

# 9

## Remoteness of damage

### Online content (part of chapter only)

#### MISCELLANEOUS

##### Continued relevance of the *Re Polemis* test

§9.A

The ‘direct consequences’ test of *Re Polemis* is not irrelevant to the question of remoteness in Tort law; it continues to apply, generally speaking, to the intentional torts.

In addition to its application in negligence, the *Wagon Mound* test of reasonable foreseeability of kind or type of damage also applies to the torts of private nuisance and *Rylands v Fletcher* (per *Cambridge Water v Eastern Counties Leather plc*<sup>1</sup>) (per Chapters 16 and 17, respectively).

Generally speaking, in the case of *intentional* torts, D is not entitled to the benefit of the narrower reasonable foreseeability test of remoteness. Instead, the ‘direct consequences’ test continues to apply. As Lord Steyn noted in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*:<sup>2</sup>

[t]he exclusion of heads of loss in the law of negligence, which reflects considerations of legal policy, does not necessarily avail the intentional wrongdoer. Such a policy of imposing more stringent remedies on an intentional wrongdoer serves two purposes. First, it serves a deterrent purpose in discouraging fraud ... Secondly, as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud. I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent, the law is simply formulated and declared morality.

Lord Nicholls also observed, in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*,<sup>3</sup> that foreseeability, as the more restrictive test, was appropriate for Ds who act in good faith, but that the wider remoteness test of ‘directly and naturally’ applied, where D acted *dishonestly*, for D should not have the benefit of a more restrictive test of liability in those circumstances.

It follows that the *Polemis* test continues to apply, say, to the following torts: fraudulent misrepresentation/deceit, where C, the victim of the fraud, can claim for all the losses directly flowing from the transaction induced by D, the fraudster, and not merely for those losses which were reasonably foreseeable (‘[a]ll such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen’, per

<sup>1</sup> [1994] 2 AC 264 (HL).    <sup>2</sup> [1996] 4 All ER 769 (HL) 790.    <sup>3</sup> [2002] UKHL 19, [2002] 2 AC 883, [103]–[104].

*Doyle v Olby (Ironmongers) Ltd*<sup>4</sup>); defamation (per *Essa v Laing*,<sup>5</sup> dicta, and see Chapter 15); conversion, where losses flowing naturally and directly from any unforeseen circumstances resulting from conversion should be borne by the wrongdoer, so that the wrongdoer is not liable for only reasonably foreseeable losses (*Kuwait Airways Corp v Iraqi Airways Co*<sup>6</sup>); assault and battery (see Chapter 14); and the statutory tort created by the Protection from Harassment Act 1997, s 3, where a victim of harassment may recover damages for any anxiety caused by the harassment and any financial loss resulting from it, without proof of foreseeability of the relevant damage (see ‘The statutory tort of harassment’, an online chapter). Other statutory torts may be treated similarly:

In *Essa v Laing*,<sup>7</sup> Mr Essa, C, was Welsh and of black Somali ancestry. In June 1999, he was employed by D as a construction worker at the Millennium Stadium site in Cardiff, working for Roy Rogers, a subcontractor. Almost immediately after starting work, he experienced petty acts of humiliation and insult. D’s foreman addressed C one day, in front of 15 men, with a very offensive racist remark ([m]ake sure that black cunt doesn’t wander off’). C became extremely upset, and suffered a dramatic personality change and depression. He left the employment, and brought a claim for the statutory tort of racial discrimination against his former employer. His financial losses were compounded by the fact that he stopped looking for other work following his resignation. **Held:** all these financial losses directly flowed from the tort and were compensable. There was no need to apply the test of reasonable foreseeability in this scenario (and even if there were a need, it was not necessary to foresee the extent of the harm that C would suffer as a result of the statutory tort).

## Remoteness of damage: negligence versus breach of contract

### §9.B

The rule of remoteness of damage in Tort (foreseeability) is wider (and permits the recovery of more damages) than the rule of remoteness in Contract (where the damage is naturally arising or in the contemplation of the parties).

The general purpose of damages in Contract and in Tort are disparate. In negligence, damages are payable so as to put C in the same position as if he had not sustained the wrong committed by D; whereas for breach of contract, the starting point is to consider what would have been the position had the contract been performed.

Furthermore, the tests of remoteness differ between the two causes of action. Where two parties have made a contract which one of them has broken, then the damages which C, the victim, ought to receive are those that either ‘fairly arise naturally, i.e., according to the usual course of things, from such breach of contract itself’ (limb 1) or those which ‘may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it’ (limb 2) (per *Hadley v Baxendale*,<sup>8</sup> and revisited in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*<sup>9</sup>). On the other hand, as discussed earlier in this chapter (per the print book), recoverable damages in Tort, per *Wagon Mound*, depends upon what was reasonably foreseeable damage arising from D’s breach. Hence, as stated in *Czarnikow Ltd v Koufos (The Heron II)*,<sup>10</sup> and reiterated in *Union Camp Chemicals Ltd v CRL TCL Ltd*,<sup>11</sup> the rule of remoteness of damage in Tort is wider than in Contract.

<sup>4</sup> [1969] 2 QB 158 (CA) 167 (Lord Denning MR).      <sup>5</sup> [2004] EWCA Civ 2, [2004] ICR 746.

<sup>6</sup> [2002] 2 WLR 1353 (CA).      <sup>7</sup> [2003] ICR 1110 (EAT).

