Too remote, or not too remote? That is the question

Case analysis: *Armstead v Royal & Sun Alliance Insurance Company Limited* [2024] UKSC 6

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Introduction

1. On 14 February 2024 the Supreme Court (Lord Leggatt and Lord Burrows, with whom Lord Richards and Lady Simler agreed, Lord Briggs concurring in a separate judgment) gave judgment on a third appeal over the sum of £1,560. More importantly, the Court gave guidance on an important principle: whether a negligent defendant is liable to the innocent claimant for economic loss stemming from a contractual liability to pay a sum of money to a third party as a result of property damage caused by the defendant's negligence. In considering this question the Supreme Court has given all of us – from law students all the way up to the Court of Appeal – a crash course on the recoverability of damages in the tort of negligence.

The facts

2. Miss Armstead was considerably unlucky. She was involved in two road traffic accidents, neither of which was her fault, within a very short time. After the first accident she was put in hire by Helphire on credit terms (eligibility for, and rate of, credit hire was not in issue). One of the (industry standard) terms of the credit hire agreement (**'clause 16'**) stated:

> *"You will on demand pay to [Helphire] an amount equal to the daily rental rate [of £130] up to a maximum of 30 days in respect of damages for loss of use for each calendar day or part of a calendar day when the vehicle is unavailable to Helphire for hire because … the Hire Vehicle has been damaged."*

3. The second (index) accident occurred whilst Miss Armstead was driving the hire vehicle. Although she was again the innocent party, she was liable to pay Helphire £1,560 for the 12 days the hire vehicle was off the road for repairs. She claimed against the other driver's insurer (**'RSA'**) in respect of:
   (a) the cost of repairs to the hire vehicle, and
   (b) the clause 16 sum.

4. RSA defended the claim in full, pleading in relation to the clause 16 sum that it was it was unenforceable as an unfair term (ss. 62 & 63 Consumer Rights Act 2015) and/or a penalty, and further that Miss Armstead failed to mitigate her loss by refusing to pay Helphire.

The decisions below

5. At first instance, the Deputy District Judge dismissed the claim on the grounds that Miss Armstead did not have any proprietary interest in the hire car, so could not claim for repairs or the clause 16 sum as these were "pure economic loss" and thus irrecoverable.

6. On appeal before a Recorder:

   (a) RSA conceded that Miss Armstead was a bailee of the vehicle, and therefore entitled to claim for diminution in value (usually linked to the cost of repairs: *Coles v Hetherton* [2013] EWCA Civ 1704; [2015] 1 WLR 160); but

   (b) The Recorder dismissed the appeal for the clause 16 sum. In essence, the reasoning was that:

      (i) a loss of use claim should be calculated according to the principles in *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647, namely interest on the capital value of the damaged car and any depreciation in value during the period of repair. The daily credit hire rate was therefore not a reasonable estimate of Helphire's actual loss and therefore not a reasonably foreseeable consequence of the collision,

      (ii) in any event, the clause 16 sum was irrecoverable "relational economic loss",[1] RSA's insured owing Miss Armstead no duty of care to prevent her from incurring a contractual liability, and

      (iii) *obiter* (as the DDJ's decision had not depended on this) he was not persuaded that clause 16 was an unfair term or a penalty clause.

7. Before the Court of Appeal, RSA did not maintain its argument that clause 16 was unfair and/or a penalty clause. In another development, counsel for Miss Armstead conceded that clause 16 would be irrecoverable if it did not represent a genuine and reasonable attempt to assess the likely losses to be incurred by Helphire as a result of its loss of use.

8. The Court of Appeal dismissed Miss Armstead's second appeal. Dingmans LJ, giving the lead judgment, ruled that the clause 16 sum was not recoverable for the following reasons:

[1] The Supreme Court warned that this phrase "is best avoided, because its precise meaning is unclear".

(a) clause 16 was an "internal arrangement" between a bailee and the bailor and, as such, could not be a basis for recovering losses from a third party;

(b) clause 16 was not negotiated at arm's length, and therefore not a "true independent agreement" between Helphire and Ms Armstead;

(c) clause 16 did not represent a genuine and reasonable attempt to assess the likely losses to be incurred by Helphire as a result of loss of use of the hire car;

(d) the clause 16 liability was a form of irrecoverable pure economic loss because it arose from the internal agreement between Helphire and Ms Armstead; and

(e) because it was not a "genuine and reasonable attempt" to assess loss, the clause 16 sum was not reasonably foreseeable and was too remote to be recoverable.

The lesson and the decision

9. The Supreme Court began its reasoning by recalling **three well-established principles**:

(a) A person owes **a duty of care not to cause physical damage to another person's property** (or person) and, **if in breach** of that duty, is **liable to pay damages** to compensate that person **for the diminution in value** of the property (or for their injury) ***and any other financial loss consequent on the damage***, subject to the general principles which limit the recovery of damages in tort.

(b) A person who negligently causes physical damage to another person's property is not liable to pay compensation to a third party claimant who suffers financial loss as a result of the damage. This is usually referred to as ***"pure economic loss"***, meaning ***economic loss that is not consequent on damage*** *to, or loss of, the claimant's property* (or their personal injury).

