumed that the charterers would collect their lost profits from the owners anyway.[90]

Under *Carbone's* interpretation, the local taffy shop is not foreclosed from recovering pure economic loss without suffering physical damage. In the instance of the local salt water taffy shop, the shop has no trustee, so it will not be able to recover

80. *Id*. at 1050 n.35.
81. 209 F.2d 178 (9th Cir. 1953).
82. *Id*. at 179.
83. *Id*.
84. *Id*.
85. *Id*.
86. *Id*. at 181.
87. *Id*.
88. *Id*.
89. *Id*. at 181–83.
90. *Id*. at 181.

without the oil company agreeing to reimburse the shop or without the assistance of the courts.[91] Courts need to determine exactly if *Robins* encompasses an assumption of recovery to entitled parties or if the court determined that the charterers were not entitled to recovery. In the first scenario, courts will have to find a test to determine what type of businesses can collect damages.

Aside from the trustee reimbursement assumption, *Carbone* created the fishermen exception to *Robins*. Because *Robins* has been labeled a rigid rule, few exceptions have been carved out in order to compensate victims who have suffered from unnatural catastrophic events.[92] The most common and widely accepted one is the fishermen exception.[93] This exception has raised curiosity as to other justifiable exceptions. As noted, some judges and commentators have questioned outright the perceived difference between fishermen (who rely on the sea for their fare) and local businesses (that totally rely on the sea to attract their customers).[94] Although the second type of business seems to be removed from the actual disaster, in truth it is not. Tourists, who are attracted by the sea, keep many coastal towns and their economies alive. The local beach shop industry and other area businesses may not survive without tourism, just as fishermen are not able to survive without water access and an uncontaminated sea.

As previously mentioned, the court in *Carbone* held that the fishermen were entitled to recovery, thus, creating the fishermen exception.[95] In that case, it appeared that the court was looking at proximate cause and remoteness in its decision because it

91. The taffy shop operates independently and is not in a contractual agreement with another party that is in the position to collect damages for economic loss.

92. *See generally* Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. SUPP. 111 (1998) (explaining how plaintiffs can recover pure economic loss through consequential damages, for instance, a court can award damages for loss of rent due to physical damage to real property).

93. *Carbone*, 209 F.2d at 182 (creating the fishermen exception).

94. *See Supra* Part IV.B.

95. *Id*.

referred to the general principles of tort law.[96] The fishing boat owners could have foreseen that if their members acted negligently then another fishing boat in the vicinity could be damaged. Another argument favoring recovery for fishermen is the inference that fishermen are viewed differently than the average claimant because "seamen are the favorites of admiralty and their economic interests [are] entitled to the fullest possible legal protection."[97] *Robins* was referenced in *Carbone*; however, the court held *Robins* was not to be applied because it dealt with completely different issues that are not applicable to fishermen.[98] Again, the significance of that case is that, in addition to the owners of the ship, the crew members were also able to recover. This implies that the court refused to extend *Robins* to *Carbone*.

Although not a fishermen case, *Masonite Corp. v. Steede*, decided in 1945 by the Mississippi Supreme Court, gives guidance on who qualifies as a proper claimant when fishing is part of a plaintiff's main livelihood.[99] In that case, the plaintiff, an owner of a fishing resort, filed suit for lost profits when the defendant's manufacturing plant discharged a large amount of wood fiber in the Pascagoula River.[100] The pollution killed a significant amount of fish, causing fishermen to stop coming to the fishing resort, which in turn put the plaintiff out of business.[101] The court rejected recovery for the plaintiff because of insufficient evidence to prove that the business was damaged only because of the killing of the fish.[102] The court held "[t]here is nothing in this evidence that would warrant a jury in finding that, but for the 1943 killing of the fish, the [plaintiff] would have had more patrons during that year and would have made a greater profit from the business than she in fact did."[103] The court, thus, relied on the general principles of tort—proximate

96. *Id.*
97. *Id.*
98. *Id.* at 181–82.
99. 21 So. 2d 463 (Miss. 1945).
100. *Id.* at 463.
101. *Id.*
102. *Id.* at 464.
103. *Id.*

cause, foreseeability, and remoteness.[104] *Robins* was not mentioned in the analysis. In Justice Griffith's concurrence, he found the plaintiff did not own the fish nor have a legal right to them; therefore, she had no right to sue the manufacturing plant.[105] However, in his dissent, Justice Alexander wrote that the plaintiff had the legal right to an unpolluted river, and she was free to use it as an asset, regardless of whether she held title to the adjacent land.[106] Further, she was suing because of her damaged business, not the death of the fish.[107] The test of liability, reasoned in the dissent, should be based on proximate cause.[108]

In regards to the fishermen exception, what is the difference between fishermen and the resort business?[109] In both instances, fishing is the predominant feature of the business and without fish or the access to fish, a claimant's business is destroyed or significantly decreased. Although *Masonite* occurred before the fishermen exception was developed, it still casts doubt on the fact that fishermen can recover while other fishing-dependent businesses cannot.

In 1974, the Ninth Circuit upheld the fishermen exception allowing commercial fishermen to recover lost profits due to an oil spill.[110] In *Union Oil Co. v. Oppen*, the fishermen had to prove that the oil spill destroyed ocean life, which in turn decreased the profits they would have received if the spill had not occurred.[111] Further, lost profits had to be proven with "certainty and must not [have been] remote, speculative, or conjectural."[112] The court described three different approaches taken by other courts: (1) defendants have no duty to compensate plaintiffs for its negligent

104. *Id*. at 463–64.

