



High Court Suggests No 'Economic Loss' Remedy for Disaster

BY ROBERT A. SCHWINGER

FROM THE vantage point of hindsight, judicial decisions that once looked routine can take on the appearance of having been eerily prescient, or at least curiously coincidental. As New York and the nation still struggle to come to grips with the myriad ripple effects radiating ever outward from the collapse of the World Trade Center on Sept. 11, 2001, a seemingly mundane New York Court of Appeals decision from June of this year, concerning the scope of economic loss liability stemming from the partial collapse of a building wall and the collapse of a construction tower, now appears poised to affect the disposition of billions upon billions of dollars of WTC-related liability claims.

We all have come to know too well the human toll of the WTC collapse that is weighed in terms of death, injury, pain, fear and the anguish of family tragedy. The economic toll, by contrast, is a sprawling morass whose limits are less clearly defined.

Businesses that were based in the Trade Center have closed. Businesses not based in the Trade Center but near "Ground Zero" or in the "Frozen Zone" reserved for rescue, recovery and repair

operations (the boundaries of which shifted over time in the days and weeks since the collapse) have been closed or severely disrupted. Businesses that serviced customers predominantly based in the Trade Center or the surrounding areas have been hurt, often severely.

The employees of such business have lost their jobs or are at risk of losing them soon, as shown by the large numbers who turned out for recent job fairs in New York City designed to assist such persons. Tourism and air travel have declined, affecting businesses as diverse as hotels, restaurants, Broadway shows and major tourist attractions. Business air travel has been curtailed or deferred as well. Slower business activity has led to corporate layoff announcements around the country. Increased security procedures at airports, office buildings and other locations have slowed the pace of certain business activity. People who resided in the affected areas of Manhattan are impacted in their businesses and employment by having to deal with the more immediate issues of sheltering, feeding and clothing themselves and their families. The list is seemingly endless.

In the inevitable liability litigation that will ensue from the towers'

collapse, which of these groups (and of others too numerous to identify here) will be able to recover for their economic losses — the collapse of once-vibrant businesses, the loss of business volume, customers, jobs, employees? Will society and the courts be willing to simply apply ordinary rules of tort liability, formulated for the mundane occurrences of daily life, to this most extraordinary and unprecedented of events?

Just three months before the WTC attack, the New York Court of Appeals issued its decision in *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.*,¹ setting forth a clear statement of those ordinary rules of economic loss liability in the context of construction-related collapses and other "urban disasters." The decision is likely to leave most of those who suffered purely economic losses from the WTC collapse (i.e., economic losses without any accompanying personal injury or direct property damage) without a tort remedy. The question that remains is whether this most recent word on the subject will indeed prove to be the last.

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Construction Accidents

The Court's decision arose from

two fairly recent and well-known construction-related collapses in Manhattan — the Dec. 7, 1997, partial collapse of a brick wall on a 39-story tower at 540 Madison Avenue (at 55th Street), and the July 21, 1998, collapse of a 48-story construction elevator tower in Times Square. These incidents caused not only significant physical damage and personal injury but also resulted in severe economic impacts on businesses in the vicinity, as neighboring buildings were evacuated and streets were closed off to traffic and pedestrians for extended periods.

Both incidents led to putative class action litigation on behalf of businesses that were affected or caused to be closed by the street closures, the emergency repair operations and building evacuations. The plaintiffs in these cases asserted a variety of claims: negligence, gross negligence, negligence per se, public nuisance, private nuisance and strict liability.

The Court of Appeals noted the “enormity” of the putative plaintiff classes in these litigations. The plaintiffs in the Times Square cases were a law firm, a public relations firm and a clothing manufacturer, and their proposed classes sought to encompass “plaintiffs as diverse as hot dog vendors, taxi drivers and Broadway productions.” The Madison Avenue cases involved a claimed class of “all ... business entities, in whatever form,” in the area bounded by Fifth and Park Avenues from 42nd Street to 57th Street, an area encompassing dozens of densely occupied midtown Manhattan blocks.

The plaintiffs contended that the defendants’ duty to keep their premises in reasonably safe condition extended to economic loss even in the absence of personal injury or property damage. The defendants argued that the absence of any personal injury or property damage precluded plaintiffs’

claims for economic injury.

After reviewing a number of its precedents in the area of economic-loss liability, arising from mass disturbances ranging from transit strikes to blackouts to water main breaks to chemical plant explosions,² the Court of Appeals adhered to the principle “historically” followed by the courts of this state. It rejected the plaintiffs’ economic-loss claims, “limiting the scope of defendants’ duty to those who have, as a result of these events, suffered personal injury or property damage.” Accordingly, “plaintiffs’ negligence claims based on economic loss alone fall beyond the scope of the duty owed them by defendants and should be dismissed.” Attempts to seek relief for these losses on a theory of public nuisance were likewise dismissed because they did not present any special injury beyond that experienced by the community at large.

The Role of Policy

The Court’s decision was forthright in placing the basis for this rule where it belonged — squarely in the realm of policy.

“The existence and scope of a tortfeasor’s duty is, of course, a legal question for the courts, which ‘fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.’ At its foundation, the common law of torts is a means of apportioning risks and allocating the burden of loss. In drawing lines defining actionable duty, courts must therefore always be mindful of the consequential, and

precedential, effects of their decisions.

