

REMOTENESS IN THE SUPREME COURT

Armstead v Royal & Sun Alliance Insurance Company Ltd. [2024] UKSC 6; [2024] 2 W.L.R. 632 concerned facts that might have been lifted from an undergraduate examination. It has important lessons for anyone interested in the fundamentals of negligence.

Ms Armstead suffered the misfortune of being involved in two traffic collisions, neither of which was her fault but both of which damaged vehicles in her possession. After the first, she hired a vehicle from Helphire, on credit hire terms, while her own was under repair. Clause 16 of their agreement stated that Ms Armstead was liable to pay Helphire the daily rate (£130 per day) for each day that the car was unavailable to Helphire if Ms Armstead returned it in a damaged state. Due to the second collision—caused by a second careless driver—the car needed 12 days of repair work. Ms Armstead therefore owed Helphire £1,560. The Supreme Court held that she could recover that amount from the second careless driver.

The framework of analysis should be straightforward: Ms Armstead suffered a wrong in having a car in her possession carelessly damaged (*Leigh & Sullivan Ltd. v Aliakmon Shipping Co. Ltd.* [1986] A.C. 785 at 809; [1986] 2 All E.R. 145 at 149 per Lord Brandon); prima facie, losses consequent upon negligently caused damage to a claimant's property are recoverable (*Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27; [1972] 3 All E.R. 557); however, some of those losses may not be recoverable if they are too remote a consequence of the wrong (*Overseas Tankship (UK) Ltd. v Morts Dock & Engineering Co. Ltd., The Wagon Mound (No. 1)* [1961] A.C. 388; [1961] 1 All E.R. 404). As Lord Leggatt and Lord Burrows stated in their leading judgment, this framework is comprised of “basic legal principles applicable to the tort of negligence arising out of damage to tangible property” ([2024] 2 W.L.R. 632 at [18]). The question was simply whether the £1,560 debt was too remote (at [45]).

However, Ms Armstead's bad luck in suffering two traffic collisions was compounded by her bad luck in the lower courts. Deputy District Judge Fawcett, in the County Court, held that she had no right to the car, which was owned by Helphire, and so had suffered no wrong (at [11]). But this decision overlooked the principle that bailees can sue those who interfere with bailed chattels based on their own right to possession (*The Winkfield* [1902] P. 42; [1900-03] All E.R. Rep. 346). In her first appeal, Ms Armstead's claim failed primarily because Recorder John Benson Q.C. considered that her loss “falls within the rule against recovery” for pure economic loss ([2021] 4 W.L.U.K. 355; [2022] Lloyd's Rep. I.R. 574 at [39]) and could not be squeezed under any of that rule's exceptions. The Court of Appeal then rejected Ms Armstead's second appeal ([2022] EWCA Civ 497; [2023] 1 All E.R. 990). Although Dingemans L.J. gave several other reasons for this decision, he too held that the claim failed because it concerned “an economic loss” created by the arrangement between Helphire and Ms Armstead (at [56]).

An unappealing consequence of allowing Ms Armstead's claim seems to have motivated these decisions. The ultimate beneficiary of a successful claim would have been Helphire, not Ms Armstead, because she would hand over her award to them (assuming she had not already paid off her debt). Thus, Helphire would likely end up with a larger sum—one derived, in practical terms, from the defendant's pockets—than they would if they had sued in their own name for their own consequential loss. The Recorder explained that this situation “makes for an uncomfortable analysis” ([2021] 4 W.L.U.K. 355 at [28]), while Dingemans L.J. worried that Helphire determining, and possibly inflating, the defendant's liability would offend “both principle and common sense” ([2023] 1 All E.R. 990 at [51]). So, he argued, “the law of bailment treats the bailor and bailee as having one set of rights to claim for the damage and loss of use of the motor car” (at [52]).

However, this reasoning misses the point that, in negligently damaging the hire car, the second careless driver had committed a legal wrong against Ms Armstead because of her own right to possession. That a single act might amount to two torts—committed against two people—follows from English law's willingness to allow multiple titles to exist concurrently in a single chattel (see *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381; [2001] 3 All E.R. 150). Prima facie, a defendant should be liable for consequential losses that follow from those wrongs. Indeed, if clause 16 was enforceable then Ms Armstead would have been liable to pay £1,560 to Helphire herself. The practical question was not whether Helphire should recover; it was whether Ms Armstead or the second careless driver (and ultimately their insurers) should pay.

Thus, as Lord Leggatt and Lord Burrows recognised, the only issue was whether the debt was too remote. At this point, a complication should be noted: Ms Armstead had earlier conceded that she could not succeed if clause 16 “did not represent a genuine and reasonable attempt to assess the likely losses to be incurred as a result of loss of use” of the car by Helphire ([2023] 1 All E.R. 990 at [49]). In a brief concurring judgment, Lord Briggs stated that the Court ought to rely on that concession; to do otherwise would shield their decision from “the refiners' fire of adversarial debate and testing” ([2024] 2 W.L.R. 632 at [78]). In contrast, Lord Leggatt and Lord Burrows thought it “inappropriate” to decide an appeal in reliance on an incorrect concession (at [46]), and so explained why they considered it to have been correctly made.