(c) At common law, **it is sufficient that the claimant has a right to possession** (as a bailee) of property to be able to recover in respect of damage to it (just as an owner could, save where the owner has already claimed). A relationship of bailment arises where a person voluntarily, whether gratuitously or under a contract, takes temporary possession of property from another with that other person's consent.

10. Applying these principles: Miss Armstead was a bailee of the hire car; she was therefore entitled to claim for diminution in value *and* any consequent economic loss; the clause 16 sum was not "pure economic loss" because Ms Armstead had a possessory title to the hire car; and because RSA were no longer contending that the clause was unenforceable, her economic loss was (at least factually) caused by the damage to the vehicle. In these

circumstances, Miss Armstead could recover any such sum unless it was established that there was some reason in law why her damages should be limited.

11. Those **"five principles" for limiting damages in tort**, the Court explained, were:

    (a) The scope of the defendant's duty of care;

    (b) The remoteness of the loss;

    (c) An intervening cause (*novus actus interveniens*) breaking the chain of causation;

    (d) A failure by the claimant to mitigate loss; and

    (e) Contributory negligence.

12. In this case, RSA argued the first four. Although the Court explained why only remoteness was really in issue in this case (and on which it spent the majority of its judgment), the other three were addressed towards the end:

    (a) The limits to the duty of care:

        (i) It is true that RSA's insured did not owe a duty of care to avoid Ms Armstead incurring a contractual liability, but this is irrelevant: her case is that he owed her a duty of care *to avoid causing physical damage to property in her possession*, and she incurred a contractual liability in consequence of that physical damage. That duty was admitted, and the factual consequence was undeniable.

        (ii) The term "scope of duty" is sometimes conflated with remoteness. As a separate concept, this is the principle recognised in *South Australia Asset Management Corporation v York Montague Ltd ("SAAMCO")* [1997] AC 191 and clarified in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21; [2018] AC 599. It has no application here, the duty being a commonplace one to take care to avoid causing physical damage to another person's property.

    (b) The concept of an intervening cause considers whether the defendant's breach of duty is to be regarded in law as responsible for causing the loss for which damages are claimed when a subsequent and significant factual cause combines with it to produce the loss. It is often elided with remoteness and the scope of duty, and sometimes referred to a "legal causation".[2] In this case, the chain of causation could not have been broken by a contract that existed before the hire car was damaged.

[2] Given the Court's analysis of anything factually caused by the breach of duty being recoverable subject to the five principles, the writer suggests that "legal causation" more appropriately refers to the question

(c) To show a failure to mitigate, RSA would have had to show that Ms Armstead had acted unreasonably by not challenging the contractual validity of clause 16. Courts are reluctant to find a claimant unreasonable for not pursuing litigation, particularly where the issue is not clear-cut.

13. Turning to **the issue of remoteness**, the Court reviewed the authorities on the recoverability of losses based on contractual liabilities: there is no reason in principle why recoverable loss should not include a contractual liability to a third party, provided that the liability is consequential on physical damage to the claimant's property.

(a) In *Ehmler v Hall* [1993] 1 EGLR 137, the defendant negligently crashed his van into the claimant's showroom. The showroom lease relieved the tenant of the obligation to pay rent while the premises were out of use; the claimant landlord was entitled to recover the rent thereby lost as loss consequential on the damage to the building. *(The Court held there was no conceptual difference between a loss of revenue under a contract and a loss relating to a sum contract payable due to property damage.)*

(b) In *Network Rail Infrastructure Ltd v Conarken Group Ltd* [2011] EWCA Civ 644; [2012] 1 All ER (Comm) 692, motorists negligently causing damage to railway property (bridges and the like) were liable for economic losses incurred by Network Rail by virtue of its contracts with train operating companies, reimbursing them for interruptions in their ability to use the track. The Court of Appeal stressed that a finding or concession that the sums payable under the contracts were reasonable *as between the contracting parties* did not automatically mean that they were recoverable from the defendants, however in that case it was common ground that the sums payable under the contract *were* a reasonable estimate of the losses caused by the temporary unavailability of the track.

14. From the *Network Rail* case, the Supreme Court distilled the following proposition: **where physical damage is negligently caused to revenue-generating property, the loss recoverable** by the owner of the property from the person who caused the damage **includes a sum payable by the owner, under an agreement** with another party to compensate that party for its loss of revenue resulting from the damage, **provided the sum agreed is a reasonable estimate of the likely amount of that loss**.

15. By this reasoning, a loss in the form of a contractual liability to a third party, consequent on damage to property in the claimant's possession, is "reasonably foreseeable", and

of the application of all of those five principles, rather than one of them.

therefore not too remote to be recoverable, if it represents a genuine pre-estimate of the loss that would befall that third party in the event of damage to the property.