105. *Id*. at 466 (Griffith, J., concurring).

106. *Id*. at 464 (Alexander, J., dissenting).

107. *Id*.

108. *Id*.

109. *See e.g*., Louisiana *ex rel*. Guste v. *M/V Testbank*, 752 F.2d 1019, 1030 (5th Cir. 1985) (en banc) (stating there is no persuasive line between fishermen and other businesses that rely on the water for their living).

110. Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974).

111. *Id*. at 570.

112. *Id*.

conduct, (2) holdings must be based on proximate cause, and (3) remoteness can be used to deny recovery for economic loss.[113] In *Union Oil*, the court applied the proximate cause approach and reasoned that the defendant could have foreseen that its negligent drilling would harm ocean life and damage commercial fishermen's businesses.[114] The court explained that barring pure economic recovery is only "a formalism."[115] In cases where economic loss is much greater than physical injury, recovery is completely justifiable.[116] If courts follow *Union Oil's* reasoning by granting pure economic recovery based on foreseeability tests, then cases must be decided on a case-by-case basis instead of having a bright-line rule as in *Robins*.

Union Oil differentiates between a commercial business and the mere private right to an "occasional Sunday piscatorial pleasure."[117] Loss of pleasure cannot be a public nuisance claim because the general public is affected by the same nuisance (and the courts are not able to provide a clear remedy for this type of pleasure diminution). However, in *Union Oil,* only commercial fishermen, a select and limited class, were able to recover because they were harmed in a different manner than the general public. This logic enhances the merits of the taffy shop's claims. Again, this is no different than a taffy shop owner trying to collect for damage done to her business. In fact, the situations are very much the same because the owner can claim that the oil spill harmed aquatic life, that it decreased the number of her customers, and that it reduced the profits that she would otherwise have collected. The fact that she was fishing for taffy-licking vacationers rather than striped bass should make no analytical difference. Both groups of claimants suffered an equal financial injury directly traceable to the same culpable conduct. In addition, the owner could show the reduction of her profits with certainty. Like the fishermen, the taffy shop owner

113. *Id*. at 563.
114. *Id*. at 569.
115. *Id*. at 567.
116. *Id*.
117. *Id*. at 570 (quoting Oppen v. Aetna Ins. Co., 485 F.2d 252, 260 (9th Cir. 1973)).

conducts her business as her livelihood, not as a "piscatorial pleasure." Both the taffy shop owner and the fishermen have distinct and limited class businesses, which clearly differentiates them from the general public. But, the court in *Union Oil* limited its ruling to fishermen only, and emphasized that the courthouse doors remain tightly shut to others who were economically and personally harmed by the oil spill.[118]

The District Court for the Eastern District of Virginia in *Pruitt v. Allied Chemical Corp.* expanded the fishermen exception further, holding that boat, tackle shop, and marina owners who suffer losses in sales and services can recover due to harm from a defendant's tortious conduct.[119] This holding alludes to the court's disagreement with *Robins*, and the court even stated that *Robins* is inapplicable in the case because of its focus on a third-party contract.[120] Judge Merhige wrote that "degrees of immediacy" exist—a direct degree would be commercial fishermen who use the sea directly, compared to a less direct example of tackle shops and restaurateurs.[121] The court held the second group is "less direct, but far from nonexistent . . . ."[122] Therefore, the fishermen's claims were comparable to the less direct plaintiffs' claims.[123]

In applying *Pruitt*'s holding to similar cases, courts must be cautious of the amount of claims that are filed. A line must be drawn to limit liability, even in cases where damage is foreseeable.[124] To determine the line's extension, some experts refer to Judge Learned Hand's formula, which provides that a party will be held liable if the cost of preventing a problem is outweighed by the cost of the accident.[125]

In an effort to clarify *Robins*, the District Court of Alaska deciding *In re* Exxon Valdez in 1991 encouraged the Ninth

118. *Id.* at 570.
119. 523 F. Supp. 975, 980 n.23 (E.D. Va. 1981).
120. *Id.* at 981.
121. *Id.* at 979.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 978; *see, e.g.*, Richard A. Posner, ECONOMIC ANALYSIS OF LAW 167–70 (6th ed. 2003).

Circuit "to render a prompt decision" on the *Robins* rule to better explain how it should be applied.[126] Unfortunately, the case was never appealed, so the judiciary never got its answer.

Interestingly, the courts that follow *Robins* have done so for different reasons and under different interpretations. Because the 1927 case has created confusion and disagreement, some courts have preferred to follow the principles of foreseeability and proximate cause in place of a rigid *Robins* analysis.

V. LOOKING THROUGH THE PERISCOPE: PRINCIPLES OF FORESEEABILITY

While *Robins* was being debated in many courtrooms, the general principles of tort law—foreseeability and proximate cause—were being used by some courts to determine liability. Foreseeability exists when harm "might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention."[127] *Pryor v. American President Lines* stressed that a ship "must proximately cause injury to those ashore" in order to be liable because "[t]o hold otherwise is to embark upon endless line drawing until we get to a time and place 'remote from the wrongful act.'"[128] Although foreseeability is essential in determining liability, the exact consequences of the accident must not necessarily have been reasonably foreseen.[129] This does not render the harm unforeseeable.[130] It would be unfair to demand that clairvoyant precision be required for foreseeability.[131] However, Judge Friendly warned that "somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be

126. 767 F. Supp. 1509, 1518 (D. Alaska 1991).