Their Lordships endorsed the remoteness test from *The Wagon Mound (No. 1)*: “loss is too remote to be recoverable as damages if the type of loss suffered was not reasonably foreseeable at the time of the breach of duty” (at [47(i)]). They concluded that Ms Armstead's debt was not too remote, and so her claim succeeded. Their Lordships adopted two different lines of reasoning to reach this conclusion.

The first began with the observation that a “reasonably foreseeable type of loss flowing from damage to a hire car is financial loss resulting from inability to use the car” (at [47(ii)]). Ms Armstead had not suffered a loss of use herself. Rather, the “type of loss

that she suffered in respect of loss of use of the car was a contractual liability (under clause 16) to pay the hire company for its loss of use” (at [47(ii)]). That kind of contractual liability, Lord Leggatt and Lord Burrows stated, was reasonably foreseeable “just as loss of use to the claimant is reasonably foreseeable and not too remote” (at [47(ii)]). However, “to fall within this reasonably foreseeable type of loss, it is necessary for the claimant’s contractual liability to reflect the loss of use of the hire company”, because otherwise the liability would “not fall within the type of loss that is reasonably foreseeable” (at [47(iii)]). Thus, the £1,560 debt would be too remote “if clause 16 was not a reasonable pre-estimate of Helphire’s loss of use of its vehicle” (at [47(v)]).

The second line of reasoning began with a different characterisation of the type of loss that careless drivers can reasonably foresee. Rather than a loss relating to lost use of a vehicle, careless drivers can foresee that they might cause other road users to incur contractual liabilities. For example, by damaging another car, I might prevent its driver from completing a contractual duty on time, such that they incur a liability for late completion. That liability is a type of loss that is reasonably foreseeable and so is not too remote. However, to fall within this foreseeable type of loss, contractual liabilities must be *valid* (at [52]). Purported liabilities, which fall foul of either the penalties doctrine or Part 2 of the Consumer Rights Act 2015 (CRA), are a different type of loss and are too remote because it is not reasonably foreseeable that claimants will pay them. Applying this reasoning, Lord Leggatt and Lord Burrows concluded that the £1,560 debt would not be too remote only if clause 16 represented a reasonable pre-estimate of Helphire’s loss of use. Otherwise, the clause would be invalid as an unfair term or penalty.

Both lines of reasoning therefore converged on the same point. Importantly however, the burden of proving that clause 16 was not a reasonable pre-estimate of Helphire’s loss fell on the defendant (at [59]). But they had pleaded no case, and the trial judge had made no finding, to that effect (at [65]). Ms Armstead’s appeal therefore succeeded.

Although the Supreme Court’s logic is an improvement from the lower courts, it still has difficulties. The first line of reasoning is very demanding of drivers, who are now taken not only to foresee that other cars on the road might have been hired, but also to have some insight into the terms of their hire contracts. Rather than explaining their reasoning in detail, Lord Leggatt and Lord Burrows simply asserted that “just as loss of use to the claimant is reasonably foreseeable and not too remote, so is the contractual liability of the claimant to pay damages for loss of use to the hire company” (at [47(ii)]).

The second line of reasoning is also problematic. The leading decision on penalties is *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd. v Beavis* [2015] UKSC 67; [2016] 2 All E.R. 519, in which Lord Neuberger and Lord Sumption stated that the penalty doctrine will rule out a provision if it creates “a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary

obligation” (at [32]). In *ParkingEye*, the Court held that an obligation on a driver who overstayed at a car park to pay £85 was not penal, despite it lacking any resemblance to the park operator’s actual loss (which was nil). *ParkingEye* establishes that contracting parties *are* sometimes permitted to impose secondary obligations on each other that are not pre-estimates of loss. Lord Leggatt and Lord Burrows reasoned that the *ParkingEye* test “is very unlikely to produce a different result from the old test”, which required a genuine pre-estimate of loss, on facts like those of *Armstead* ([2024] 2 W.L.R. 632 at [49]). It is bizarre that the Court rested its decision on the *likelihood* that the *ParkingEye* test would produce a given result, rather than on an actual application of the test. It is not difficult to think of interests to which Helphire could point—such as concerns to deter careless driving or to increase revenue—which might have allowed clause 16 to survive challenge as a penalty even if it did not represent an estimate of their loss. In a similar fashion, their Lordships did not thoroughly apply the CRA to clause 16, but rather asserted that it would survive challenge only if it was a reasonable pre-estimate of Helphire’s loss.

