Scott, by contrast, is commonplace, and if Mr. Gregg had won this would have opened the door to very many claims. As Lord Hoffmann said, "It would have enormous consequences for insurance companies and the National Health Service".

J.R. SPENCER

LIABILITY FOR LOST FUTURE BUSINESS IN CONTRACT

As Lord Emsworth's second son Freddie knew, there is money to be made in selling dog biscuits (P.G. Wodehouse, *Blandings Castle*). Life, of course, imitates art, and in *Jackson* v. *Royal Bank of Scotland plc* [2005] UKHL 3, [2005] 1 W.L.R. 377 the House of Lords had to consider a bank's liability to customers engaged in just such a line of profitable business. The defendant bank disclosed confidential information about the business activities of the claimants (who were importers of dog chews from Thailand) to the claimants' principal customers. These purchasers were so incensed by the size of the claimant importers' mark-up, disclosed by the bank in breach of its duty of confidence, that they terminated their relationship, with "disastrous consequences" for the claimants' business. The claimants sued the bank for the losses consequent on its disclosure of the commercially sensitive information. The learned judge found a substantial chance that the claimants' business relationship with the dog chew *aficionados* would have lasted for a further four years had it not been for the bank's revelations, and with appropriate (and increasing) discounts for hypothetical vicissitudes, he awarded damages accordingly. The Court of Appeal, however, held that an additional limit was imposed by the well known test of remoteness of damage in *Hadley* v. *Baxendale* (1854) 9 Exch. 341. Accordingly, "the cut-off point for the bank's liability was the end of such period as was within the reasonable contemplation of the bank at the time of breach", and this was held to be one year only, rather than four.

The House of Lords decided that this was wrong. Once it had been found as a fact that the loss of business over a four-year period was reasonably foreseeable at the time of contracting, there was no justification for limiting those losses according to what the defendant bank might have foreseen at the time of breach. The remoteness test in contract is applied at moment of formation, and not breach. "Extraordinary" losses (beyond the "naturally foreseeable") will be recoverable if the defendant had knowledge of

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the particular circumstances relevant to them at the time of contracting, since as Lord Hope of Craighead remarked, "the assumption is that the defendant undertook to bear any special loss which was referable to those special circumstances. It is assumed too that he had the opportunity to seek to limit his liability under the contract for ordinary losses in the event that he was in breach of it." The defendant's knowledge in fact serves to expand and not to limit his liability. Thus, the Court of Appeal's reliance upon the bank's expectations to limit liability for what had been naturally foreseeable was quite mistaken. As Lord Hope pointedly observed, the bank had failed to stipulate for a clause limiting its liability for loss of business to any particular period. Therefore, as counsel submitted, the Court of Appeal's decision "cut across the rules in *Hadley* v. *Baxendale*, which allocated risk between the parties at the time of the contract when they were still in a position to make provision for it in their bargain if they wished to do so".

Just so. *Jackson* is a salutary reminder of the rules of remoteness of damage in contract, and their coherence with wider Freedom of Contract ideas. The parties' knowledge at the time of concluding the contract is the key question. It determines what they can reasonably be taken to have foreseen, and for which the law will deem them to have assumed responsibility, upon contracting. Such an approach would sit uneasily with the tort of negligence, where the paradigm case is a complete stranger running down the victim in the street. The remoteness test is cast in terms of what was, *objectively* speaking, foreseeable at the time of the *breach*. It would make no sense to consider the tortfeasor's special knowledge about the victim's circumstances, when typically they will have had nothing to do with one another, prior to the incident complained of. *Res inter alios acta*.

The House of Lords has apparently adopted a more demanding test as to the degree of foresight of consequences required in contract, compared to the reasonable foreseeability test in tort: *The Heron II* [1969] A.C. 350. However, Scarman L.J. once described the difference as "semantic, not substantial" (*H. Parsons (Livestock) Ltd.* v. *Uttley Ingham Ltd.* [1978] Q.B. 791). Sir Thomas Bingham M.R. said in the *Banque Bruxelles Lambert* case [1995] Q.B. 375 that "Somewhat different language has been used to define the test in contract and tort, but the essence of the test is the same in each case ... whether, at the date of the contract or tort, damage of the kind for which the plaintiff claims compensation was a reasonably foreseeable consequence". This is the preferable interpretation. Nevertheless, the attention paid to the

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parties' knowledge remains quite distinct in contract and tort, in the way explained above.

What, however, if the parties to a negligence action are not total strangers? By definition, for liability to arise *vis-à-vis* pure economic loss, there must have been an "assumption of responsibility" by the defendant, upon which the claimant relied. Lord Mustill has forcefully argued that "mutuality" is the hallmark of duty of care in this context, lamenting its absence and dissenting in *White* v. *Jones* [1995] 2 A.C. 207. This is surely correct; indeed, there is a distinctly contractual flavour to the very phrase "assumption of responsibility", especially given that modern English contract law grew out of the action on the case for *assumpsit*. It follows that the contractual approach to remoteness should be adopted in such cases. We might, accordingly, doubt the readiness in *Henderson* v. *Merrett Syndicates* [1995] 2 A.C. 145 to apply the more favourable tort rules on limitation of actions, given liability concurrent with contract. The approach to remoteness suggested above is reminiscent of Lord Denning M.R.'s distinction between physical and economic loss in *Parsons* v. *Uttley Ingham*, above. Physical damage is paradigm tort, whereas to recover economic loss requires a relationship "equivalent to contract"—or indeed straightforwardly contractual. The relevant rules should apply in each case.

JONATHAN MORGAN

YOUR FLEXIBLE FRIEND?

THE Consumer Credit Act 1974, section 75(1) ("CCA 1974") establishes a regime of connected lender liability. This provision applies when a financial institution (or "creditor") provides finance to its customer (or "debtor"), by means of a "debtor-creditor-supplier agreement", for the purchase of goods or services from a third party (or "supplier"). Its effect is to render the creditor jointly and severally liable to the debtor for any losses caused by the supplier's misrepresentation or breach of the underlying supply contract. The creditor may, however, seek an indemnity from the supplier in respect of its liability to the debtor (CCA 1974, section 75(2)). In *Office of Fair Trading* v. *Lloyds TSB Bank plc* [2004] EWHC 2600 (Comm), [2005] 1 All E.R. 843, the OFT sought declarations clarifying the extent to which CCA 1974, section 75(1) rendered card-issuing banks liable to their customers for breaches of supply contracts financed by credit card. Two distinct issues arose.

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