127. Lloyd's Leasing Ltd. v. Conoco, 868 F.2d 1447, 1449 (5th Cir. 1989) (per curiam) (quoting Consol. Aluminum Corp. v. C.F. Bean Corp., 833 F.2d 65, 68 (5th Cir. 1987)).

128. 520 F.2d 974, 982 (4th Cir. 1975).

129. Petition of Kinsman Transit Co., 338 F.2d 708, 725 n.11 (2d. Cir. 1964) (citing Hughes v. Lord Advocate, [1963] A.C. 837, 852, 855, 857).

130. *Id.*

131. *Id.*

consequence is only fortuity."[132]

Contrarily, *Lloyd's Leasing Ltd. v. Conoco* expressed the opposing argument that foreseeability precision is important.[133] In that case, a ship spilled 65,500 barrels of oil into the Gulf of Mexico.[134] Some of the oil washed ashore approximately seventy miles away.[135] Oil was trekked into the plaintiff's store, so he sued for damages.[136] The Fifth Circuit affirmed the district court's decision that the harm was not foreseeable.[137] Although it was foreseeable that the oil would wash ashore, the court concluded that the plaintiff "had no reason to have anticipated that the oil would probably wash ashore in a heavily populated area and then be tracked into businesses and homes."[138] Judge Higginbotham disagreed and in his dissent wrote: "The predictable result was a significant downturn in the fortunes of surrounding businesses dependent on the tourist trade."[139] Further, he wrote that it is important only that the harm fall "within the set of foreseeable risks," and that it is illogical to hold that a precise location be known at the time of the accident.[140] He illustrated duty and foreseeability with the act of shooting a gun in a crowded area.[141] The shooter's duty "extends to all persons in the zone of danger of his acts."[142] Therefore, according to Judge Higginbotham, it was unsurprising that the oil traveled seventy miles and washed ashore. Even though this was not foreseeable at the time, the businesses that were damaged were still in the "zone of danger"; therefore, they were not too remote.[143]

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132. *Id*. at 725.

133. 868 F.2d 1447 (5th Cir. 1989) (per curiam).

134. *Id*. at 1448.

135. *Id*.

136. *Id*.

137. *Id*. at 1450.

138. *Id*. at 1449.

139. *Id*. at 1450 (Higginbotham, J., concurring in part and dissenting in part).

140. *Id*.

141. *Id*.

142. *Id*.

143. Oftentimes, plaintiffs are unable to recover because their claims are too remote from the actual cause of the injury. *See* Adkins v. Trans-Alaska Pipeline

VI. A LIGHTHOUSE TO GUIDE RULINGS: OIL POLLUTION ACT OF 1990

Case history, in itself, depicts a need for government involvement in reducing oil spills and limiting a spill's horrific consequences. In an effort to enact an adequate statute for oil pollution liability, compensation, and oil spill prevention, Congress passed the Oil Pollution Act of 1990 (OPA).[144] Congress hoped that the act would mitigate civil liability for future United States oil spills.[145] The OPA allows each state to enact additional liabilities and requirements, which has permitted states to see how far pollution prevention requirements can be extended.[146] The OPA provides that a party is responsible for damages resulting from oil discharged into navigable waters, shorelines, or the "exclusive economic zone" from a facility.[147] Hence, this requirement establishes a "strict liability standard."[148] These damages can include "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."[149] In addition, the OPA holds that loss of profits or inhibition to earning capacity can be claimed for injury to natural resources.[150] The OPA departs from general maritime damage principles and extends recovery to "virtually every conceivable

Liab. Fund, 101 F.3d 86, 89 (9th Cir. 1996) (holding that Alaska businesses and property owners' damages were too remote after considering factors such as time and place. Businesses complaining of loss of patronage were denied because of intervening causes, "such as diversion of labor to clean-up activities, the independent decisions of prospective customers, or a general decline of business due to the disruption of fishing."); Benefiel v. Exxon Corp., 959 F.2d 805, 807 (9th Cir. 1992) (finding the plaintiffs' claim too remote because the oil spill itself did not cause direct injury to the plaintiffs complaining of increased gasoline prices).

144. 33 U.S.C. § 2701 (2006).

145. 3 DAVID E.R. WOOLLEY & ANTONIO J. RODRIGUEZ, BENEDICT ON ADMIRALTY § 111 (2005).

146. *Id*.

147. § 2702(a).

148. WOOLLEY & RODRIGUEZ, *supra* note 145, § 112.

149. § 2702(b)(2)(C).

