

CHAPTER FOUR CAUSATION

4.3. ISSUES RELATING TO THE SEQUENCE OF EVENTS

4.3.1 PREDISPOSITIONS OF THE PLAINTIFF

Introductory Note

a) In Chapter III, it was seen that the appreciation of fault or negligence on the part of the defendant generally involves setting his or her conduct against that of the hypothetical reasonable person, which the defendant may or may not be.¹ The assessment of fault thus involves an abstraction away from the actual defendant. It may be wondered whether, in the assessment of damages, a similar abstraction would be made for the plaintiff, so that the defendant could argue that he or she should only be liable for the injury which his or her conduct would normally have caused to an “objective” plaintiff, and not for the injury which results essentially from some “oversensitivity” which makes the plaintiff more prone to suffer damage.

b) This subsection shows that none of the systems under study permits such an argument to succeed when it comes to *physical injury* to the plaintiff. As it is succinctly put in the English common law, “the wrongdoer must take the plaintiff as he finds him”. One case has been included from each of English, German and French law on this point.

c) As regards *injury to animals*, English and German law do not allow plaintiffs to claim for damage which is due to oversensitivity of the animals.²

d) It is also possible that the plaintiff’s property and financial situation would make him or her particularly sensitive to *property damage*, possibly leading to extraordinary consequences such as bankruptcy. Two cases have been included below on this issue, from English and German law.

¹ *Supra*, Chapter III, 3.2.2.

² See for instance two cases which are very close on their facts, *Hollywood Silver Fox Farm Ltd. v. Emmett* [1936] 1 KB 468, KBD and RG, 4 July 1938, RGZ 158, 34. Compensation was allowed in the first case only because the conduct of the defendant was intentional. See also BGH, 2 July 1991, *supra*, 4.G.3., concerning the oversensitivity of pigs in an intensive farming installation.

*Queen's Bench Division*³
Smith v. Leech Brain & Co. Ltd.

4.E.24.

PREDISPOSITION TO PHYSICAL INJURY

Cancer from burn by molten metal

"A tortfeasor takes his victim as he finds him".

Facts: The victim was in the employment of the defendant at their galvanization plant. His work included manoeuvring a crane to lower large articles into a tank of molten metal. On 15 August 1950, in the course of one such operation, a piece of molten metal accidentally hit his lower lip and caused a burn. The evidence showed that the burn acted as a promoting factor for a cancer which developed where the burn had occurred. Due to previous occupations, the victim may have had a pre-malignant condition at the time of the accident. Accordingly, it was possible that cancer would have developed at some later point in the victim's life. The plaintiff, the widow of the victim, claimed damages from the defendant. *Held:* The plaintiff's claim was upheld.

Judgment: LORD PARKER CJ: "[After having found that the defendant was negligent and that the burn was a cause-in-fact of the death of the plaintiff, Lord Parker CJ moved on to consider whether the damage was not too remote.] Here I am confronted with the recent decision of the Privy Council in *Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, [1961] 2 WLR 126, [1961] 1 All ER 404, PC.⁴ But for that case, it seems to me perfectly clear that, assuming negligence proved, and assuming that the burn caused in whole or in part the cancer and the death, the plaintiff would be entitled to recover...

...I am quite satisfied that the Judicial Committee in *The Wagon Mound* case did not have what I may call, loosely, the thin skull cases in mind. It has always been the law of this country that *a tortfeasor takes his victim as he finds him* [emphasis added; Lord Parker CJ then reviewed case-law on that principle].

...There is not a day that goes by where some trial judge does not adopt that principle, that the tortfeasor takes his victim as he finds him. If the Judicial Committee had any intention of making an inroad into that doctrine, I am quite satisfied that they would have said so.

[In *The Wagon Mound*,] Lord Simonds is clearly... drawing a distinction between the question whether a man could reasonably anticipate a type of injury, and the question whether a man could reasonably anticipate the extent of injury of the type which could be foreseen.

