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ONE of the delights of the common law is that the smallest claims often generate the knottiest legal issues (Mrs. Donaghue's upset tummy, for example), and it is always a disappointment to discover that behind the small claim there is an issue of economic importance, typically to battling insurance companies. *Armstead v Royal Sun Alliance Insurance Company Ltd.* [2024] UKSC 6 is no exception. Ms. Armstead's car was negligently damaged, without fault on her part. To tide her over, she hired a Mini from a company called Helphire on "credit hire terms" (meaning the cost of the hire would be recovered from the other driver's insurer). Her contract with Helphire obliged her to return the Mini in good condition, and contained clause 16, common in credit hire agreements, that she would "on demand pay to [Helphire] an amount equal to the daily rental rate [of £130] up to a maximum of 30 days in respect of damages for loss of use for each … day … when the vehicle is unavailable to Helphire for hire because [it] has been damaged". £130 was higher than the standard daily rate for hiring the Mini.

By unhappy coincidence, a negligent van driver collided with the hired Mini, again without fault on Ms. Armstead's part. When she returned it to Helphire, the necessary repairs took 12 days, so she incurred liability of £1,560 under clause 16. The question for the Supreme Court was whether Ms. Armstead could recover damages to compensate her for this £1,560 liability – in practice, under the European Communities (Rights Against Insurers) Regulations 2002, her claim was brought directly against the driver's insurer, RSA.

The lower courts rejected the claim, but a unanimous Supreme Court allowed the appeal. Lords Leggatt and Burrows (with whom Lord Richards and Lady Simler agreed) gave the main judgment, with a short additional judgment by Lord Briggs. Exposition of some basic negligence principles revealed errors made by the lower courts. This was *not* a claim for pure economic loss, but of damage to the claimant's property. It is trite law that "someone who negligently causes physical damage to another person's property is not liable to pay compensation to a third-party claimant who suffers financial loss as a result of the damage" (at [20]), famously established in *Cattle v Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453. Nonetheless "to count as the claimant's property … it is sufficient that the claimant has a right to possession of the property" (at [21]), as Ms. Armstead did as bailee in possession of the car. The "authorities recognise that the bailor and the bailee may each be entitled to sue for the loss of or damage to the property. The only restriction is that there cannot be double recovery" (at [40]).

A claimant's ability to recover all their losses depends on the application of various limiting principles, which meet the policy concern that a defendant should not be liable for an excessive, disproportionate amount. Here, there was no so-called "intervening cause" since "the chain of causation cannot have been broken by a contract that existed before the hire car was damaged by the negligent driving of RSA's insured" (at [56]); Ms. Armstead did not fail to mitigate her loss, nor do anything to attract the partial defence of contributory negligence. In a welcome development, Lords Leggatt and Burrows doubted the general application of the "scope of the duty" principle for all negligence claims, or of the negligence "checklist" suggested by Lords Hodge and Sales in *Meadows v Khan* [2021] UKSC 21. Scope of the duty reasoning helps in cases of negligent professional services, where the defendant's role is delineated by a retainer or equivalent. Here there was "no issue about the scope of the relevant duty, being the commonplace duty to take care to avoid causing physical damage to another person's property" (at [55]).

The "real issue" was remoteness of damage, tested in negligence by the reasonable foreseeability of the type of damage, specifically whether "the clause 16 sum was too remote to be recoverable on the ground that it was not a reasonable estimate of the loss likely to be incurred by Helphire as a result of the unavailability of the hire car while it was repaired" (at [45]). This formulation reveals the central tension in the case, between two very different private law issues – remoteness of damage in negligence, and the enforceability of contractual damages clauses.

On the contractual question, matters were further confused by the conduct of the litigation. RSA initially pleaded that clause 16 was an unenforceable penalty (and an unfair term under the Consumer Rights Act 2015) but abandoned those arguments before the Court of Appeal. Meanwhile Ms. Armstead's counsel, somewhat surprisingly, conceded that "she could not claim the clause 16 sum as damages if it did not represent a genuine and reasonable attempt to assess the likely losses to be incurred by Helphire as a result of its loss of use of the hire car" (at [15]). This is puzzling, because the test for a penalty is no longer whether the term represented a genuine pre-estimate of loss, but since *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 is tougher – the clause will only be penal if it is unconscionable and extortionate, imposing a liability to pay damages that are out of all proportion to a legitimate interest of the claimant. For this reason, Lord Briggs regretted Ms. Armstead's concession, which prevented adversarial argument on the point.

