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ARTICLES

DAMAGES, *THE LIESBOSCH*, AND IMPECUNIOSITY

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"THE damages for which the defendant is liable cannot be increased by reason of the want of funds of the plaintiff." So said the edition of *Salmond on Torts*[1] used by my generation of undergraduates. The authority cited was *Owners of Dredger Liesbosch* v. *Owners of Steamship Edison*[2] (hereafter *The Liesbosch*), a decision of the House of Lords in 1933.

In fact, though, even in 1933 there were circumstances in which a plaintiff's impecuniosity could have the effect of increasing the amount recoverable in damages. And in the years since then, some important developments have changed relevant aspects of the law of damages. So it is hardly surprising that since that passage appeared in *Salmond*, *The Liesbosch* has been doubted,[3] distinguished,[4] even confined to its own facts,[5] not to say misunderstood.[6] Nevertheless, it still appears in Torts textbooks in England, Canada, Australia and New Zealand.

Very recently, the Privy Council in *Alcoa Minerals of Jamaica Inc.* v. *Herbert Broderick*,[7] on appeal from the Court of Appeal of Jamaica, was invited by counsel to hold that *The Liesbosch* was no longer part of the law of that country. Their Lordships chose not to consider that question, it being unnecessary to their decision to do so. In the result, how far, if at all, impecuniosity is or ought to be relevant to damages is still in issue and that is the question to which the present article is directed.

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[1] *Salmond's Law of Torts*, 10th ed. by W.T.S. Stallybrass (Sweet & Maxwell Ltd., London, 1945), p. 125.
[2] [1933] A.C. 449.
[3] *Dodd Properties* v. *Canterbury City Council* [1980] 1 W.L.R. 433, 458.
[4] *Ibid.*, p. 452.
[5] *E.g. Perry* v. *Sydney Phillips & Son* [1982] 1 W.L.R. 1297, 1302; *Attorney General* v. *Geothermal Produce NZ Ltd.* [1987] 2 N.Z.L.R. 348, 355.
[6] *E.g. Martindale* v. *Duncan* [1973] 1 W.L.R. 574, 577.
[7] [2000] 3 W.L.R. 23.

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The Liesbosch: *the Facts*

The plaintiff owners of the Liesbosch, a dredger, were a syndicate of civil engineers who had contracted with the Harbour Board at Patras for the construction there of piers and quay walls under heavy penalties for default. The works included a considerable amount of dredging, for the purpose of which the plaintiffs had bought the Liesbosch at a cost of £4000 plus an additional £2000 for fitting it out and transporting it to Patras. On 26 November 1928, the defendants' ship, Edison, fouled the moorings of the Liesbosch, dragging it into the open sea where it sank and became a total loss.

Because its funds had all been committed to the construction contract, and to the payment of a deposit which it had been required to make thereunder, the syndicate had no moneys available to purchase a replacement dredger. What it did, therefore, was at high rates to hire the Adria (a rather larger dredger) plus a tug and two hopper barges. It was not until 17 June 1929 that these had arrived at Patras and could be put to use. Until then, work on the contract had to be suspended. In the event, the high cost of hire proved such a burden that the Harbour Board, in order to assist the plaintiffs, bought the Adria for £9177 and resold it to them on relatively easy terms. In May 1930, almost a year after the arrival of the substitute vessels, the owners of the Edison finally admitted liability.

Before the Admiralty Registrar and Merchants, the syndicate claimed £23,514 made up as follows:

(i) the actual value of the lost Liesbosch, together with certain expenses attendant upon the purchase of the Adria;
(ii) expenses incurred during the time when the plaintiffs were unable to carry on any of the work of dredging but were obliged to maintain certain members of their staff and minor items of plant;
(iii) the hiring expenses of the Adria from May 1929 to June 1930;
(iv) the extra cost of operating the Adria as compared with the Liesbosch; and
(v) loss of profit owing to cessation of all work under the contract for the period November 1928 to June 1929.

Under (i) the Registrar allowed,[8] as the actual value of the Liesbosch, the sum of £9177, being the amount for which the Harbour Commissioners had bought the Adria in June 1930. With

[8] [1933] A.C. 449, 450–451.

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certain reductions, he also allowed the greater part of (ii), (iii), and (iv) and about one-third of the amount claimed under (v), totalling in all the sum of £19,820. He also held that "having regard to all existing circumstances, such as the severe terms of their contract in regard to penalties and their want of liquid resources", the plaintiffs had acted reasonably and that the hiring of the Adria was a "direct and natural" result of the collision. They were entitled to take all reasonable steps to carry out their contract with as little delay as possible. They were equally bound to minimise the damages flowing from the sinking, which they had done.

The owners of the Edison next moved in the Probate Division to vary the Registrar's report, substantially on the ground that they were being called upon to pay much more than twice the value of the sunken dredger, merely because the plaintiffs had been too poor to buy a substitute. The proceedings before the Probate Division and the appeals which followed are illustrations of the truth that the answers a court will, or should, give depend crucially on how it classifies the problem before it. The Probate Division seems to have seen the main issue as being one of mitigation. In the Court of Appeal, the emphasis was on the measure of damages and in the House of Lords it was to an important degree on causation and remoteness. Accordingly, at one point or another as the case proceeded through its various stages, four basic components of the law of damages were canvassed, each of them having discernibly different incidents. It is important to an understanding of *The Liesbosch* and of its continuing significance that these four aspects of damages be treated separately, at least for the purpose of analysis.

The Probate Division: Mitigation

Argument and judgment

Before Langton J. in the Probate Division,[9] the defendants argued that it was not a normal consequence of a tort that a plaintiff should be too poor to be able to carry on his business. Any loss, therefore, beyond the value of the sunken dredger, would be too remote. In response, the syndicate submitted that the question at issue was not of remoteness but of mitigation.[10] An innocent party ought not to be under an obligation to keep or reserve funds on hand just for the benefit of potential wrongdoers, or to mitigate damages at his own expense.

[9] *Sub nom. The Edison* [1931] P. 230, 231–232.
[10] *Ibid.*, p. 232.

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In his judgment, Langton J. accepted the Registrar's finding that the hiring of the Adria was a direct and natural result of the collision.[11] That being so, he seems to have accepted the submission that the problem became in large measure one of mitigation. The correct approach, he considered, was to test each item claimed by the plain criterion whether it was properly and reasonably incurred. He referred with approval to the passage, already mentioned, of the Registrar's report in which it was stated that the plaintiffs were not only entitled to take all reasonable steps to carry out their contract with as little delay as possible but were equally bound to minimise the damages flowing from the sinking of the Liesbosch. The defendants' motion to vary the Registrar's report was therefore dismissed.

