# NOTES OF CASES

## CONTRACT — REMOTENESS OF DAMAGE

*Koufos* v. *C. Czarnikow Ltd.*

Plaintiffs in search of damages for breach of contract which are not too remote to be recoverable can now look to the case of *Koufos* v. *Czarnikow*.[1] There they will find assistance but not much encouragement. For the law student, the case completes a trinity, of which the other component members are *Hadley v. Baxendale*[2] and *Victoria Laundry* (*Windsor*) *Ltd,* v. *Newman Industries Ltd.*[3] These two cases were extensively discussed in the instant case.

The facts were these: the defendant shipowners agreed to load a cargo of sugar in Constanza and carry it with all convenient speed to Basrah. The voyage was one of just over 4,000 miles and should have been accomplished in about 20 days. In fact, the ship deviated from the customary route, calling at three intermediate ports, and eventually took 30 days to reach Basrah. Between the date on which the ship should have arrived at Basrah and the date on which she actually arrived there, another ship had arrived with sugar and the market price for this commodity had dropped. The shipper sought to recover by way of damages the difference between the market value of the sugar at Basrah on the two dates. The House of Lords held that such loss was not too remote and the plaintiff charterers succeeded.

In general terms, the test of loss which is not too remote, which emerges from the judgments, is that it is loss which is "not unlikely" to occur (although Lord Hodson disliked this expression) or loss of which there is "a serious possibility" (although Lord Reid disliked that expression). At first sight, this is no more than one set of verbiage to replace another set of verbiage. Lord Morris gave the warning that:[4]

> "Words which are but servants to convey and express meanings — cannot always be servants of precision and may sometimes be given a dominance which is above their status. If 'language is the dress of thought,' it is the thought which must be understood."

Moreover, there is nothing new or modern in the expressions preferred by the House; it is not a question of discarding the sweeping legal robes of 1854 for the miniskirt of 1967. The object of this note is, firstly, to identify the language with which their Lordships have dressed the rule and then to seek the thought that lies modestly beneath. This is best achieved by a process of elimination.

In the first place, there were two expressions which their Lordships rejected because the words themselves were unsatisfactory. The first expression was "loss liable to result," a phrase used by Lord Justice Asquith in the *Victoria Laundry* case.[5] This phrase was actually approved, somewhat differently, by Lord Hodson in the instant case[6] who said that ' This may be a colourless expression but I do not find

1. [1967] 3 W.L.R. 1491.
2. (1864) 9 Exch. 341.
3. [1949] 1 All E.R. 997.
4. [1967] 3 W.L.R. 1491, 1609.
5. [1949] 1 All E.R. 997, 1002.
6. [1967] 3 W.L.R. 1491, 1524.

it possible to improve upon it." Moreover, Lord Morris[7] referred in general to the judgment of Lord Justice Asquith as "a most valuable analysis of the rule," but nonetheless refused[8] "to express a preference or any definite preference as between the words and phrases that were submitted" to the court. Two judges objected to the expression. Lord Pearce[9] thought it colloquial and thus too ambiguous. Lord Reid [10] agreed and also thought that there was a danger that this expression would lead to too wide a test of remoteness: he said that 'liable' is "a very vague word but I think that one would usually say that when a person foresees a very improbable result he foresees that it! is liable to happen." It is unnecessary to decide which of the judges is right. Their disagreement itself is eloquent; a phrase which can evoke a different range of ideas in the trained minds of persons in a common profession will not readily lend itself to the precision required of a test in law, and is best avoided.

The second expression was a "loss that is on the cards," also a phrase used by Lord Justice Asquith in the *Victoria, Laundry* case.[11] The three judges who considered this expression were one in rejecting it. Lord Pearce [12] thought it colloquial and ambiguous. Lord Upjohn was emphatic, saying: [13]

> "Like all your Lordships I deprecate the use of that phrase which is far too imprecise and to my mind is capable of denoting a most improbable and unlikely event, such as winning a prize on a premium bond on any given drawing."

The House also rejected two further tests, not because the words were unsatisfactory, but because, in its view, the tests themselves were wrong. On the one hand, their Lordships dismissed the suggestion that the loss must be reasonably certain or highly probable; this would be too narrow a test of remoteness. Lord Reid thought[14] that "so strict a test has long been obsolete."

On the other hand, and this is the most interesting aspect of the decision, the House would not adopt the test of foreseeability, a criterion accepted by Lord Justice Asquith which reappears in the pages of some of the leading textbooks on the law of Contract; [15] these must now be read in the light of the decision in *Koufos* v. *Czarnikow*. The House thought that to accept this test would lead to confusion with the test in the law of Tort, and that the test of remoteness of damage in Contract should be a narrower test. Thus, for instance, Lord Reid said: [16]

> "To bring in reasonable foreseeability appears to me to be confusing measure of damages in contract with measure of damages in tort. A great many extremely unlikely results are reasonably foreseeable."

Considering the original statement of the rule in *Hadley* v. *Baxendale* [17] he said: [18]

> "The decision makes it clear that a type of damage which was plainly foreseeable as a real possibility but which would only occur in a small minority of cases cannot be regarded as arising in the usual course of things or be supposed to have been in the contemplation of the parties."