<sup>8</sup> (1854) 9 Exch 341, 355 (Alderson B).      <sup>9</sup> [2008] UKHL 48, [2009] 1 AC 61.

<sup>10</sup> [1969] 1 AC 350 (HL) 359, 386 (Lord Reid).      <sup>11</sup> [2001] All ER (D) 94 (May) [121].

Over the years, some judges have considered that any distinction between what damages should be considered too remote under Contract law and under Tort law is, or should be, non-existent. For example, in *McElroy Milne v Commercial Electronics Ltd*,<sup>12</sup> Cooke P of the New Zealand Court of Appeal considered that any so-called distinction ‘remain[ed] obscure’ and ‘[was] not unquestionably convincing’; in *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*,<sup>13</sup> Lord Denning MR applied the tortious rules on remoteness to a contractual claim for physical damage; and in *Banque Bruxelles Lambert SA v Eagle Star Ins Co Ltd*,<sup>14</sup> Sir Thomas Bingham MR conflated the measures by stating that ‘[t]he test is whether ... damage of the kind for which [C] claims compensation was a reasonably foreseeable consequence of the breach of contract or tortious conduct of which [C] complains’.

However, the distinction between remoteness of damage in Contract and Tort has since been reiterated and endorsed by the House of Lords in *Sempre Metals Ltd v IRC*,<sup>15</sup> where Lord Mance stated that the distinction ‘remains good’. The distinction was also endorsed by the Singapore Court of Appeal (in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*<sup>16</sup>), when that court conducted a thorough review of the relevant English authorities, and concluded that there are two principal differences between the rules of remoteness in Tort and in Contract, describing these as follows:

**The relationships between the parties are entirely different.** Tort is more generous to C than Contract, by allowing him to recover for wider, reasonably foreseeable, damage, for one important reason. In Contract, C could have protected himself against an unusual risk of damage, by insisting on a liquidated damages clause (i.e., a genuine pre-estimate of loss that might flow from a breach), or by specifying that a particular breach causing a particular damage would be especially important to him (*viz*, by specifying that an obligation was a condition of the contract). In Tort, victim C has none of those opportunities. C and D are often strangers to each other, and there is no chance for C to protect himself in advance. Thus, as Lord Reid said in *Czarnikow Ltd v Koufos (The Heron II)*,<sup>17</sup> D ‘cannot reasonably complain if he has to pay for some very unusual, but nevertheless foreseeable, damage which results from his wrongdoing’ in Tort. In *Robertson Quay*,<sup>18</sup> the Singapore Court of Appeal noted that to conflate the rules of remoteness in Contract and in Tort would be ‘confusing’, because it would ignore the differing relationships between the victims and wrongdoers:

The law of contract, put simply, is about *agreement*. It is true that there can be concurrent liability in contract and in tort, but, where there is no such concurrent liability, the law of tort clearly relates to civil wrongs that occur *not as a result of a contractual relationship* between the party that has suffered damage and the party that committed the tort(s) in question as such but, rather, *despite* the fact that both have hitherto been strangers to each other. This is a simple – yet profoundly important – starting point [for the distinction between the rules of remoteness].

**The timing of the assessment is different.** Damages arising out of breach of contract are governed by the expectation of the parties at the time the contract was made (per *Hadley v Baxendale*<sup>19</sup>). By contrast, the time for assessing reasonable foreseeability of damage in Tort is when the tort was committed (i.e., what should a reasonable D have foreseen as the type or kind of damage likely to flow from his breach at the time that he committed the breach).

<sup>12</sup> [1993] 1 NZLR 39 (CA) 42.      <sup>13</sup> [1978] QB 791 (CA).      <sup>14</sup> [1995] QB 375 (CA) 405.

<sup>15</sup> [2007] 4 All ER 657 (HL) [216].      <sup>16</sup> [2008] SGCA 8, [52]–[83].      <sup>17</sup> [1969] 1 AC 350 (HL) 359, 386, and cited *ibid*.

<sup>18</sup> [2008] SGCA 8, [75] (original emphasis).      <sup>19</sup> (1854) 9 Ex 341, 355–56.

**The effect on concurrent duties?** It will be recalled, from **Chapter 1**, that whether or not concurrent duties should arise in Contract and in Tort, where the rules of remoteness differ, has been the subject of recent judicial query, both curially (e.g., *Wellesley Partners LLP v Withers LLP*<sup>20</sup>) and extra-curially (in a speech by Jackson LJ<sup>21</sup>). A further conundrum lies in whether C's damages should be governed by the contractual or the tortious rules of remoteness, where concurrent liability does arise (a point floated, but not answered, recently in *Yapp v Foreign and Commonwealth Office*,<sup>22</sup> and of which Nugee J commented, in *Wellesley*, that '[g]iven that there can be quite significant practical differences between the application of the test for remoteness in contract and that in tort, it is a little surprising that the question does not appear to have come up otherwise, or been decided'<sup>23</sup>). These are conundrums which lie beyond the scope of discussion in this book.

<sup>20</sup> [2014] EWHC 556 (Ch) [214] (Nugee J).

<sup>21</sup> 'Concurrent Liability: Where Have Things Gone Wrong?' (Lecture to the Technology and Construction Bar Assn and the Socy of Construction Law, 30 Oct 2014, copy on file with the author).

<sup>22</sup> [2014] EWCA Civ 1512, fn 8.      <sup>23</sup> [2014] EWHC 556 (Ch) [210].