The mitigation point

Although it was apparently not cited until *The Liesbosch* reached the House of Lords, part of the speech of Lord Collins in *Clippins Oil Co.* v. *Edinburgh and District Water Trustees*[12] would have been very much in point if the question at issue had correctly been one of mitigation. There his Lordship had referred to a point taken by the appellants which they contended showed that a wrong measure of damages had been applied and that, in consequence, the amount awarded had been improperly reduced. For this point they relied mainly on a passage from the judgment of Lord Dunedin, below, in which it was stated: "The defenders are not to be prejudiced by the fact that the times were bad and that the company was not rich. Accordingly a claim upon total loss is, I think, inadmissible." Lord Collins continued:

> It was contended that this implied that the defenders were entitled to measure the damages on the footing that it was the duty of the company to do all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures the defenders ought not to suffer for it. If this were the true construction to put upon the passage cited, I think there would be force in the observation, for in my opinion the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act.[13]

[11] *Ibid.*, p. 238.
[12] [1907] A.C. 291, 303.
[13] His Lordship went on to add "On the other hand, the victim being in fact a poor man is not entitled to claim damages in respect of lost opportunities which he could not have utilised unless he had been rich", words as true now as they were then.

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In his speech in *The Liesbosch*, Lord Wright, who delivered the leading judgment of the House of Lords, did not question the correctness of this passage. He simply distinguished it on the ground that it was concerned only with a victim's duty to minimise damage[14] and was therefore irrelevant to the case before him. Much more recently, Megaw L.J. has stated that "a plaintiff who is under a duty to mitigate is not obliged, in order to reduce the damages to do what he cannot afford to do".[15] There is no reason to doubt the correctness of what Lord Collins and Megaw L.JJ. were saying. Certainly, *The Liesbosch* is no authority to the contrary. However, in a couple of more recent cases before the Court of Appeal, where mitigation had been postponed by the plaintiffs at least in part because of impecuniosity, there has been judicial reluctance to distinguish *The Liesbosch* on the mitigation point. The Court has chosen, instead, to accept other reasons to justify the delay.

The first of these cases was *Martindale* v. *Duncan*[16] where the plaintiff, who was impecunious and whose motor car had been damaged in a collision with another belonging to the defendant, waited until liability had been admitted and the insurers of both parties had approved the repairer's estimate before authorising the repairs to go ahead. At issue in the appeal was an award of £220 for ten weeks' loss of use of his car, at the rate of £22 a week, that being the cost of hiring a substitute vehicle. The appeal was dismissed on the ground that, until both insurers were satisfied, the plaintiff could not be certain of retaining his no claims bonus or his good standing with his own insurance company. It was this, rather than his inability to pay, which was taken to justify his delaying the repairs and prolonging the period of hire.

The second case was *Perry* v. *Sydney Phillips & Sons*.[17] In reliance on a surveyor's report, the plaintiff had bought a house property which turned out to have serious defects. The surveyor denied liability and the plaintiff, who could not himself afford any major expense, executed only minor repairs. On a claim for distress and discomfort, the defendant contended that whatever the plaintiff had suffered was due to his own failure to carry out sufficient repairs. That defence was rejected at first instance and by the Court of Appeal. Lord Denning M.R. took the view that, so far as *The Liesbosch* had laid down that loss due to impecuniosity was not recoverable, it should be restricted to its

[14] [1933] A.C. 449, 461.
[15] *Dodd Properties* v. *Canterbury City Council* [1980] 1 W.L.R. 433, 453.
[16] *Martindale* v. *Duncan* [1973] 1 W.L.R. 574.
[17] [1982] 1 W.L.R. 1297.

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own facts.[18] On the other hand, Oliver L.J. identified the real question as being:[19]

> Was it reasonable in all the circumstances for the plaintiff not to mitigate his damage by carrying out the repairs which were required? One reason, no doubt, was the plaintiff's poverty. As I said, if that were the only reason, *The Liesbosch* might well provide an answer for the defendants. But in fact the plaintiff's conduct in not carrying out the repairs was quite reasonable for a number of other reasons; and one of the reasons why he did not do them was because the defendants were strenuously resisting any liability at all for the repairs and denying that they were responsible.

Kerr L.J. agreed that these reasons were sufficient and thought that if it were reasonably foreseeable that the plaintiff might be unable to mitigate as soon as he would have done had he been provided with the necessary funds to do so from the other party, *The Liesbosch* would no longer apply in its full rigour.[20]

To the extent that the problem before them was correctly one of the duty to mitigate, the reluctance to accept that impecuniosity went to the reasonableness of a plaintiff's behaviour seems much too cautious. The explanation may be that, in *Martindale* v. *Duncan*,[21] Davies L.J., with whom the other members of the Court agreed, asserted that *The Liesbosch* was "authority for the proposition that impecuniosity is no excuse for not mitigating damage". While that was clearly not correct, it doubtless reflected the sort of view of *The Liesbosch* evidenced by the passage from *Salmond on Torts* cited at the beginning of this article.[22]

A more important reason for caution may have been the fact that while the matters actually at issue before the Court of Appeal in the two cases were loss of use, and vexation and inconvenience, respectively, and therefore involved questions of mitigation, in both the loss had arisen from delays in the execution of repairs with a consequent increase in their costs. That increase in the cost of repairs, as such, raised questions, not of mitigation but of the measure of damages for a primary loss. It is a distinction which, as we shall see, was to prove fatal to the syndicate's case when *The Liesbosch* reached the Court of Appeal.

[18] *Ibid.*, p. 1302.
[19] *Ibid.*, p. 1305.
[20] *Ibid.*, p. 1307. Foreseeability has not commonly been seen as an element of the "duty" to mitigate.
[21] [1973] 1 W.L.R. 574, 577.
[22] See text above, at note 1.

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The Court of Appeal: Measure of Damages

The conventional measure

The irony of the position in which the syndicate found itself in *The Liesbosch* was that, had the Edison merely damaged the dredger, there was ample authority for allowing it the cost of hiring another vessel while its own was being repaired. Thus, in an earlier case concerning a damaged dredger, *The Greta Holme*, Lord Herschell stated that: "If the appellants had hired a dredger instead of purchasing one, and had they during the months they were deprived of its use been bound to pay for its hire, it cannot be doubted that the sum so paid could have been recovered."[23] Lord Herschell added that out of pocket expenses would also have been recoverable, together with interest, and general damages for delay.