The Judicial Committee were, I think, disagreeing with the decision in the *Polemis* case [1921] 3 KB 560 that a man is no longer liable for the type of damage which he could not reasonably anticipate. The Judicial Committee were not, I think, saying that a man is only

³ [1962] 2 QB 405.

⁴ Note: *Supra*, 4.E.4.

liable for the extent of damage which he could anticipate, always assuming the type of injury could have been anticipated...

In those circumstances, it seems to me that this is plainly a case which comes within the old principle. The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that [Mr. Smith] would die. The question is whether these employers could reasonably foresee the type of injury which he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends on the characteristics and constitution of the victim.

Accordingly, I find that the damages which the plaintiff claims are damages for which the defendants are liable... [However, his Lordship considered that he must make a substantial reduction from the damages awarded because of the fact that Mr. Smith might have developed cancer if he had not suffered the burn].”

Notes

(1) The “thin-skull” rule,⁵ or the maxim “the tortfeasor takes his victim as he finds him” is probably the clearest exception to the test of reasonable foreseeability set out in *The Wagon Mound (No. 1)* for the assessment of the remoteness of damage.⁶ Indeed, in most cases, it could not reasonably be foreseen (unless some external sign indicated the vulnerability of the plaintiff) that the victim was oversensitive and that the injury caused by a given course of conduct would be much greater than to a “normal” victim. The “thin-skull” rule can be explained only if the test for remoteness of damage is directness (as was the case before *The Wagon Mound (No. 1)*, on the basis of *Re Polemis*). In the annotated case, Lord Parker CJ had to decide whether the Privy Council’s reversal of case-law in *The Wagon Mound (No. 1)* also extended to the “thin-skull” rule. Lord Parker CJ found that the “thin-skull” rule was so strongly enshrined in the common law of England (“...not a day... goes by where some trial judge does not adopt that principle”) that the Privy Council could be assumed not to have wanted to modify it in *The Wagon Mound (No. 1)* unless it had expressly said so.

(2) Lord Parker CJ reconciled the annotated case with *The Wagon Mound (No. 1)* by finding that the “thin-skull” rule covers situations where the kind of damage caused is foreseeable, but not its extent. The interpretation given by Lord Parker CJ is fully consistent with the position taken by the House of Lords shortly thereafter in *Hughes v. Lord Advocate*.⁷

⁵ As stated by Mackinnon LJ in *Owens v. Liverpool Corporation* [1939] 1 KB 394 at 400-401, [1938] 4 All ER 727, CA: “One who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him; it is no answer to a claim for a fractured skull that its owner had an usually fragile one”.

⁶ *Supra*, 4.1.2, Introductory Note and 4.E.4.

⁷ *Supra*, 4.E.5.

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(3) The annotated case has been followed ever since.⁸ In *Robinson v. Post Office*,⁹ the “thin-skull” rule was held to apply also to injuries resulting from particular sensitivity to treatment made necessary by the injuries inflicted to the plaintiff, who had contracted encephalitis as a result of allergy to an anti-tetanus vaccine which he had to be given following a work accident for which the defendant was responsible.

(4) The “thin-skull” rule also applies to psychological injury. For instance, in *Pigney v. Pointers Transport Services Ltd.*,¹⁰ the victim was injured in a work accident for which the defendant was responsible, and as a result began to suffer from acute anxiety neurosis, which ultimately led him to commit suicide. The court, on the basis of *Re Polemis*, found that the suicide was a direct consequence of the work accident; commentators think that *The Wagon Mound (No. 1)* has not affected the *ratio* of *Pigney* in any event.¹¹

Nonetheless, the application of the “thin-skull” rule to psychological injury is somewhat more complex than to physical injury.¹² As stated in *Page v. Smith*, if it was reasonably foreseeable that a plaintiff might suffer physical injury, the defendant will be liable for psychological injury even if the plaintiff did not actually suffer any physical injury.¹³ When it was not reasonably foreseeable that the plaintiff would suffer physical injury, then the defendant will be liable for psychological injury if it was foreseeable that a *person of reasonable fortitude* in the position of the plaintiff might suffer from some psychological injury; once that is established, the defendant will be liable for all psychological injury actually suffered by the plaintiff, even if the plaintiff was overly sensitive to such injury.¹⁴

*OLG Karlsruhe, 25 January 1966*¹⁵

4.G.25.