16. Later in the judgment the Court recognised that this formulation of "genuine pre-estimate of loss" reflected the old law on liquidated damages (*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79), which was current at the time of the *Network Rail* case, and that this test has now been overhauled following *ParkingEye Ltd v Beavis; Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172 such that "a clause must not impose a liability to pay damages that are out of all proportion to a legitimate interest of the innocent party". Curiously, although it considered that the new test is very unlikely to produce a different result from the old test, the Supreme Court's leading judgment considered the concession in terms of the old law was "rightly made", effectively distinguishing between the law of tort and the law of contract. For this reason alone, Lord Briggs gave a separate judgment stating his preference simply to rely upon the concession, without giving authority to the proposition of law embedded in it.

17. Considering whether clause 16 *was* a reasonable pre-estimate of Helphire's loss of use, the Supreme Court determined:

    (a) The principles set out in *Beechwood Birmingham*, as relied on by the Recorder, were inapplicable here. In that case, the car that sustained damage was not a revenue-earning asset, and there was a large pool of available cars from which a substitute could have been provided without further loss (save for interest and depreciation). No such finding was made by the trial judge in this case.

    (b) The Court of Appeal's reasoning that clause 16 was not a reasonable pre-estimate was because it was the credit hire rate, not the basic hire rate, and there was no guarantee that someone such as Ms Armstead would be impecunious and so entitled to recover the credit hire rate. This was beside the point: the loss of use which clause 16 is meant to compensate is *the hire company's, not the claimant's*; in any case, the loss of a car used for rental on credit hire terms will be the rate at which it is rented out.

    (c) Further reasons from the Court of Appeal, that not all Helphire vehicles would be hired at credit hire rates, and there probably would have been other vehicles available (i.e. the Helphire fleet would probably not be at 100% use) were unsupported by any evidence nor argued at trial, and thus not open to the Court of Appeal to so find. In any event, the Supreme Court held it was reasonable in principle to use as the measure of compensation a simple and easily calculated sum in preference to a

complex and finely-tuned formula – and therefore it was a reasonable way of pre-estimating that loss to use the contractual rate that Ms Armstead had already agreed.

18. Finally, the Court considered what would have been the case if the loss had *not* been a reasonable and genuine pre-estimate: it would be wrong for Miss Armstead to recover nothing. Instead, she would be "entitled to recover such part of the loss actually resulting as was … reasonably foreseeable as liable to result from the breach" (see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, at 539).

Who has the burden of proof?

19. Because the key issue of remoteness depended on a concession, rather than the subject of argument, it was unclear who had the burden of proving remoteness and there was a "surprising absence of authority on the question". The Court considered each of the "five principles" of limiting recovery (see paragraph 11 above).

20. In respect of the scope of duty, this was not the occasion to discuss that test, analysed more thoroughly in *Hughes-Holland v BPE*. The Court also stated that the "six questions" posed by the Court of Appeal below as a checklist for its conclusion (see *obiter dicta* in *Meadows v Khan* [2021] UKSC 21; [2022] AC 852, para 28) were concerned with whether particular damage fell within the scope of the duty of care, and were therefore unnecessary and unhelpful in a case such as this.

21. As regards a failure to mitigate (in contract and in tort) as well as contributory negligence, the burden in each case lies with the defendant. As regards intervening causes, there were differences of opinion in the authorities but the Court affirmed the view in *The Metagama* (1927) 29 Ll L Rep 253, 254, 256 (see also *Philco Radio and Television Corporation of Great Britain Ltd v J Spurling Ltd* [1949] 2 All ER 882) that once it is shown that loss was in fact caused by the defendant's tort, the burden is on the defendant to establish that a subsequent event operated as a new intervening cause.

22. In respect of remoteness, the Court considered the position analogous to the duty to mitigate, contributory negligence and the endorsed position on intervening causes. The **legal burden of proof** must logically therefore also lie **on the defendant to plead and prove that loss** which was in fact caused by the defendant's tort is nevertheless irrecoverable because it **is too remote**. This was for reasons of both fairness and efficiency: once a claimant proves breach of duty and loss, the onus should be on the wrongdoer to show a good reason why the wrongdoer should not be liable to compensate the victim for the full extent of the loss caused; and as a matter of practicality it would be

unduly burdensome to require a claimant to anticipate and rebut the ways in which the defendant may seek to reduce or extinguish liability for a loss.

Conclusion

23. This case is of immense importance to understanding the fundamental legal principles underpinning the recoverability of damages in the law of tort, and should be read (and re-read) by students and practitioners alike.

24. Once a claimant establishes a duty of care, breach of that duty and factual causation, then (with the possible exception of the "scope of the duty" test of no application here) it falls to the defendant to *plead and prove* a reason or reasons why the level of damages flowing from that breach should be limited as a matter of law.

25. The duty breached here was not to cause damage to the claimant's property. Property for the time being legitimately within her possession is her property. A contractual liability owed by a claimant to a third party that is contingent on damage to the claimant's property (in this case, a hire vehicle bailed to her) is not "pure economic loss" as factually it flows from the damage itself. The contractual liability was not the result of an unfair term, nor was it a penalty clause as it was a "reasonable and genuine pre-estimate of loss" *(watch this space for a future appeal on this form of words)*; consequently it was reasonably foreseeable and so not too remote.

26. As there were no other legal reasons to limit the recoverability, the appeal was allowed.

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