In *The Liesbosch*, the root cause of the plaintiffs' troubles in the Court of Appeal and, subsequently, in the House of Lords, was that instead of merely damaging the dredger, the defendants had destroyed it. As Scrutton L.J. said, that made the situation quite different.[24] Behind that difference lay a universal rule, obtaining then and until the 1970's, that damages were to be fixed as at the time of loss. In the case, say, of a motor car or vessel which had merely been *damaged*, the cost of the repairs themselves, whenever done, was measured by reference to the charges which would reasonably have been incurred as at the time of the accident (or immediately thereafter). To that calculation, mitigation was necessarily irrelevant. On claims for loss of use, on the other hand, losses continued to accrue until the repairs had in fact been done and claims could be subject to the defendant's duty to mitigate. When chattels were *destroyed*, damages were also to be measured by value as at the date of loss. But it seems that the plaintiff was for other purposes treated as though he had actually gone into the market and obtained a substitute, however unreal that possibility might be in practice given his lack of funds.[25] That it did not turn on the realities of the situation is evidenced by the analogous case of the non-delivery of goods where, again, the measure was value as at the date of loss. It was established quite early that it would make no difference to the result if the plaintiff buyer had prepaid the purchase price and was, therefore, so much the less likely to have funds for a substitute purchase readily available.[26]

[23] [1897] A.C. 596, 605.
[24] *The Edison* [1932] P. 52, 64.
[25] Cf. Goode, *Commercial Law*, 2nd ed. (Penguin Books, London, 1995), pp. 415–416.
[26] *Startup* v. *Cortazzi* (1835) 2 C.M. & R. 165; 150 E.R. 71.

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This conventional assumption, independent of the realities, that the plaintiff could and would obtain a substitute if one were available, had the unfortunate result for the owner of a sunken vessel that, being notionally in the early possession of the substitute, he could have no claim for the subsequent loss of use or loss of profits unless he could show good reason to the contrary. In the Court of Appeal, it was held that the owners of the Liesbosch were entitled to be paid only its "value" as at the time of the loss, plus interest from then until the date of judgment. On the other hand "value" for these purposes was not necessarily limited to the market price at that time. In the case of a vessel which was under a charter (a common occurrence) its value could reflect its worth to the plaintiff "as a going concern",[27] based on the usual rates of hire, provided always, as Greer L.J. stated,[28] the plaintiff had not been entitled under the charter to employ a substitute vessel to perform it. Scrutton L.J. added that the valuation as a going concern should be "at that place" since, if the vessel had to be replaced at the point where it had been lost, expense and time might have to be added to the cost of the substitute.[29] From this it follows that in appropriate cases the Court of Appeal would have allowed the possibility of recompense for a notional short-term loss of use and loss of profits, but this would have been only as an element in the valuation of the lost vessel. That being so, the plaintiffs' actual inability, from lack of funds, to replace the sunken dredger would have been wholly irrelevant. And, as Scrutton L.J. said, to allow extra expenditure incurred because of the owners' poverty, in addition to the value of the vessel so assessed, would be to give them its value twice over.[30] In the result, the Court of Appeal reversed the judgment of Langton J. in part. The figure of £9177, which the Registrar had based on the cost of the replacement dredger, was treated instead by the Court as if it were the value of the Liesbosch as a going concern. Interest on that sum was allowed as from the date of the sinking.

The assessment date

As is well known, there has since the 1970s been a significant weakening of the rule that damages are to be assessed as at the date of loss. An important illustration of that for present purposes was afforded by the decision of the Court of Appeal in *Dodd Properties Kent Ltd.* v. *Canterbury City Council*.[31] There, work on

[27] At p. 65.
[28] At p. 73.
[29] At p. 65.
[30] At p. 67.
[31] [1980] 1 W.L.R. 433 (HC and CA).

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the foundations of a new car park had damaged adjoining business premises known as Marlowe Garage. At the time of the trial, the relevant repairs had not yet been done and the question at issue was whether the date as at which damages should be assessed should be 1968, when the damage was discovered, 1970, which the experts on both sides agreed was the earliest it would have been reasonable to begin repairs, or 1978, being the time of the judgment. Because of inflation, the 1970 figure of £15,483 had risen to £42,278 by 1978.

In his judgment at first instance, Cantley J. drew attention to the distinction between the measure of damage and the duty to mitigate.[32] The normal measure in the case of chattels damaged and destroyed was, he said, respectively the cost of repair, or the market value, at the time of the loss. He also saw the irrelevance to these enquiries of the plaintiff's inability to purchase a substitute. It would have made no difference to the amount recovered in *The Liesbosch*, he said, had the owners spent 10 years saving to buy a similar dredger to the one they had lost. These comments by Cantley J. were premised on the continued application of the principle that damages were to be assessed as at the date when the damage occurred and he cited Denning L.J. in *Phillips* v. *Ward*[33] to that effect. However, he recognised that even under this rule, there could be circumstances under which it would be necessary or prudent to delay commencement of repairs while necessary inspections were done, a contractor found and the damage itself had stabilised. He generalised from this to the proposition that "the appropriate damages are the cost of repairs at the time when it was reasonable to begin repairs" and he thought that what was reasonable for this purpose should be judged "objectively", without taking account of the impecuniosity or financial stringency of the plaintiff.[34] On that basis, he chose the cost as at 1970, rather than as at 1968, when the damage occurred.

In the Court of Appeal, the valuation date chosen was the date of judgment in 1978. The Court did this in reliance on such cases as *Miliangos* v. *George Frank (Textiles) Ltd.*,[35] *Radford* v. *De Froberville*[36] and *Johnson* v. *Agnew*,[37] all then very recent, which had established that while the date of loss was still generally the appropriate date, it was no longer universally so. Rather, it could

[32] *Ibid.*, p. 443.
[33] [1956] 1 W.L.R. 471, 474.
[34] [1980] 1 W.L.R. 433, 444–445.
[35] [1976] A.C. 443.
[36] [1972] 1 W.L.R. 1262.
[37] [1980] A.C. 367. A more recent example is *Smith New Court Securities Ltd.* v. *Citibank NA* [1997] A.C. 254.

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be said the appropriate date had become that which best did justice between the parties. Like Cantley J., their Lordships accepted that the relevant date should be that at which it would have been "reasonable" to begin repairs. But they considered that, questions of impecuniosity apart, there were sufficient other grounds, *including* the plaintiff's financial stringency[38] to make it reasonable for the commencement of repairs to be delayed until the date of judgment and they allowed the appeal accordingly.

In reaching this conclusion, they relied on the following passage from Cantley J.'s judgment:

> I find that the first plaintiffs could probably have raised the money for repairs but this would have increased their annual losses and their financial stringency. As a commercial decision, judged exclusively from the point of view of the immediate and short-term welfare of the companies, it was reasonable to postpone incurring the very considerable expense of these repairs while no harm was being done to the building by the delay in repairing it and while these three rich defendants with apparent if not genuine belief in the validity of their defences were firmly denying liability to make even a contribution.[39]

Reasonableness

At this point, two tests of reasonableness would seem to be operating, the first concerning the measure of damages for a primary loss and the second, the date as at which those damages nowadays fall to be assessed. If Cantley J. is right and the former is properly objective in the sense of having no regard to factors personal to the plaintiff,[40] it has to be contrasted with the latter which does seem to allow for the inclusion of such personal factors as financial stringency.