PREDISPOSITION TO PHYSICAL INJURY

Amputation due to step on the foot

Someone whose wrongful conduct results in injury to a person of frail health cannot argue that his or her liability should be assessed as if the victim had been healthy. The

⁸ Rogers at 221-2; *Clerk & Lindsell on Torts* at 399, para. 7-192; Markesinis and Deakin at 198.

⁹ [1974] 1 WLR 1176. See the comment by RWM Dias, “Remoteness and Personal Injury” [1975] Cambridge LJ 15.

¹⁰ [1957] 1 WLR 1121, [1957] 2 All ER 807.

¹¹ See G. Williams, “The Risk Principle” (1961) 77 LQR 179.

¹² See *Clerk & Lindsell on Torts* at 262-3, 399, para. 7-45, 7-192.

¹³ *Supra*, Chapter II, **2.E.9.** and notes thereafter.

¹⁴ *Page v. Smith, ibid.*; *Brice v. Brown* [1984] 1 All ER 997.

¹⁵ VersR 1966, 71. Translation by A. Hoffmann and Y.P. Salmon.

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alleged tortfeasor is liable for physical injury only insofar as his or her conduct remains an adequate cause of such injury.

Facts: On 6 August 1963, the defendant accidentally stepped on the plaintiff's right foot in a warehouse, without causing any apparent injury. As it turned out, the plaintiff had serious circulatory problems in both legs as a result of a previous infarct, and it appears that the step on the foot was the triggering factor for a series of complications which led to the amputation of the plaintiff's right leg. Evidence showed that, given the plaintiff's condition, those complications might have occurred in any event, irrespective of any external cause. The plaintiff sued the defendant for damages, arguing that the step on the foot was the cause of his injury.

Held: The court of first instance dismissed the plaintiff's claim. The OLG upheld the judgment of the court of first instance.

Judgment: "In the case at bar, the step on the [plaintiff's] foot was not particularly heavy, yet its consequences were so exceptional that there can be no adequate causal link between the step and such consequences. The defendant... is not liable for them..."

It is true... that in the case law, the fact that the victim was of frail health or ailing at the time of the accident does not suffice to deny causation. The matter is governed by the following principle: someone whose wrongful conduct results in injury to a person of frail health cannot argue that his or her liability should be assessed as if the victim had been healthy, so that he or she would only be liable for that part of the damage that resulted from his or her wrongful conduct, the other part being attributable to the pre-existing condition. Rather in such cases, the question is at what point in time the pre-existing condition or ailment would have brought about the alleged injury, independently of the occurrence of any event [such as the plaintiff's wrongful conduct] that would accelerate or further that condition or ailment [reference omitted]. Still this does not mean that the requirement of adequate causation is abandoned...

In applying the above principles, however, a low degree of probability has generally sufficed for the courts to be satisfied about adequate causation...

In the case at hand... the [following] circumstances speak against adequacy. In August 1963, the defendant stepped on the plaintiff's foot, as happens hundred times every day in crowds, in the tram, in the cinema, on the sports field, etc. This cannot... be presented as an accident [i.e. the occurrence of injury] without more. When someone's foot is stepped upon in the tram, when a pedestrian inadvertently gets hit by another's elbow, etc. the general opinion is that this does not qualify as an accident, and common sense tells us that there was no injury. Injury would occur only under very exceptional conditions in the person of the plaintiff... as happened here with the injury that the plaintiff traces back to that step on his foot..."