“As we have many times noted, foreseeability of harm does not define duty. Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant’s act.”

Thus, in such “urban disaster” cases, the Court explained that historically it has “circumscribed the ambit of duty to avoid limitless exposure to the potential suits of every tenant in the skyscrapers embodying the urban skyline.” It has rejected the suggestion “that a landowner owes a duty to protect an entire urban neighborhood against purely economic losses.” In a premonition of the dominant metaphor used to describe the wide-ranging economic consequences of the WTC collapse, it has declined “to extend a duty to defendant[s] [that] would, ‘like the rippling of the waters, [go] far beyond the zone of danger of the explosion,’ to everyone who suffered purely economic loss.”

The Court was frank that the line it had drawn historically, and which it reaffirmed in *532 Madison Avenue*, could not be portrayed merely as the exercise of science or logic. Rather: “Policy-driven line-drawing is to an extent arbitrary because, wherever the line is drawn, invariably it cuts off liability to persons who foreseeably might be plaintiffs.”

While the Court noted the attempt by the Appellate Division “to draw a careful boundary” among the affected plaintiffs on some sort of principled basis, ultimately it seemed that “that line excludes others similarly affected.” “[A]n indeterminate group in the affected areas thus may have provable financial losses directly

traceable to the two construction-related collapses, with no satisfactory way geographically to distinguish among those who have suffered purely economic losses." The Court thus concluded that the historically applied cutoff of personal injury and/or property damage "affords a principled basis for reasonably apportioning liability."

Different Result?

Given the billions of dollars of economic loss arguably attributable directly or indirectly to the WTC collapse, there will be enormous litigation pressure to chip away at the economic-loss rule enunciated in *532 Madison Avenue*, or at least to circumscribe its application if at all possible. The decision does not hide its soft underbelly — that its in-some-sense "arbitrary" holding ultimately rests upon a judicial calculation and balancing of numerous social factors to formulate an overall social policy about allocating risks and losses in modern life. Can this fact provide an avenue for those economically injured by the WTC collapse to avoid the Court's unforgiving holding?

The *532 Madison Avenue* decision, and the precedents upon which its holding was based, all arose from the conventional incidents of modern urban and commercial life. While any individual occurrence (such as a blackout or an explosion) is always in some sense unexpected and unique, the fact is that we know that inevitably there will be such events from time to time in the course of modern society, even though we hope them to occur as infrequently as possible and cannot predict when they will.

Plainly this is not the case with the Trade Center attack and the collapse

of the towers that followed. These events are not the routine incidents of our modern urban and industrialized society that are statistically inevitable in the aggregate even though unpredictable in any specific instance. This was an occurrence that has no obvious parallel in the body of precedents that make up our modern law of torts.

The policy issues of how our society goes about apportioning the extraordinary losses to which it gave rise may even have national and perhaps international implications. In short, it may be too simplistic to automatically equate the proper treatment of this event with how we resolve the typically local issues of the relations of landowners, utilities and industries with their neighbors, customers and suppliers. Perhaps an event like the WTC collapse warrants a different or more wide-ranging analysis.

That being said, it is hardly inevitable that even if a different policy calculation were appropriate here, it necessarily would call for a loosening of the economic loss strictures enunciated by the Court in *532 Madison Avenue*. For example, do the extraordinary responses by the federal government and the outpouring of private charity in response to the events of Sept. 11 argue for a greater or lesser scope of private tort liability? Does foreign policy come into play here? Is it offensive to the U.S. foreign policy response to the WTC attack for state courts to be widely imposing billions of dollars in liability on the basis that local parties (e.g., landowners, building management companies, airport security companies) were somehow to blame? Does the potential for such litigation, if allowed, to overwhelm local courts for years to

come have any relevance to the analysis? How should factors like these fit into the courts' consideration of "the consequential, and precedential, effects of their decisions"?

It remains to be seen whether the courts will entertain arguments of these kinds and grapple seriously with the issues they pose. Certainly it would be easy for the courts, at least when dealing with defendants other than the terrorist perpetrators and their backers, to conclude that there is no reason why ordinary local defendants and their insurers should face radically increased liability merely because this was an unprecedented terrorist attack. There may also be enormous institutional and administrative pressure within the judiciary to hew to the settled law and not do anything to unleash more litigation upon the local courts than the existing law would already allow.

It seems safe to conclude, however, that legal principles that just a few months ago seemed settled and uncontroversial will soon be severely tested. How the courts respond may write a new chapter in the law's explanation of the lines it draws in imposing and excluding tort liability.



(1) 96 N.Y.2d 280, 750 N.E.2d 1097, 727 N.Y.S.2d 49 (June 7, 2001).

(2) *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983) (transit strike); *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985) (blackout); *Milliken & Co. v. Consolidated Edison Co.*, 84 N.Y.2d 469, 644 N.E.2d 268, 619 N.Y.S.2d 686 (1994) (water main); *Beck v. FMC Corp.*, 53 A.D.2d 118, 385 N.Y.S.2d 956 (4th Dept. 1976), *aff'd*, 42 N.Y.2d 1027, 369 N.E.2d 10, 398 N.Y.S.2d 1011 (1977) (chemical plant explosion); see also *Dunlop Tire & Rubber Corp. v. FMC Corp.*, 53 A.D.2d 150, 385 N.Y.S.2d 971 (4th Dept. 1976) (same).

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