Additional authority for the application of a reasonableness test to the fixing of the assessment date can be found, for example, in the speech of Lord Wilberforce in *Johnson* v. *Agnew*[41] and in the judgment of Oliver J. in *Radford* v. *De Froberville*.[42] But that test has also been seen as analogous to a third reasonableness requirement, the one which qualifies the duty to mitigate. That appears from what was said by Oliver J. in the *Radford* case[43] and it is also reflected in the judgments of Megaw L.J. and Donaldson L.J. in *Dodd Properties*[44] itself. Thus, according to Megaw L.J.:[45]

[38] [1980] 1 W.L.R. 433, Megaw L.J. at p. 453; Donaldson L.J. at p. 459.
[39] [1980] 1 W.L.R. 433, 442.
[40] Brown L.J., 456, queried the use of the word "objective".
[41] [1980] A.C. 367, 401.
[42] [1977] 1 W.L.R. 1262, 1287.
[43] *Ibid.*, pp. 1285, 1286.
[44] [1980] 1 W.L.R. 433.
[45] At p. 453.

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> Once it is accepted that the plaintiff was not in breach of any duty owed by him to the defendant in failing to carry out repairs earlier than the time when it was reasonable for the repairs to be put in hand, this becomes, for all practical purposes, if not in theory, equated with a plaintiff's ordinary duty to mitigate his damages. Lord Wright in his speech in *The Liesbosch*, accepted Lord Collins' dictum in *Clippins Oil Co. Ltd.* v. *Edinburgh and District Water Trustees*: "... in my opinion the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer ..."

Donaldson L.J. took a not dissimilar view, stating that whether the fixing of a reasonable date was "regarded as arising out of the primary measure of damage, *i.e.* that the relevant time is when the property should have been reinstated, or whether it is regarded as being a reflection of a plaintiff's duty to mitigate his loss, may not matter."[46]

If this analogy is correctly drawn, it would follow that the standard of reasonableness required for fixing an assessment date ought to be no higher than the relatively relaxed standard required of mitigation.[47] It ought also to follow, given what was said by Lord Collins in *Clippins Oil*[48] about taking a victim *talem qualem*, that there should be no barrier to having regard to a plaintiff's impecuniosity when settling an assessment date. And if that is so where a chattel has been damaged and requires repairs, it is not immediately obvious why, on the same reasoning, it should not nowadays also be the case where the chattel had been destroyed and has to be replaced. Nevertheless it has to be recorded that in *Ramwade Ltd.* v. *W. J. Emson & Co. Ltd.*,[49] decided six years after *Dodd Properties*, where there had been the total loss of a motor lorry, the hire of a substitute vehicle while the plaintiff waited for damages to be paid was held by the Court of Appeal to flow from the plaintiff's impecuniosity and, therefore, to be irrecoverable under the principles stated in *The Liesbosch*. On the other hand, it does not appear from the judgments that the possible significance of cases like *Johnson* v. *Agnew* was actually drawn to the attention of the Court or considered by it.

[46] At p. 458.
[47] See *e.g.* Vol 12 (1), *Halsbury's Laws of England,* 4th ed., reissue (Butterworths, London, 1998), para. 859.
[48] [1907] A.C. 291, p. 303.
[49] [1987] R.T.R. 72.

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The House of Lords: Causation and Remoteness

The judgment

When *The Liesbosch* reached the House of Lords, the conclusions arrived at in the leading judgment, given by Lord Wright, were not too dissimilar to those reached by the Court of Appeal. He, too, saw the question at issue as being, basically, the measure of damages for a primary loss to be assessed as at the date of the loss.[50] He also agreed that the value of the dredger as at that date must include elements additional to the mere market price of a comparable substitute. But he supposed that in awarding what was in substance the purchase price of the replacement dredger, the Court of Appeal intended to give simply the replacement cost of the Liesbosch without including, in its value, allowance for any other factor.[51] With respect, that conclusion is not easy to accept. It was clear from the judgment of Scrutton L.J. that the Liesbosch had to be valued as "a profit-earning dredger" and, as we have seen, that had to include allowance for the expense of, and the time taken in, getting the replacement to Patras.[52] What the learned Lord Justice did say was that the Registrar had given, as the value of the Liesbosch, the sum of £9000—odd, that being half as much again as the original cost to its owner of buying her and getting her to Patras. It was also more than half as much again as her insurance value. That therefore seemed to him to be "an ample measure" of the dredger's value as a going concern.[53]

What Lord Wright and the House of Lords chose to do was to refer back to the Registrar ascertainment of the true value on the following basis:

> The value of the Liesbosch to the appellants, capitalized as at the date of the loss, must be assessed by taking into account: (1) the market price of a comparable dredger in substitution; (2) costs of adaptation, transport, insurance, etc, to Patras; (3) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the Liesbosch and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth thrown away, but neglecting any special loss due to the appellants' financial position.[54]

On the capitalised sum so assessed interest was to run from the date of the loss.

[50] [1933] A.C. 449, *e.g.* at p. 468.
[51] At pp. 467–468.
[52] See text at n. 28.
[53] [1932] P. 52, 58, 59, 67.
[54] [1933] A.C. 449, 468.

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Pace Lord Wright, the Court of Appeal's global figure of about £9000 was certainly intended to cover much the same ground. However, taken on his own terms, what Lord Wright wanted (while purporting to remain within the principle that damages be assessed as at the date of loss and that the lost dredger be valued as at that date) was in effect to allow the plaintiff damages based not on the assumption that the Liesbosch had been replaced instantly but on the basis of its having been replaced and made available within a reasonable time. But that reasonable time was to be fixed without reference to the plaintiffs' financial difficulties.[55] In consequence, the plaintiffs, in addition to getting the value of the lost dredger, were to be recompensed for the costs incurred and losses suffered between its sinking and its notional replacement at the "reasonable" later date. In that respect, he was doing rather as did Cantley J., later, in the *Dodd Properties* case, when that learned judge fixed 1970 as the date at which repairs were to be costed rather than 1968, the date the damage occurred, or 1978, the date of judgment.