150. *Id*. § 2702(b)(2)(E).

consequence of a spill" in regard to removal costs and damages.[151] A defendant's liability is unlimited if the spill is "proximately caused by gross negligence or willful misconduct of, or the violation of an applicable Federal . . . regulation by the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party . . . ."[152] Otherwise, the defendant's liability is limited.[153] The only defenses available to a responsible party are "an act of God, an act of war, or an act or omission of a third party . . . ."[154]

Three routes to compensation exist: recovery from the responsible party, from the Federal Oil Spill Liability Trust Fund (the Fund),[155] and from state-regulated funds. In addition, the OPA amended the Clean Water Act giving the President the power to ensure that oil spills are properly cleaned up and the ability to take steps to prevent further discharge from the source of the spill.[156]

The *Robins* rule is not referenced in the OPA. It has yet to be decided if the statute overrules *Robins* or if *Robins* is still to be incorporated in determining recovery. Therefore, the confusion in judicial proceedings as to who is entitled to recover continues.

VII. CURRENT AND PROPOSED TECHNIQUES TO CLEAN UP A STICKY SITUATION

In addition to current statutes, the United States government responded to the *Deepwater Horizon* Oil Spill because of its size and location. On June 16, 2010, President Barack Obama publicized BP's agreement to set aside 20 billion

151. WOOLLEY & RODRIGUEZ, *supra* note 145, § 112.

152. § 2704(c)(1)(A)–(B).

153. *Id*. § 2704(a)(3) (stating a MODU's damages amount shall not exceed $75,000,000).

154. *Id*. § 2703.

155. 26 U.S.C. § 9509 (2006). The Fund, which is "supported by a five cents per barrel tax on imported oil" can be used to pay for damages claims. WOOLLEY & RODRIGUEZ, *supra* note 145, § 112.

156. CURRY L. HAGERTY & JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R 41262, *DEEPWATER HORIZON* OIL SPILL: SELECTED ISSUES FOR CONGRESS 7 (2010), *available at* http://assets.opencrs.com/rpts/R41262_20100730.pdf.

dollars for economic damage claims for individuals and businesses that were affected by the oil spill.[157] The GCCF is administered by a neutral fund administrator, Kenneth Feinberg, who was selected to process the claims.[158] Under the program, individuals and businesses are eligible to recover lost earnings and lost profits,[159] so long as the damages were *proximately caused* by the spill and not too remote in time and place.[160] This form of recovery is not the law; it is simply a quicker recovery provided by BP to damper the crisis situation it created. To receive payment, acceptable documentation must be submitted per the GCCF guidelines, and a major emphasis is based on the geographic proximity to the spill.[161] A claimant may file for a lump-sum payment whereby he waives his right to sue, or he has the option to receive between one and six months compensation whereby he retains his right to litigate.[162]

Even though the GCCF presents itself as a neutral fund administrator operating to keep businesses open and to provide justice, it has not exactly brought peace and recovery to businesses barely surviving. Although Feinberg was also in charge of fund distribution for the September 11 terrorist attacks,[163] he was not prepared for the disarray and difficulty of this task.[164] Initially, he promised to compensate all claimants within forty-eight hours; however, he was unable to uphold his guarantee due to the enormous volume of claims and the amount of time required to distinguish between legitimate and fraudulent claims.[165] In an attempt to speed along the process, Feinberg has extended recovery by accepting claims that are not

157. *Id*. at 13.

158. *Id*.

159. GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com (last visited Apr. 9, 2011).

160. *Id*.

161. *Id*.

162. *Id*.

163. David Segal, *Should BP's Money Go Where the Oil Didn't?*, N.Y. TIMES, Oct. 23, 2010, www.nytimes.com/2010/10/24/business/24claim.html.

164. Dionee Searcey, *Bumpy Start to BP Fund Puzzles Gulf*, WALL ST. J., Oct. 20, 2010, http://online.wsj.com/article/SB10001424052748703673604575549970587948384.

165. *Id*.

geographically close to the sea, and he has even reevaluated claims that were originally denied.[166]

In addition to creating the GCCF, President Obama gave the Secretary of the Navy the duty to devise "a plan of Federal support for the long-term economic and environmental restoration of the Gulf Coast region, in coordination with States, local communities, tribes, people whose livelihoods depend on the Gulf, businesses . . . and persons as he deems necessary."[167] The plan's purpose is to create an approach that will guarantee economic recovery and support for those who suffer damages from an oil spill.[168]

Further, there are several acts and statutes that have been proposed to provide prevention and regulation programs for oil spills.[169] The tremendous amount of proposals shows the need

166. *Id*.

167. Memorandum on Long-Term Gulf Coast Restoration Support Plan, 2010 DAILY COMP. PRES. DOC. 564 (June 30, 2010), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201000564/pdf/DCPD-201000564.pdf.

168. *Id*.

169. *See, e.g*., Andrea J. Chambers and Jerry D. Brown, *The 2010 Gulf Oil Spill and Questions of Liability*, 5281 EMERGING ISSUES 1, 5–6 (2010). Chambers and Brown discuss several legislative initiatives, including: Outer Continental Shelf Reform Act of 2010, S. 3516, 111th Cong. (2010) (seeking to refurbish the "[Outer Continental Shelf Lands Act] and broaden the [Department of the Interior]'s role in ensuring environmental and safety standards are met before oil companies receive offshore drilling leases and permits"); Blowout Prevention Act of 2010, H.R. 5626, 111th Cong. (2010) (which would "expand regulation of all 'high-risk' offshore and onshore wells, allow citizen lawsuits against oil producers, and prohibit drilling without blowout preventers"); Consolidated Land, Energy and Aquatic Resources Act, H.R. 3534, 111th Cong., 2d Sess. (2010) (which would "prohibit oil companies with poor safety records from getting new offshore drilling leases, deny permits and leases for federal law violations such as worker deaths, implement large fines, and introduce specific guidelines for the use of oil and gas royalties"); Big Bailout Prevention Liability Act, S. 3305, 111th Cong. (2010) (which would "remove the financial liability cap for offshore drilling, making oil companies responsible for all cleanup costs and damages, and require detailed oil spill response plans and predictions of worst-case scenario impacts from oil companies"); Oil Spill Accountability and Environmental Protection Act of 2010, H.R. 5629, 111th Cong. (2010) (which would "remove the financial liability cap for oil companies and require all oil rigs operated within 200 miles off the United States coast to be owned by American citizens"); Department of Interior Research and Technologies for Oil Spill Prevention and Response Acts, S. 3515, 111th Cong. (2010) (which would "require the [Department of the Interior] to carry out in-depth research on oil