Notes

(1) Much like English law, German law also does not allow the defendant in principle to argue that physical injury was caused by the oversensitivity of the plaintiff. The OLG in the annotated case recalls the well-established maxim: "Someone whose wrongful conduct results in injury to a person of frail health cannot argue that his or her liability should be assessed as if the victim had been healthy, so that he or she would only be

liable for that part of the damage that resulted from his or her wrongful conduct, the other part being attributable to the pre-existing condition”.¹⁶

Contrary to the situation in English law where the “thin-skull” rule conflicts with the general test of reasonable foreseeability set out in *The Wagon Mound (No. 1)*,¹⁷ German writers consider that the maxim set out above can be derived from all leading causation theories, namely the adequacy theory or *Adäquanztheorie* (the objective observer would not regard it as improbable that the plaintiff might be more sensitive than usual¹⁸), the “scope of rule” theory or *Schutzzwecktheorie* (the aim of a protective rule is to shift the whole loss onto the defendant) or even the *Risikobereich* approach (it is not for the victim to take measures against oversensitivity; rather, it is for everyone to ensure that they do not cause physical injury, irrespective of the state of health of the victim).¹⁹

(2) The annotated case is one of a small number of cases where the application of the maxim set out above has been denied.²⁰ In the annotated case, the circulatory condition of the victim was so bad that he ended up having to have his leg amputated because of a simple step on the foot. The OLG based its reasoning on adequacy, finding that the unfolding of events in the annotated case was simply too extraordinary to meet the test of adequacy, even if a low measure of probability will suffice to find adequacy where the plaintiff was oversensitive. Furthermore, according to the court, it comes within the *Risikobereich* of the victim to protect his health if he is sensitive to daily occurrences such as a step on the foot. Some writers consider that in such a case, one could even doubt whether there has been a violation of bodily integrity at all, since the triggering event (here a step on the foot) is not usually considered as an accident (*Unfall*).²¹

(3) In principle, the same reasoning can apply to psychological injury.²² It should be noted that the German courts have had to deal with so-called *Rentenneurose* cases where, precisely because the victim knew that compensation was ordinarily payable for such consequences, the victim failed to get over the psychological consequences of an accident

¹⁶ See Staudinger-Medicus, § 249 at 41-2, para. 52; Soergel-Mertens, § 249 at 257-8, para. 134; Münchener-Grunsky, § 249 at 372-3, para. 51.

¹⁷ *Supra*, 4.E.4. as well as 4.E.24. and Notes (1) and (2) thereafter.

¹⁸ On this point it appears that the English test of reasonable foreseeability and the German adequacy test, even though they are both based on probabilities, would produce diverging results.

¹⁹ See Staudinger-Schäfer, § 823 at 68-9, para. 96.

²⁰ Other cases are listed by Münchener-Grunsky, § 249 at 373, para. 51a; Soergel-Mertens, § 249 at 254, para. 128 and Staudinger-Medicus, § 249 at 42, para. 54.

²¹ Staudinger-Medicus, § 249 at 42, para. 54.

²² See for instance the interesting decision of the RG, 27 October 1914, DJZ 1915, 207, where the owner of an ice cream parlour had to compensate a customer for the psychological problems which she suffered after having found a bit of glass in her ice cream. The customer was prone to hysteria and overreacted at the thought that she might have swallowed a bit of glass (it was not shown that she did). The RG did not consider that the psychological oversensitivity of the plaintiff affected the causal link. Compare that case with *Donoghue v. Stevenson*, *supra*, Chapter I, 1.E.23.

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(shock, depression, difficulties in resuming a normal life, etc.). With the support of German legal writers, German courts have refused to entertain such claims, on the ground that they run contrary to the basic principles of reparation of damage, since the damage is more or less brought about by the possibility of obtaining compensation for it.²³

*Cass. civ. 2e, 19 July 1966*²⁴
Leven v. Thépaut

4.F.26.

PRE-EXISTING PHYSICAL CONDITION

Loss of only eye

If the injury caused by the defendant renders the plaintiff incapable of working, when combined with a pre-existing condition which had not affected the plaintiff's capacity, the defendant is liable for the full extent of the plaintiff's incapacity to work.

Facts: The plaintiff lost his left eye in a hunting accident for which the defendant was responsible. He had already lost the use of his right eye, although that had not prevented him from exercising his profession. The loss of his only eye in the hunting accident left him unfit for work. He sued the defendant, claiming damages for total incapacity to work.