Given the non-existent purchase taken to have occurred at an artificially determined time leading in turn to an inflated valuation, it might have been assumed that the House of Lords would have treated the plaintiffs' impecuniosity as totally irrelevant. But that is not how Lord Wright saw it. Having remarked that the impecuniosity was not traceable to the respondents' acts and was in his opinion outside the legal purview of the consequences of those acts,[56] he went on to state in the most often cited sentence from his speech: "In the present case if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger."[57]

It would appear to follow from this dictum that if a causal link could have been shown between the sinking of the Liesbosch, the plaintiffs' impecuniosity and their eventual losses, and if the remoteness hurdle could have been overcome, those extra losses could have been added to the three groups of losses listed above by Lord Wright. They would then presumably, on the same reasoning, have all formed part of the "valuation" of the lost vessel. The third group would seem to include some degree of loss of use and it has

[55] This, presumably, was what Cantley J. had in mind (above, n. 33) when in the *Dodd* case he spoke of an objectively reasonable time. The Court of Appeal in that case appear to have concluded that, in relation to the newly emerging test of reasonableness in fixing the date at which damages should be assessed, different criteria should apply.

[56] [1933] A.C. 449, 461.

[57] *Ibid.*, p. 461.

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only recently been said in the House of Lords that loss of use is a capital account loss.[58] The same third group would also, potentially, include loss of profits. However, in those cases, it would doubtless have been incumbent on the plaintiffs to mitigate the additional loss by hiring a substitute dredger, as in fact had been done in *The Liesbosch*. On the capitalised sum finally arrived at, the defendants would have to pay interest as from the date of the sinking.

But if contortions of these kinds are really required by Lord Wright's reasoning, it can only be because of his desire to give the plaintiffs something more than the replacement cost of their lost dredger, within the confines of the rule that damages be quantified as at the date of the loss. And that is a requirement which, as we have seen, no longer necessarily exists.

Causation

Lord Wright obviously saw causation and remoteness as separate concepts. In practice, they can easily enough be confused, especially when, as we shall see was for a time established in *In re Polemis and Furness Withy & Co. Ltd.*,[59] the notion of a direct cause is treated also as the test for remoteness.

On the question of causation, Lord Wright's first point was that the plaintiffs' impecuniosity was a separate and concurrent cause, extraneous to and distinct in character from the tort.[60] Secondly, the impecuniosity was not traceable to acts of the defendants. Thirdly, even if the plaintiffs' financial embarrassment were regarded as a consequence of the defendants' tort, it was too remote. Fourthly, he preferred to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger. Fifthly, he distinguished *In re Polemis* on the ground that it dealt with the immediate physical consequences of the negligent act and not with the cooperation of an extraneous matter such as the plaintiffs' want of means. Finally, he stated that the plaintiffs' financial disability was not to be compared with "that physical delicacy or weakness which may aggravate the damage in the case of personal injuries".

That list is not without its problems, the first of which is in what circumstances the plaintiffs' impecuniosity can be said to have been the result of the plaintiffs' acts. On one approach, the financial problems of the owners of the Liesbosch were entirely the result of the defendants' wrongful act in the sense that, but

[58] *Dimond* v. *Lovell* [2000] 2 W.L.R. 1121, 1139, *per* Lord Hobhouse of Woodborough.
[59] [1921] 3 KB 560. See text below, at fn. 82 *et seq.*
[60] [1933] A.C. 449, 460–461.

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for the loss of the dredger, they would have had no shortage of funds. In *Dodd Properties*,[61] where a similar situation arose, Megaw L.J. made the point that the "financial stringency" of the plaintiffs in that case "arose, as a matter of common sense, if not a matter of law, solely as a consequence of the defendants' wrongdoing". Clearly, Lord Wright must have had in mind something other than a cause in that sense.

In the cases decided since *The Liesbosch*, at least two types of situations have been identified where a causal connection can exist. In one, the wrongful act has so injured the plaintiff that he has been unable to earn the funds to enable him to replace what he has lost. Thus in the New Zealand case, *Attorney-General* v. *Geothermal Produce NZ Ltd.*[62] the plaintiff, his initial plantings having been destroyed by the wrongful act, was deprived of earnings from them which would have made further plantings possible. And in a very recent West Australian case, *Watts* v. *Turpin*,[63] the plaintiff, through injuries suffered in a motor accident, was unable to earn the income which could have enabled him to replant lost trees.

The second type of situation arises where a party who has undertaken to supply funds has failed to do so. An early example was *Muhammad Issa el Sheikh Ahwad* v. *Ali*[64] on appeal to the Privy Council from the Supreme Court of Palestine. The owner of land which he had already contracted to sell, resold it to a third person, receiving in return an indemnity from that person against any claims the original purchaser might have against the vendor. The original purchaser, having sued, received judgment but the final purchaser defaulted on his indemnity. The vendor, despite having previously received the purchase price from the first purchaser, lacked the funds to himself satisfy the judgment. Other property of his was taken under execution and sold at a heavy loss. It was held that that loss was not too remote and was recoverable. Another early example was *General Securities Ltd.* v. *Don Ingram Ltd.*,[65] before the Supreme Court of Canada. There, a finance company had repudiated its contract to finance a car sales company's purchase of cars from a manufacturer under an exclusive franchise. The sales company was unable to obtain funds elsewhere in the time available and, amongst other things, lost its franchise. An analogous New Zealand case was *Dods* v. *Coopers Creek Ltd.*[66]

[61] [1980] 1 W.L.R. 433, 453.
[62] [1987] 2 N.Z.L.R. 348.
[63] (1999) 21 W.A.R. 402.
[64] [1947] A.C. 414.
[65] [1940] 3 D.L.R. 641.
[66] [1987] 1 N.Z.L.R. 530, applying the ratio of *Wadsworth* v. *Lydall* [1981] 1 W.L.R. 598. It was pointed out by Holland J. in *Krehic* v. *Clark* [1991] 1 N.Z.L.R. 703, 709, that this approach

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where the defendant's failure to pay a debt owed to the plaintiffs meant that they had to borrow money at some cost.

An additional point emerging from *Attorney-General* v. *Geothermal Produce NZ Ltd.*[67] is that the causal link between wrongful act, impecuniosity and eventual loss would not be broken just because the majority shareholders in the plaintiff company could have raised funds by selling other property. That would seem to be consistent with a statement by Scrutton L.J. in *The Liesbosch* appeal[68] that ships themselves were treated in the authorities as the claimants and "an isolated account taken as if the injured ship were the whole business of the shipowner."