for change in the area of oil spill prevention. However, once more rigid prevention programs are in place, there will still be a need for practical and legal routes to ensure fair and efficient compensation to businesses that are harmed from an oil spill in the event recovery is not decided extra-judicially. Liability cannot be limitless though; therefore, any proposed test must determine how far legal responsibility should extend. One suggestion is as follows.

VIII. A SWEETER SOLUTION TO THE SALT WATER TAFFY SHOP'S RECOVERY CLAIM

Liability must stop somewhere, but courts and the government struggle with where that boundary should be drawn. Some claims clearly warrant recovery, but courts cringe at granting relief because of the potentially vast number of claims that could follow. This is a valid consideration so that courts are not flooded with frivolous claims, but it is not a legitimate justification for denying injuries that are clearly foreseeable and direct. Therefore, this Note proposes a three-prong test to determine which claims the law should honor following an oil spill. The test will allow recovery to a narrow group of claimants, yet remain broad enough to include businesses and individuals with legitimate claims. The test asks: (1) is the claimant's livelihood entirely dependent on its geographical position in the affected area? (2) is the claimant's livelihood dependent on the affected body of water? (3) is the claimant's injury foreseeable and calculable? If the answers to each question is yes, then the plaintiff would be entitled to recovery.

A. First Question: Is the Claimant's Livelihood Entirely Dependent on its Geographical Position in the Affected Area?

The first question examines the business itself. In typical resort areas, there are generally two types of businesses: "Mom and Pop" local businesses and large companies that have a

spill prevention and response technology, direct the [Environmental Protection Agency] to conduct a pilot program with demonstration in deep water, and provide the program with $25 million from a trust fund"). *Id*.

national presence with multiple locations across the United States.[170] The likelihood that small revenue operations or closely held corporations can survive a local environmental catastrophe is much less certain than a large company.[171] In fact, the federal government has already identified the particular importance of small businesses and has developed programs to jumpstart operations to help them remain in business.[172]

Looking at the two types of businesses in light of the *Deepwater Horizon* Oil Spill, it is easy to see how a leisure salt water taffy shop that has one location in Pensacola, Florida, might not be able to bear a catastrophe as well as a Hilton Resort Hotel that has locations across America. For example, tourists who had reservations at a Hilton in Pensacola may now go to a Hilton in Mount Pleasant, South Carolina, because of the oil spill. The key difference is the taffy shop permanently lost its opportunity to provide taffy to these tourists; however, the Hilton can still accommodate the tourists in a different location and can still collect what it anticipated, minus the costs suffered to relocate the guests.[173] Although the Hilton will be affected in other areas, such as possible employee layoffs, the business will be able to survive. The change in travel plans is basically self-mitigation for Hilton. However, it will be impossible for Hilton to alleviate its losses by hotel transfer if the hotel in Mount Pleasant is at full guest capacity before business is transferred from Florida. The court must take this into consideration on a case-by-case basis and evaluate a business's situation to determine if the business can absorb and make up for its losses or if the business truly cannot recover.

170. Interview with Suzanne Holmes, Portfolio Manager, The Beach Company (Jan. 7, 2011) (on file with author).

171. *Id.*

172. U.S. SMALL BUSINESS ADMINISTRATION, http://www.sba.gov (last visited Mar. 22, 2011). The U.S. Small Business Administration (SBA) provides certain tax credits, loan initiatives and counseling/training programs to small businesses because the government realizes these businesses are great economic contributors. *Id.*

173. The costs are not all associated with hotel revenue. These costs might include hotel management, janitors, laundry staff, and other employee layoffs.

B. Second Question: Is the Claimant's Livelihood Dependent on the Affected Body of Water?

The second question is essential to recovery because if the plaintiff does not "rely" on the affected body of water then it can still thrive in an oil spill situation, unlike businesses that must have the sea to maintain their livelihoods. A direct reliance, like fishing, is not required; recovery can be granted to businesses that are indirectly affected by the water, such as businesses that depend on the water to attract visitors. For example, a shop that receives ninety-nine percent of its business from local residents does not rely on tourists to visit the area; therefore, it is not entitled to recovery when tourists stop visiting the area because a nearby body of water is contaminated. Under this requirement, it is not necessary that the plaintiff completely rely on the water, but a set threshold will require that seventy percent (or some specified statutory percentage) of the plaintiff's livelihood is "sea-dependent." Seventy percent was selected because it is broad enough to give businesses, whose survivability is truly dependent on tourism, the ability to remain open; however, it is conservative enough to allow the judiciary to focus on claimants who absolutely need tourism to survive. A business that collects less than seventy percent in tourist sales will still have local resident support to keep it afloat. The threshold should not be set too high because no one would be able to collect, but the percent cannot be set too low because it would put the tortfeasor completely out of business, which in turn would cause more harm. An important factor to consider is the time of year that the calamity strikes. For example, if an oil spill contaminates the area during the off-season, the devastation will not be as great as if it occurred during the summer or tourist season. This is true so long as the spill is cleaned and the traveling public believes the beaches are in good enough condition to still visit.