7. [1967] 3 W.L.R. 1491, 1514.
8. [1967] 3 W.L.R. 1491, 1512.
9. [1967] 3 W.L.R. 1491, 1528.
10. [1967] 3 W.L.R. 1491, 1506.
11. [1949] 1 All E.R. 997, 1003.
12. [1967] 3 W.L.R. 1491, 1528.
13. [1967] 3 W.L.R. 1491, 1536; see also Lord Morris at p.1514.
14. [1967] 3 W.L.R. 1491, 1508; see also Lord Morris at p.1515, Lord Hodson at p.1525 and Lord Upjohn at p.1536.
15. *cf.* also *dicta* in *Quinn* v. *Burch Bros.* [1966] 2 W.L.R. 1017, 1026.
16. [1967] 3 W.L.R. 1491, 1506.
17. (1864) 9 Exch. 341, 354.
18. [1967] 3 W.L.R. 1491, 1502.

So the test of remoteness in the law of Contract differs from that in the law of Tort; in the latter the test is wider. Why is this so? If they were the same, life would be easier for law students, but not, it seems, for businessmen. The House felt the distinction justifiable as a matter of policy. In particular, Lord Reid said this:

> "The modern rule of tort is quite different and it imposes a much wider liability. The defendant, will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it. And there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made. . . . But in tort there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing. I have no doubt that a tortfeasor would be held liable for a type of damage as unlikely as was the stoppage of Hadley's mill for lack of a crankshaft: to anyone with the knowledge the carrier had that may have seemed unlikely but the chance of it happening would have been seen to be far from negligible. But it does not follow at all that *Hadley v. Baxendale* would today be differently decided." [19]

What is the test to be applied? The position is summarised by Lord Upjohn: [20]

> "It is clear that on the one hand the test of foreseeability as laid down in the case of tort is not the test for breach of contract; nor on the other hand must the loser establish that the loss was a near certainty or an odds-on probability. I am content, to adopt as the test a 'real danger' or a 'serious possibility.'"

Elsewhere Lord Reid uses the test of loss that is not unlikely to occur. What is the thought behind these words?

The answer seems to be that loss will not be too remote following breach of contract if there was "rather less than an even chance"[21] of its happening: but not much less than an even chance, lest it approach the test in tort, perhaps a forty per cent chance. Thus, on the facts of the case, it was enough that the carrier knew that it was not unlikely that the sugar would be sold at Basrah, that market prices fluctuate, and that, if the ship were not) on time, there was at least a fifty per cent chance that the fluctuation would act against the shipper. This is, however, only a rough conclusion, for their Lordships did not agree precisely upon the odds to be attributed to the words "not unlikely" and "serious possibility." Aft one end of the scale Lord Hodson thought that there must be rather more than a fifty per cent chance of the loss; he said: [22]

> "I find guidance in the use of the expression 'in the great multitude of cases' which is to be found in more than one place in the judgment in *Hadley* v. *Baxendale* and indicates that the damages recoverable for breach of contract are such as flow in most cases from the breach."

At the other end of the scale, Lord Pearce would not, in appropriate circumstances, regard a chance of ten to one against as being too remote; he said: [23]

> "I do not think that Alderson B. (in *Hadley* v. *Baxendale*) was directing his mind to whether something resulting in the natural course of events

19. [1967] 3 W.L.R. 1491, 1502; see also Lord Hodson at p.1524, Lord Pearce at P.1526 and Lord Upjohn at p.1534; on this, critically, see Professor Hamson in 1968 Cambridge Law Journal p.14; *cf.* also Lord Diplock in the Court of Appeal [1966] 2 W.L.R. 1397, 1415-6, sub. nom. *C. Czarnikow Ltd.* v. *Koufos.*
20. [1967] 3 W.L.R. 1491, 1536.
21. *per* Lord Reid [1967] 3 W.L.R. 1491, 1505.
22. [1967] 3 W.L.R. 1491, 1524.
23. [1967] 3 W.L.R. 1491, 1529.

> was an odds-on chance or not. A thing may be a natural (or even an obvious) result even though the odds are against it. Suppose a contractor was employed to repair the ceiling of one of the Law Courts and did it so negligently that it collapsed on the heads of those in court. I should be inclined to think that any tribunal (including the learned baron himself) would have found as a fact that the damage arose 'naturally, i.e., according to the usual course of things.' Yet if one takes into account the nights, weekends, and vacations, when the ceiling might have collapsed, the odds against it collapsing on top of anybody's head are nearly ten to one."

Lest it be thought that damages, like charity, begin at home, it seems clear from the context that such a chance would in other circumstances be too remote, and his Lordship would not settle for any particular fixed odds.

Thus the best 'starting price' would seem to be a mean. One can hazard as the probable test that of Lord Reid who said: [24]

> "I use the words 'not unlikely' as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable."

Their Lordships also seemed to recognise that the original statement of the rule by Baron Alderson [25] involved not two rules but one; there is one test of remoteness which is applied to the sum total of the parties' knowledge which, in turn, comes from two sources: usual knowledge which such parties can be presumed to have and special knowledge over and above that usual knowledge which they have in fact. Thus, in conclusion, the defendant will be liable for the actual loss caused, provided that in the light of their knowledge, actual or constructive, at the time the contract was made, it was in the contemplation of both parties as not unlikely to be the result of a breach of the contract.

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24. [1967] 8 W.L.R. 1491, 1500, relying on *dicta* in *R. & H. Hall Ltd.* v. *W.H. Pim (Junior) & Co. Ltd.* (1928) 33 Com. Cas. 324.

25. loc. cit. supra, note 17.