A second problem with Lord Wright's references to causation stems from his distinguishing financial from physical "delicacy". Ordinarily, supervening events will not be treated as causes if they are unforeseeable. But in the case of existing circumstances, a causal connection will not ordinarily be negatived however abnormal those circumstances might be, the most commonly cited example being the plaintiff with an egg shell skull.[69] In *The Liesbosch*, the plaintiff's lack of liquid resources was an already existing state at the time of the sinking. In *Clippins Oil*[70] Lord Collins affirmed that a wrongdoer must take his victim *talem qualem* and he very clearly saw an impecunious plaintiff as such a victim. Lord Wright chose to confine what Lord Collins had said to mitigation but, with respect, that dismissal, at least on that ground, cannot be correct. What Lord Collins was addressing when he referred to taking the victim *talem qualem* included a question of causation. As Donaldson L.J. was to observe years later in *Dodds Properties*: "It is not at once apparent why a tortfeasor must take his victim as he finds him in terms of exceptionally high or low profit-earning capacity, but not in terms of pecuniosity or impecuniosity which may be their manifestation."[71]

Lord Wright's statement that the syndicate's financial disability could not be compared with a physical delicacy or weakness has been taken by subsequent commentators to have been based on policy grounds alone.[72] Hart and Honore have suggested[73] that the

can have the effect of conferring an advantage on the impecunious which is denied to those who have funds available. See also *Jarvis* v. *Richards & Co.* (1980) 124 Sol. Jo. 793.

[67] [1987] 2 N.Z.L.R. 348.

[68] [1932] P. 52, 61.

[69] *E.g.* Hart and Honore, *Causation in the Law*, 2nd ed. (Clarendon Press, Oxford, 1985), pp. 172 *et seq*; Vol 12(1), *Halsbury's Laws of England*, 4th ed., reissue (Butterworths, London, 1998), para. 858; *McGregor on Damages*, 16th ed. (Sweet & Maxwell, London, 1997), paras. 210 *et seq.*

[70] [1907] A.C. 291, 303.

[71] [1980] 1 W.L.R. 433, 458.

[72] *E.g. McGregor on Damages*, cited above at n. 69, para. 210.

[73] At p. 175.

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law is often reluctant, as a matter of general policy, to take steps to extricate parties from predicaments into which they would not have fallen but for lack of means. (From him that hath, it would seem, shall be taken even that he hath!) But if such a policy does apply in the case of existing circumstances, it might be asked why it should not also apply in the case of mitigation. Fortunately, no policy is set in stone and it would always be open to a court of final resort to take a different view.

Remoteness

The modern law of remoteness, both in contract and in tort, is descended from the often quoted dictum of Alderson B. in *Hadley* v. *Baxendale* in which he said:

> Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally according to the usual course of things, from such breach of contracts itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it.[74]

But, as was pointed out, for example, by Bowen L.J. a few years later in *The Argentino*,[75] there was at that time seen to be a crucial difference in the application of this dictum to contract as distinct from tort. In both, damages could be such as "flow directly" and in "the usual course of things" from the wrongful act. In the case of contract, though, the law uniquely super-added such damages "as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of its breach".

It became significant that while the passage from *Hadley* v. *Baxendale* spoke of damages arising "naturally, *i.e.* in the usual course of things", Bowen L.J. substituted the word "directly" in that phrase and Lord Esher M.R. in the same case[76] cited with approval the fourth edition of *Mayne on Damages*[77] which spoke of damage "immediately and necessarily" flowing from the cause of action. When *The Argentino* went on appeal to the House of Lords,[78] Lord Herschell used the expression "directly and naturally, or in the ordinary course of things". In the period between *The Argentino* and *The Liesbosch*, two different

[74] (1854) 9 Ex. 341; 156 E.R. 145.
[75] (1888) 13 PD 191, 201 (affirmed (1889) 14 App. Cas. 519).
[76] At p. 197.
[77] He referred to page 44 of that edition.
[78] (1889) 14 App. Cas. 519, 523.

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approaches to remoteness developed from those varied but seemingly similar ways of stating the test. Under the one, "natural" was taken to require that the damage be foreseeable. Under the other, the damage, to be natural, had to be "direct". The second approach owed most to the speech of Lord Sumner in *Weld-Blundell* v. *Stephens*,[79] a case in which accountants engaged by the plaintiff to report on a company negligently left the plaintiff's letter of instructions in the company's office. It contained libellous statements which, when found, led to a successful claim against the plaintiff by the persons defamed. The plaintiff sought to recover the damages and costs he had had to pay in the libel action. By a majority of three to two, the House of Lords held against the plaintiff on the ground that the damages for libel were not the result of the defendants' breach of duty.

In his speech, Lord Sumner dismissed each element of the test of "natural probable and necessary" consequences and preferred instead the expression "direct" cause.[80] He then added: "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation."[81]

These words of Lord Sumner strongly influenced the decision of the Court of Appeal the following year in *In re Polemis and Furness Withy & Co. Ltd.*[82] In that celebrated case, tins of petrol stowed in a ship had leaked with the result that when it reached Casablanca there was a considerable quantity of petrol vapour in the hold. Stevedores engaged by the charterers negligently caused a heavy plank to fall into the hold where four or five Arab labourers were working at the time. The plank must have struck two pieces of metal together, causing a spark. There was an instantaneous rush of flame resulting in the destruction of the vessel.[83] London arbitrators decided that while some damage to the ship might have been anticipated, it could not reasonably have been anticipated that a spark could have resulted from the descent of the plank. They nevertheless awarded the ship owners the full value of the lost ship.

In the Court of Appeal, Mr. R.A. Wright K.C. (as Lord Wright then was) argued for the charterers that from the requirement that the damage be the "natural and probable" consequence of the negligent act, it followed that the damages had to be those which

[79] [1920] A.C. 956.
[80] At pp. 983–984.
[81] At p. 984.
[82] [1921] 3 K.B. 560.
[83] We are not told what became of the five Arab workmen!

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could reasonably have been anticipated.[84] On the other hand, counsel for the owners argued that all damages which flowed "directly" from the negligent act should be recoverable and they relied in particular on what had been said by Lord Sumner in *Weld-Blundell* v. *Stephens*.[85] The Lords Justices recognised that two conflicting views existed but they preferred the one stated by Lord Sumner. It was, they held, sufficient to create liability that damage of some kind could have been anticipated from the act complained of. Once that was established, the wrongdoer was responsible in law for all damage directly resulting or, in other words, direct causation was to be the test for remoteness.

When *The Liesbosch* reached the House of Lords, Lord Wright distinguished *In re Polemis* on the ground that it was concerned with the immediate physical consequences of the negligent act and not with the co-operation of an extraneous matter such as the plaintiffs' want of means.[86] Since he did not suggest that the tests adopted by the Court of Appeal in that case had been wrong, it can be inferred he accepted that they were correct. If that is so, it would follow that when he earlier stated "... if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote,"[87] he must have had in mind not that it was too remote because not reasonably foreseeable but, rather, too remote because it was not the "immediate physical" (that is, "direct") result of the tort. His going on to say that he preferred to regard it as an independent cause again hardly indicates a preference for a test of foreseeability.