Business trends, such as changes in profits, may help determine a company's reliance on the affected body of water. For instance, if the taffy shop profited $50,000 the previous year and $40,000 two years ago and now ten months after an oil spill only has $5,000 in profits, the decrease in profits can be correlated with the calamity. With this drastic decrease in

profits, the local taffy shop might not be able to stay in business. Under the inquiry of who is best positioned to cover the loss, the answer is the oil company.

Foreseeability works hand-in-hand with reliance. The generally accepted tort principles, which are often ignored in maritime law,[174] state that the harm must be anticipated by a reasonable person for it to be compensable at law. Here, it is reasonable that the oil company would know that an oil spill would devastate a local beach business that depends on the Gulf of Mexico to draw tourists to the area. Small Mom and Pop beach shops cannot survive without tourists. Clean-up crews, news reporters, and conservationists visiting the area help mitigate the loss of commercial opportunities for some businesses, such as restaurants and hotels; however, they likely cannot be expected to spend dollars at typical tourist venues, such as jet ski huts and beach shops. Tenant ledgers can prove businesses' dependency on tourism.[175] In fact, it is common for landlords to allow commercial tenants to pay their January and February rental payments (months which fall during the off-season) during high-season months because tenants simply are unable to come up with enough rent when tourism declines during the off-season.[176] These rental histories show that beach shop owners' main livelihoods depend strictly on tourism.[177] Therefore, it is foreseeable that if a beach shop business does not collect enough funds during its high season, then it might not be

174. Tort principles are not predominantly used in maritime law in cases such as the taffy shop because *Robins* is typically applied banning pure economic loss without completely analyzing causation. *See* Carbone v. Ursich, 209 F.2d 178 (9th Cir. 1953).

175. Interview with Trish Pruitt, Assistant Prop. Manager, CPM, Freshfields Vill. (Mar. 22, 2011) (on file with author) (stating locally-owned seasonal retailers on Kiawah Island rely heavily on tourism during the high season months because a great percentage of their profits are generated during that time).

176. *Id.* (explaining that rental payment relief during January and February can help a small business survive during the slower winter months). Without this deferred payment option, a retailer would not be able to buy merchandise for the peak season. Under a rental payment agreement or promissory note, the tenant must pay the deferred rent back during the peak season when sales are higher. *Id.*

177. *Id.*

able to survive its low season.

As previously stated, there is a common law fishermen exception that allows fishermen to recover for economic harm. From a foreseeability standpoint, a fisherman's hardships are similar to a taffy shop owner's suffering because both lose earnings. After an oil spill, a fisherman is unable to catch fish in the ocean, which translates into a loss of profits. It is equally foreseeable that the same act on the oil company's part will prevent the taffy shop from earning the level of profits it made before the spill. In both scenarios, the fisherman and the taffy shop owner utilize the water. Therefore, a taffy shop should not be precluded from recovery just because it does not earn profits directly from the sea.[178]

A claimant's geographical location is important because it isolates the point at which a claim becomes remote. This must be evaluated on a case-by-case basis. Beach-front property is not a requirement; however, recovery should not extend beyond the beach communities. Legal responsibility limitations should be set because endless liability would eventually bankrupt the oil company. There will always be another link in the chain bringing in another claimant; therefore, a line must be drawn. Recent "too big to fail" policies show the government is reluctant to put a viable business in a position that would force it to declare bankruptcy.[179] For example, in 2008 the government infused a weakened American International Group, Inc. (AIG) with new capital in an effort to keep it from collapsing.[180] There was widespread belief that AIG was so woven into the economy that allowing it to fail would have been too costly.[181] Likewise, an oil company's bankruptcy could create dire consequences, such as putting thousands of people out of jobs thus hurting both the local and national economy.

178. The salt water taffy shop does not literally use the salt water to produce the taffy, but depends on the salt water to attract its customers.

179. *Too Big to Fail Definition*, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/too-big-to-fail.html (last visited Mar. 17, 2011).

180. *Panel: Gov't Bailout of AIG was 'Poisonous'*, FOX NEWS (June 10, 2010), http://www.foxnews.com/politics/2010/06/10/panel-govt-bailout-aig-poisonous/.

181. *Id*.

C. Third Question: Is the Claimant's Injury Calculable?

The third and final question requires that the injury be capable of calculation, and perhaps a statutory formula would be in order. A business's loss of commercial opportunity should be based on lost profits compared to previous years' profits.[182] However, this is not always a simple determination. Statistical measurements should be taken to show the percentage of customers that are tourists, the projected lifespan of the business, and the correlation between declining sales and the oil spill. A general study of the average life of a Mom and Pop business should be conducted in order to determine the future loss of income because many local beach businesses do not remain open more than a few years.[183] If a beach store has been operating for an excessive amount of time (i.e., more than ten years), its longevity should be taken into account. If a tenant is renting space for a shorter period, for example a five-year lease without renewal options, the term of the lease should control the amount of future collections. In addition to the individual business study, a community-wide study is crucial. The results would be essential in providing trends in the number of tourists visiting the area.