For Lords Leggatt and Burrows, however, the clash of private law principles could be resolved. They opined that, here, the new test for a penalty was unlikely to produce a different result from the old test (referencing Lords Neuberger and Sumption in *Cavendish* that "in the case of a straightforward damages clause, that [legitimate] interest will

rarely extend beyond compensation for the breach"). The concession was therefore properly made, and (on authority such as *Network Rail Infrastructure Ltd. v Conarken Group Ltd.* [2011] EWCA Civ 644) dovetailed with the remoteness test of reasonable foreseeability of the type of damage:

> 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. To be a valid contractual liability, as opposed to an unfair term or penalty, clause 16 must comprise a reasonable pre-estimate of the hire company's loss of use. In contrast, a purported but invalid contractual liability is not the same type of loss and would not be reasonably foreseeable (at [52]).

In a final twist, Lords Leggatt and Burrows held that *defendants* have the burden of proving that particular loss or damage is too remote (a fundamental issue on which there was apparently no relevant authority). Unsurprisingly, RSA had not discharged this burden of proof – it "pleaded no case and adduced no evidence to prove, or even suggest, that Helphire was likely to have had other spare cars available and that a liability to pay the daily hire rate for the vehicle limited to 30 days' loss of use was likely to result in overcompensation" (at [71]). So, the clause 16 loss was recoverable. If RSA had discharged the burden, Ms. Armstead would have been confined to a reasonable/reasonably foreseeable level of damages.

This solution is ingenious and elegant, allowing the blameless Ms. Armstead to recover her financial loss while incentivising credit hirers such as Helphire not to set extortionate rates. But it prompts at least two queries about the Supreme Court's application of basic private law principles.

The first relates to the side-stepping by Lords Leggatt and Burrows of the modern approach to penalties from *Cavendish*. Not only was it assumed without analysis that, for clause 16, the test remained the traditional "genuine pre-estimate of loss" approach, but there was also no mention of the prior, and more difficult, jurisdictional issue emphasised in *Cavendish*. This is that the penalty jurisdiction applies only to secondary obligations, not conditional primary obligations (application of which divided the Supreme Court on the facts of *Cavendish* itself). This suggests a credit hirer might be able to bypass the problem by phrasing the relevant clause in primary terms – yet the amount payable is equally (un)foreseeable either way.

Therein lies the more fundamental problem with the reasoning – "foreseeability" is revealed as denuded of real meaning. Its origin as the remoteness test in negligence, *Overseas Tankship (UK) Ltd. v Morts Dock & Engineering Co. (The Wagon Mound No 1)* [1961] A.C. 388, envisaged a meaningful question of fact, asking what type of harm a reasonable

person in the defendant's position could actually foresee. This was clarified in *Overseas Tankship (UK) Ltd. v Miller Steamship Co. Pty Ltd. (The Wagon Mound No 2)* [1967] 1 A.C. 617, with the Privy Council deciding that damage was not too remote as long as it was foreseeable as a "possibility, but one which could become an actuality only in very exceptional circumstances". Yet posit the question – could a reasonable driver foresee as an exceptional possibility that a car hire company might charge considerably more than its standard hire figure for loss of use of the vehicle if damaged? The answer is a resounding, "yes, obviously".

Foreseeability is an overused, problematic concept in negligence. As a remoteness test for primary victims of personal injury it is redundant, since the House of Lords in *Page v Smith* [1996] A.C. 155 lumped together as one "type" of harm any conceivable physical or psychiatric injury. Types of harm are more meaningfully segregated in cases of property damage and pure economic loss, but *Armstead* shows that sometimes the conclusion seems like the application of a legal rule, not a genuine evaluation of what was and was not foreseeable. Ultimately remoteness is a value judgment about the scope of liability for consequences. Maybe it is time to stop pretending that foreseeability invariably informs that value judgment. If the real conclusion is, unreasonable contractual charges cannot be claimed in damages, why not say so directly?

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