That makes all the more puzzling Lord Wright's other often-quoted dictum on impecuniosity when, in *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B)*, he said:

> In *Liesbosch (Owners)* v. *Edison (Owners)* it was held that loss due to the party's impecuniosity was too remote and therefore to be neglected in the calculation of damages: it was special loss due to his financial position. A different conclusion was arrived at in *Muhammad Issa el Sheikh Ahwad* v. *Ali*, where damages consequent on impecuniosity were held not too remote, because, as I understand, the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken.[88]

[84] At pp. 564–566.
[85] At p. 567.
[86] [1933] A.C. 449, 461.
[87] *Ibid.*, p. 460.
[88] [1949] A.C. 196, 224.

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If that were where the dictum had ended, it could easily enough be explained in terms of the *In re Polemis* approach, once regard is had to the use of the expression "special loss". Earlier in his speech, Lord Wright had defined "special" by reference to the second category of loss identified in *Hadley* v. *Baxendale*.[89] And that, as we have seen, was confined in *The Argentino* to loss resulting from breach of contract.[90] (*Monarch* was a contract case). In the first part of his dictum he could be understood as saying that loss due to impecuniosity was "special" in that sense and therefore not recoverable in tort. On the other hand, in a contract case like *Ali*, it could be recoverable if in contemplation, provided a causal link could be found, as it had been in that case.

The problem with this interpretation is that Lord Wright immediately went on to say, "The difference in results did not depend on the differences (if any) between contract and tort in this connection." That does rather suggest that his Lordship was again espousing the foreseeability test for remoteness in tort which he had argued as counsel in *In re Polemis*. If so, that could well explain the shift from his stated preference in *The Liesbosch* for a causation explanation to his choice of remoteness in his *Monarch* dictum. More importantly, it would show that Lord Wright himself now took the view that the law had moved on since *In re Polemis* and *The Liesbosch*, with the result that the latter was now of doubtful authority on the relation of a plaintiff's impecuniosity to questions of remoteness.

The directness test of remoteness in tort was, of course, finally rejected by the Privy Council in *Overseas Tankships (UK) Ltd.* v. *Morts Dock & Engineering Co. Ltd. (The Wagon Mound)*[91] and the foreseeability test confirmed. That might, incidentally, have been expected to spell the effective end of the "existing state" rule of causation since, ex hypothesi, a loss due to an improbable existing state would be unlikely to be reasonably foreseeable. In practice, though, that has not happened, as was confirmed in recent years by the House of Lords in *Page* v. *Smith*.[92] In consequence the egg shell skull rule was unaffected and could potentially still apply to an existing state of impecuniosity.

This, then, is the background to the recent decision of the Privy Council.

[89] *Ibid.*, p. 221.
[90] See text above, at fn. 75.
[91] [1961] A.C. 388.
[92] [1996] A.C. 155.

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The Alcoa Minerals *Case*

In *Alcoa Minerals of Jamaica Inc.* v. *Broderick*,[93] the defendant company, Alcoa, operated a smelting plant which for many years had discharged pollutants, noxious gases and corrosive dust over the surrounding area. In what was, effectively, a test case, the plaintiff, Broderick, a local resident, claimed in nuisance for the resulting damage to the roof of his house. His claim initially was for some $200,000 (Jamaican) being the then cost of repairing the roof. The defendant denied liability and the plaintiff was not, himself, able to afford to have the repairs done. Due mainly to inflation, the cost of repairs escalated and, four years after beginning his action, the plaintiff was permitted to increase the amount of his claim to $938,000. An award of that amount was subsequently upheld by the Jamaican Court of Appeal.

As will by now be apparent, the facts in *Alcoa* were closely analogous to those in *Dodd Properties* v. *Canterbury City Council*[94] and the issue raised was, as in that case, the measure of damages for a primary loss, namely the cost of repairs. Again as in *Dodd*, the plaintiff had not himself had the repairs done, the cost of which had increased in the meantime. The task of the Privy Council, therefore, was to fix the date at which the cost of repairs should be assessed and that, in turn, depended on what justice required and on whether the plaintiffs' delay had been reasonable. On both counts, the Privy Council, in a judgment delivered by Lord Slynn of Hadley, held for the plaintiff. The Court of Appeal below had accepted that Broderick had been told that Alcoa would pay for the repairs and that this had justified his waiting. Alcoa denied this but the alternative was that they had been refusing to accept liability. The facts had been complex and the outcome of the case had not been so obvious that Broderick ought to have borrowed at a high rate of interest in order to have the repairs done at his own expense. It was reasonable for him to wait until either Alcoa paid or liability had been established.[95] The Privy Council seems to have reached this conclusion independently of whether the plaintiff, from his shortage of funds, would in fact have had any realistic alternative. On the general question of whether impecuniosity could in principle be a reasonable ground for fixing a later assessment date, their Lordships were somewhat less than bold. After a review of the cases they summarised the present law thus: "It seems generally to be accepted that there is no absolute rule that where the plaintiff at the date of

[93] [2000] 3 W.L.R. 23.
[94] [1980] 1 W.L.R. 433.
[95] *Ibid.*, p. 32.

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breach did not have the funds to repair the damage that his impecuniosity is to be ignored in all cases when deciding the appropriate date for the assessment of damages."[96] In an earlier passage they were equally tentative: "In a case where repairs have to be done at what is a heavy cost in relation to the plaintiff's financial position there may be stronger grounds for delaying the date of assessment than in a case where the plaintiff has undertaken a contractual obligation to buy and pay for goods, where he could go out into the market and buy the goods at or near the same price."[97]

On this view, it would seem that a plaintiff's impecuniosity is relevant to the fixing of the assessment date, if at all, only as one supporting factor amongst others. But in any event, in *Alcoa* itself, there was on previous authority, the *Dodd Properties* case in particular, no need to have any recourse to Broderick's financial position.

It should be noted that by the time the case reached the Privy Council no question of causation, remoteness or mitigation was in issue, unless, in the latter case, by way of analogy to the requirement of reasonableness in relation to the assessment date. Accordingly, as Oliver L.J. said of the *Dodd Properties* case in *Perry* v. *Sidney Phillips & Son*,[98]

> ... it could not be suggested that there was any other measure of damages than the cost of repair, the only question being the date at which the repairs ought to have been carried out; and the debate there was as to the date at which it was reasonable for plaintiffs to having carried out the repairs ... the question was what loss the plaintiff, acting reasonably, had actually suffered.

Nevertheless, their Lordships seemed to have felt constrained also to say that "the real question [here] is whether Mr. Broderick was in breach of his duty to mitigate his damage". They added that it seemed to them to have been obviously foreseeable that the plaintiff would not, or might not, have had the wherewithal to do the repairs.[99]

With respect, those observations may be no more than a reflection of the confused state of some earlier authority. Certainly, they were addressed only to questions of mitigation and remoteness. But if an inference to be drawn is that before a factor can be taken into account in fixing an assessment date it must have been reasonably foreseeable by the tortfeasor, or in contemplation, it is submitted a significant departure from previous understandings would have occurred. In such cases as *Johnson* v. *Agnew*,[100] *Radford*

[96] *Ibid.*, p. 30.
[97] *Ibid.*, pp. 26–27.
[98] [1982] 1 W.L.R. 1297, 1304.
[99] [2000] 3 W.L.R. 23, 31.
[100] [1980] A.C. 367.