D. Charting a Different Course: A Proposed Alternative Option to the Three-Prong Test

Another proposed option, which might only reward bigger profit-making businesses, would be to determine each business's economic contribution to the community. Depending on a business's impact on the economy, it may be able to recover damages. There would be a strong correlation between the economic impact of a business and the level of compensation it

182. A new business should not be precluded from recovery solely based on the fact that there are no previous year financial reports. In order to determine its damages, a special exception should be provided to allow courts to calculate its expected losses based on forecasted income along with industry averages.

183. Kirkland Grant, Professor, Charleston School of Law, Business Associations Class Lecture (Mar. 3, 2011) (on file with author) (stating eighty-five percent of businesses close during their first five years of operations).

receives for damages caused by the oil spill. For example, a business that makes up five percent of the area's economy could not collect forty percent of the total damages awarded to that area. Both the three-prong test and this alternative test would have to be done on a community-wide level.

E. Heading Further Out to Sea: Additional Recovery Ideas

In addition to giving claimants the opportunity to file with the court, the federal government should allow the states themselves to distribute recovery money in a crisis situation. Distribution of recovery money could be done similarly to the GCCF.[184] After a disaster takes place, the court will find a neutral administrator to regulate the claims. This administrator will find one distributor in each state directly affected by the catastrophe. He will then allocate a percentage of the allotted recovery money to each state based on the damage to the state as a whole. Depending on the disaster, the allotted recovery money will come from the wrongdoer or the federal government. Because each state knows its counties better than the neutral administrator, the states can then conduct the surveys mentioned above and distribute money based on tourism trends as determined by statisticians, reasons for decline in business, and the projected business's lifespan. In addition to judicial involvement in selecting an administrator, the legislature will be required to review current statutes and safety standards and implement new laws and prevention programs based on its findings.

In addition to selecting a test to determine claimants, punitive damages should not be granted until all businesses that qualify for recovery are made whole again. If funds are depleted before all qualified claimants receive recovery, the oil company will be required to contribute a certain percentage of its profits each year to go toward the Gulf Coast Revitalization Fund, which will then distribute money to claimants who are owed damages

184. The GCCF acts on behalf of the tortfeasor, BP. GCCF and an appointed administrator use their own judgments to determine who will be awarded money based upon claimants' costs and damages which resulted from the oil spill. GULF COAST CLAIMS FACILITY, *supra* note 159.

and to future unknown claimants. Their obligation should not just stop after the pay-outs. This continual responsibility should incentivize other oil companies to abide by all regulations, react to warning signs, and take all necessary safety measures to avoid another horrific disaster.

F. High Tide or Low Tide: Current State of Law Compared to the Sweeter Proposed Three-Prong Test

In contrast to the three-prong test proposed above, the law currently leaves us with the *Robins* rule, the general principles of tort law, and the OPA.

Robins is still the predominate law in most jurisdictions;[185] however, some jurisdictions have limited *Robins* to its facts.[186] Courts embrace *Robins* because of its longevity, bright-line nature, and success in limiting otherwise endless liability. However, many courts have expressed their doubts and confusions on the rule.[187] These courts' analyses hold that plaintiffs, who have suffered the same type of harm, should not be treated differently just because they have different types of careers. For example, the common question exists as to why the foreseeability test is applied to form the fishermen exception but courts will not grant pure economic loss recovery for non-fishermen plaintiffs whose harm is foreseeable and direct. Despite the fact that one plaintiff is a fisherman and the other is a store owner, both have lost earnings due to the defendant's negligence. The main focus in both scenarios should be on proximate cause and foreseeability.

Interestingly, in cases outside of maritime law, the rules of foreseeability and proximate cause are followed by courts in order to determine liability. Even in some federal admiralty jurisdictions where *Robins* has not been extended, proximate

185. *See, e.g.*, Louisiana *ex. rel.* Guste v. *M/V Testbank*, 752 F.2d 1019, 1032 (5th Cir. 1985) (en banc) ("The *Robins* rule has proved to be a workable and useful tool in our maritime jurisprudence.").

186. Sullivan, *supra* note 31.

187. *See, e.g.*, *In re Exxon Valdez,* 767 F. Supp. 1509, 1518 (D. Alaska 1991) (expressing the need for the Ninth Circuit Court of Appeals to render a prompt decision on *Robins'* application in order to cease further confusion).

cause and foreseeability are applied.[188] In addition, the legislature incorporated these tort principles into the OPA.[189] However, the OPA is silent on the *Robins* rule; therefore, it did not bring an end to the ambiguity. The courts continue to question whether the common law rule should have been replaced with the statute since it was not specifically addressed.

Liability should go further than the fisherman exception. In addition to fishermen, whose livelihoods are based on the sea, an exception should be created for a local beach business that uses natural resources to attract customers. As the proposed three-prong test above reveals, recovery should extend to businesses that depend on the geographical position of the affected area and that are greatly dependent on the affected body of water. In addition, injuries must be calculable. This would include the salt water taffy shop and other local shops that depend on tourism to keep their businesses viable.