Another difficult issue is the relationship between the first and second lines of reasoning. The distinction between them did not matter in *Armstead* because of the way the penalties doctrine and unfair terms legislation were interpreted. However, the two lines of reasoning will not always converge. Following *ParkingEye*, it is possible that the negligent damage of a claimant’s property will lead to them coming under a valid contractual liability to a third party that is not a pre-estimate of that third party’s loss under a contract with the claimant. *Armstead*’s first line of reasoning suggests that such a liability could be too remote; its second suggests that it cannot be. How a judge is to resolve this tension is not explained. The suggestion that the two lines of reasoning are *alternatives* to each other (at [48] and at [52]) indicates that the claimant may be able to choose whichever suits them. However, at times Lord Leggatt and Lord Burrows appeared to mean rather that the validity of clause 16 was a necessary, not sufficient, condition on recovery: “The link between remoteness and the law on unfair terms and penalties is that the type of loss, here a contractual liability, is only reasonably foreseeable if it really is a contractual liability” (at [52]). If so, our hypothetical claimant would probably be limited to an award reflecting either the third party’s actual loss or a reasonable estimate of that loss (*Cory v Thames Ironworks & Shipbuilding Co. Ltd.* (1867-68) L.R. 3 Q.B. 181; [1868] 1 W.L.U.K. 38).

Lurking in the background is a familiar difficulty: only the “type” of the claimant’s loss must be reasonably foreseeable, but there is no one way to characterise the type of a given loss. One could say that road users whose vehicles are damaged might suffer financial loss, or contractual liabilities to third parties, or a contractual liability to a hire company, or a contractual liability to a hire company to compensate the company for their lost use of a hired car. The more precisely one specifies the type of Ms Armstead’s loss, the less reasonably foreseeable it appears. Different courts may characterise the “type” of loss differently, which may in turn lead to unpredictable and arbitrary decision-

making. Indeed, existing case law on this point is probably irreconcilable. For example, Weil's disease is supposedly a different type of loss than food poisoning (*Tremain v Pike* [1969] 1 W.L.R. 1556; [1969] 3 All E.R. 1303), but frostbite is the same type of loss as a common cold (*Bradford v Robinson Rentals Ltd.* [1967] 1 W.L.R. 337; [1967] 1 All E.R. 267). Guidance on this issue is sorely needed. That Lord Leggatt and Lord Burrows adopted two different characterisations of Ms Armstead's loss in the same judgment only proves the point.

To remedy this issue, courts must be willing to inquire into the underlying justification of the remoteness rule. The details of legal rules are the product of the rationale that lies behind them—as Lord Burrows himself recently explained in relation to vicarious liability (*Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15; [2023] 2 W.L.R. 953 at [58(iv)]). Unfortunately, courts have not yet settled on a useful justification of the remoteness rule. Lord Leggatt and Lord Burrows explained the rule in these terms ([2024] 2 W.L.R. 632 at [47(iv)]):

“One might add that the underlying policy reason for the remoteness rule is to ensure that an excessive burden of liability does not fall on the defendant. A line must be drawn to ensure that the defendant is not held liable for all loss factually caused by the tort, however far removed in time and space”.

However, this is only the shell of a justification for the remoteness rule. It is not much more than a statement of the rule and an assertion that it is justified. Why any given burden of liability should be considered excessive, rather than acceptable, is not explained. Their Lordships' analysis therefore cannot do the work that rationales of legal rules are supposed to do, which is to inform the application of the rule.

This problem goes at least as far back as *The Wagon Mound (No. 1)* [1961] A.C. 388, which introduced the “reasonable foreseeability” test in place of the “directness” test applied in *Re Polemis and Furness Withy & Co. Ltd.* [1921] 3 K.B. 560; [1921] 7 W.L.U.K. 85. Under the latter, defendants were liable to compensate for any loss directly caused by their wrongdoing, even if those losses were not foreseeable. In *The Wagon Mound*, Viscount Simonds claimed that this test led to two difficulties. First, it placed too great an emphasis on “the never-ending and insoluble problems of causation” and, in particular, the *novus actus interveniens* doctrine ([1961] A.C. 388 at 423). However, the reasonable foreseeability test has not replaced the *novus actus* doctrine; the test now stands alongside it, as recognised in *Armstead* ([2024] 2 W.L.R. 632 at [23]). *The Wagon Mound* has made the law more complicated, not simplified it.

Second, Viscount Simonds argued, *Polemis* did not cohere with “justice or morality”, because it meant that someone who committed a “slight or venial” wrong might be held liable for serious and wide-ranging losses ([1961] A.C. 388 at 422). However, this assertion was never fully defended, and so is open to a similar criticism

as that raised against *Armstead*'s defence of the remoteness rule: it is not a compelling justification of the test, but a statement that the test is justified.

For a coherent body of law to emerge, courts must do better than this. *Armstead* is the latest in a line of cases where they have avoided the normative puzzle at the heart of remoteness. It needs solving—and perhaps not only because the law will otherwise remain difficult to apply. There is a very simple objection to the reasonable foreseeability test. When a remoteness issue arises, a court must decide whether to leave the burden of a loss with the claimant or to shift that burden onto the defendant. The defendant is a wrongdoer and their wrong has caused the loss. Is it not fairer that they bear it, rather than an innocent claimant? A similar thought is found in *Armstead*. When explaining why the burden of proving a loss to be too remote should fall on the defendant, Lord Leggatt and Lord Burrows said that “it is fair to place the onus on the wrongdoer to show a good reason why the wrongdoer should not be liable to compensate the victim for the full extent of the loss caused” ([2024] 2 W.L.R. 632 at [63]). By the same token, the burden of proof in deciding between *The Wagon Mound* and *Polemis* presumably falls on supporters of the former.

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