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v. *De Froberville*,[101] and *Dodd Properties* v. *Canterbury City Council*,[102] the requirement laid down was, as we have seen, not foreseeability but reasonableness. That, after all, is why it was thought an analogy could be drawn with mitigation, which has nothing at all to do with foreseeability.

Contract

So far as it relates to impecuniosity, *The Liesbosch* is not usually to be found cited in the Contract text books of Commonwealth countries, Canada being an exception. It seems not unlikely that the reason for this dismissal of the case stems from a perception that, in *Muhammad Issa* v. *Ali*,[103] the Privy Council showed that, at least in that respect, it had no application to contract cases. If this is indeed the case, it is (in the phrase used by Donaldson L.J.[104]) "not at once apparent" why it should have been so. *The Liesbosch* is not mentioned in the Privy Council judgment, and, in any event, the plaintiff's impecuniosity and the ultimate loss were held to be the "direct result" of the breach of contract. That apart, it is not easy to find any features distinguishing contract from tort when the four aspects of damages are considered separately. The rules relating to mitigation are the same in both cases and in relation to remoteness the difference is merely between foreseeability and contemplation and so hardly relevant for present purposes. Likewise, the rules relating to causation are also the same. That leaves only the measure of primary loss. The modern rules relating to the date of loss owe at least as much to contract cases as they do to tort ones. The only obvious difference concerns sale of goods cases where the assessment date is required by statute to be the date of loss. That particular exception can be regarded as an important protection of certainty in commercial cases or, alternatively, as an illustration of the potential disadvantages of statutory codification.

SUMMARY

It is submitted that the relevance of impecuniosity to the four aspects of damages can be summarised in the following way.

[101] [1977] 1 W.L.R. 1262.
[102] [1980] 1 W.L.R. 433.
[103] [1947] A.C. 414.
[104] Cited above, at fn. 71.

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A. Torts

(i) *Mitigation*[105]

As Megaw L.J. said in the *Dodd* case, a plaintiff who is under a duty to mitigate is not obliged, in order to reduce the damages, to do what he cannot afford to do. In other words, whether a plaintiff is impecunious is relevant to the question whether he has taken reasonable steps to mitigate his loss. Lord Collins said as much in *Clippins Oil* and when, in *The Liesbosch*, Lord Wright referred to that passage he did not question its correctness. The uncertainty apparent in subsequent cases seems largely to have been the result of a misunderstanding of the effect and extent of the *Liesbosch* decision.

(ii) *The measure of damages for primary loss*[106]

The crucial determinant of the result in *The Liesbosch*, at both Court of Appeal and House of Lords levels, was not the plaintiff's impecuniosity but the fact that the claim arose from the *destruction* of the dredger. For that, the primary measure of damages in 1933 was its value as a going concern as at the date of the loss. To the measure thus arrived at, the plaintiff's inability from his own resources to afford to replace the vessel was strictly irrelevant. In the 1970s the rule that damages be assessed as at the date of loss ceased to be invariable and it was established that some other date could be fixed should justice so require. The question then became one of fixing a date at which it would have been reasonable for the plaintiff to have acted. In cases where the primary loss has been the cost of repair, it seems now to have been accepted that, in determining what is reasonable, the plaintiff's impecuniosity can be taken into account at least as one factor amongst others. But if, in this context, an analogy between reasonableness in relation to the date of loss and reasonableness in relation to mitigation is accepted, as seems increasingly to be the case, any lingering reluctance to have regard to impecuniosity in the case of destruction ought to disappear. On the evidence of the decision of the Court of Appeal in *Ramswade Ltd.* v. *W. J. Emson & Co. Ltd.*, the changes of the 1970s have yet to be taken into account in cases calling for replacement rather than mere repair. On the other hand, those changes do not appear from the reports to have been argued, or considered, by the Court in that case.[107]

[105] See text at fnn. 9–22.
[106] See text at fnn. 23–58.
[107] See, now, *Glenmont Investments Pty Ltd.* v. *O'Loughlin* (2001) 79 S.A.S.R. 151, a case of destruction, where Millhouse J., in fixing the date at which damages for the primary loss

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(iii) *Causation*[108]

Where a causal link exists between the wrongful act, the plaintiff's impecuniosity and the eventual loss, there can be no doubt that recovery can be had. *The Liesbosch* allowed for it and it has been confirmed in subsequent decisions. Where *The Liesbosch* created a difficulty was in deciding in effect that the plaintiff's impecuniosity could not be treated like other existing states (the "egg-shell skull" rule) despite the assertion by Lord Collins that a wrongdoer must take his [impecunious] victims *talem qualem*. As Donaldson L.J. has said, it is not at once apparent why such an exception should exist. Commentators have attempted to justify it on grounds of policy but these are increasingly difficult to maintain in the face of the contrary position in mitigation and the developing position in relation to the date of loss. As Donaldson L.J. hinted later in the passage just referred to, the only reason for the continuation of the exception is the rule *stare decisis*.

(iv) *Remoteness*[109]

The Liesbosch was decided not long after *In re Polemis* in a climate where directness of causation was the test for remoteness of damage in tort. By the time of his speech in *The Monarch SS Co.* case, Lord Wright himself appears to have moved away from directness in favour of a test of foreseeability. Any doubt about the correct test for remoteness was finally removed in favour of foreseeability by *The Wagon Mound* and there can no longer be any reason, other than *stare decisis*, for denying that reasonably foreseeable impecuniosity is relevant to questions of remoteness.

B. Contract[110]

Statutory provision apart, there is no conceptual reason why the treatment of impecuniosity should differ as between contract and tort. Certainly, *Muhammad Issa* v. *Ali* is no authority to the contrary.

CONCLUSION

Developments in the law since *The Liesbosch* was decided in 1933 have made it increasingly difficult in principle to justify special treatment of the plaintiff's impecuniosity in the context of any of the four aspects of damages considered in this article. Almost

were to be assessed, took account of the plaintiff's impecuriosity. He did, though, appear to see the question as one of mitigation.

[108] See text at fnn. 39–73.

[109] See text at fnn. 74–92.

[110] See text at fnn. 103–104.

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certainly, had *The Liesbosch* not been a decision of the House of Lords, it would before now have been overruled. To state the obvious, litigation by the impecunious is not frequently taken to the very highest level. Even when it is, the Court may still not feel prompted or required to undertake a fundamental reconsideration. *Alcoa* was such a case and an opportunity was missed.

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