G. Testing the Current: Three-Prong Test Application

To fully make sense of the above proposed test and the current law, I will apply the three-prong test to the local taffy shop that has suffered no physical harm, only loss of past and future profits due to the *Deepwater Horizon* Oil Spill. The first step is to determine the jurisdiction. This case will fall under federal admiralty jurisdiction because the federal admiralty jurisdiction two-prong test is met. First, the locality requirement is satisfied because the wrong occurred within two hundred miles of the shore. Second, the maritime nexus standard is met because the harm occurred within the stages of oil commerce activity.

To determine if the taffy shop owner can recover lost profits, all three prongs of the proposed test must be analyzed. First, the taffy shop owner's livelihood is dependent on the geographical position of the affected area. The taffy shop has been in that

188. *See, e.g.*, Lloyd's Leasing Ltd. v. Conoco, 868 F.2d 1447, 1450 (5th Cir. 1989) (per curiam); Pryor v. Am. President Lines, 520 F.2d 974, 982 (4th Cir. 1975); Carbone v. Ursich, 209 F.2d 178, 182 (9th Cir. 1953).

189. Oil Pollution Act of 1990, 33 U.S.C. § 2703(a)(3) (2006) (incorporating due care and foreseeable acts, which are considered general tort principles).

same area for three generations and has predominantly served vacationers in that particular area. The owner owns and operates only this one store and there is no way for her to recover profits or mitigate damages by collecting from another store because no other store exists.

Second, the taffy shop owner's livelihood is dependent on the Gulf of Mexico. Eighty-five percent of all of its sales come from tourists between late April and mid-September. All other sales are to local residents during the off-season. In addition, the second step can incorporate the rule in *Union Oil Co. v. Oppen* which holds that the harm suffered must be distinct from the harm suffered by the general public.[190] Here, the taffy shop owner is separate from the general public; this business is the owner's livelihood, just as catching fish is a fisherman's livelihood.

Third, the shop's injury is calculable. Because the shop has been open for so long, a study will show that eighty-five percent of sales are from tourists, the business is stable, and there are no expectations of closing in the near future. Finally, based on the past five years' sales reports, ninety percent of the declining sales is due to the oil spill and the remaining ten percent is due to other economic conditions. Just as in *Union Oil*, the shop must show the oil spill actually diminished tourism and also show that this diminution reduced the profits it would have realized had the oil spill not occurred. The loss of "profits must be established with certainty and must not be remote, speculative or conjectural."[191] In this example, the three-prong test allows the local taffy shop to collect damages.

If the proposed three-prong test is not adopted, the taffy shop's recovery could depend on common law or the GCCF. Based on common law, the particular court's view on *Robins* is crucial. If the court heavily relies on *Robins*, the local taffy shop owner will not be able to collect on its claim because it did not suffer physical damages. If the jurisdiction applies the general tort principles to maritime law, the taffy shop may be able to recover. It is foreseeable to BP that an oil spill will deter tourists

190. 501 F.2d 558, 570 (9th Cir. 1974).
191. *Id.*

from visiting the beach community. Thus, without tourism, a taffy shop, which realizes eighty-five percent of its annual sales from vacationers, would lose tremendous profits and other commercial opportunities.

The GCCF does not base its disbursement decisions on common law, so it is possible the taffy shop may be able to recover damages under its principles. However, there is no recovery guarantee under the GCCF based on its erratic responses to previous claims. The principle of foreseeability is used to an extent, but without complete legal analysis. Feinberg's goal was to turn claims over in forty-eight hours.[192] Apparently, the amount of claims that are being received prohibits a thorough legal analysis from being conducted. *Robins* is clearly disregarded because individuals and businesses who suffered no physical harm are receiving money for lost profits.[193] Even employees' claims are being granted for lost profits.[194] This is much more extreme than what common law currently provides. The GCCF is trying to satisfy and appease affected people in order to save BP's reputation. The goal is to get compensation to the people whose lives have been damaged in order to keep their businesses viable; however, a new precedent should not be based on this type of pacification.

IX. CONCLUSION

In a situation like the *Deepwater Horizon* Oil Spill, a local saltwater taffy shop should be able to collect due to the harm suffered by the shop from the oil company's tortious conduct. Claims should be decided on a case-by-case basis, but the proposed three-prong test of geographical dependency, water dependency, and calculable damages will help refine the courts' focus and include reliability and predictability in a manner that

192. Andrew Restuccia, *Gulf Coast Residents in Financial Dire Straits, Waiting for BP Claims*, WASHINGTON INDEPENDENT (Sept. 13, 2010), http://washingtonindependent.com/97213/gulf-coast-residents-in-financial-dire-straits-waiting-for-bp-claims.

193. *Frequently Asked Questions,* GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/faq (last visited Apr. 9, 2011).

194. *Id*.

is fair to all parties. The illustrative three generation salt water taffy shop that predominantly depends on tourism should be saved. Based on current tort principles, grace is due because the shop is not too remote from the water to collect and the danger was foreseeable. With the adoption of the three-prong test, recovery is even more evident because the shop relies on its location and the ocean, plus, based on financial reports and its enduring existence, all three elements are satisfied. Further, the test serves sound public policy by incentivizing oil companies to uphold the safety standards and incorporate preventative maintenance regimes.