Held: The court of appeal allowed the claim. The Cour de cassation upheld the decision of the court of appeal.

Judgment: "The defendant criticizes the court of appeal for having assessed [the plaintiff's] incapacity at 100 per cent, without distinguishing between the pre-existing incapacity and that which resulted from the accident.

However, it must be recalled that... the law does not require the many disabilities of the victim to be treated separately. Moreover, the judges of fact are sovereign to assess the extent of the damage. They state that the plaintiff's pre-existing disability did not prevent him from exercising his profession normally, and that the hunting accident of which he was a victim and which resulted in the loss of his left eye was the direct cause of his total and permanent incapacity to perform any work. Thus... the court of appeal legally justified its decision."

Notes

(1) French law approaches the issue of predisposition of the victim within the general

²³ See Münchener-Grunsky, § 249 at 383-4, para. 70-71a; Staudinger-Medicus, § 249 at 43-4, para. 56-7.

²⁴ D 1966.Jur.598. Translation by Y.P. Salmon.

framework used for cases where multiple causes are present,²⁵ since the predisposition of the victim then combines with the conduct of the alleged tortfeasor to result in the actual injury. As is explained below, French law takes a perhaps more differentiated approach than German or English law, but reaches similar results in substance.

(2) The first question thus arising is whether the pre-existing condition of the victim can be assimilated to *force majeure*, so that it would exonerate the defendant from any liability.²⁶ On this point, French case-law and writers are unanimous: the pre-existing condition of the victim cannot qualify as *force majeure* and thus it cannot negate the causal link between the conduct of the alleged tortfeasor and the injury to the victim.²⁷

(3) The issue then becomes whether the pre-existing condition of the victim at least lead to a partial exoneration of the defendant, to the extent that part of the final injury could be attributed to the pre-existing condition.²⁸ Legal writers have proposed the following distinction: on the one hand, the influence of “a pre-existing condition without any external injurious manifestation” (*prédispositions sans manifestations externes dommageables*) cannot be divorced from the impact of the conduct of the alleged tortfeasor and should thus not lead to any exoneration, even partial, in favour of the defendant. On the other hand, neither a pre-existing “stable and consolidated pathological condition” (*états pathologiques stables et consolidés*) nor the unavoidable evolution of a pre-existing pathological condition can in all fairness be imputed to the defendant, who should then be exonerated to the extent the influence of these conditions in the final injury can be isolated.²⁹

It appears that French case-law now follows the above distinction, albeit with a marked reluctance to allow the defendant to be partially exonerated from liability because of the pre-existing condition of the victim;³⁰ a recurring theme in the case-law of the civil and criminal chambers of the Cour de cassation is that compensation should not be reduced because of the victim’s pre-existing condition when “the injury resulting therefrom was only revealed or triggered by the accident or the wrongful act [of the

²⁵ On this general framework, see *infra*, 4.F.38.-39. and notes thereafter.

²⁶ For a discussion of the requirements of *force majeure*, see *supra*, 4.1.3., Introductory Note under h) and Chapter III, 3.2.3.

²⁷ Viney and Jourdain, *Conditions* at 300-1, para. 434; Le Tourneau and Cadiet at 256, para. 887; Starck, Roland and Boyer at 440, para. 1068.

²⁸ If the final injury cannot be divided, the defendant must then be liable for the whole of that injury: Jourdain at 160/17, para. 81.

²⁹ The terminology comes from J. Nguyen Thanh Nha, “L’influence des prédispositions de la victime sur l’obligation à réparation du défendeur à l’action en responsabilité” (1976) 75 RTDciv. 1, and has been adopted by the other writers: see Viney and Jourdain, *Conditions* at 301, para. 434; Jourdain at 160/17, para. 82-3. See also Le Tourneau and Cadiet at 256-7, para. 889.

³⁰ Viney and Jourdain, *Conditions* at 304-5, para. 434-1, approves the position of the case-law, noting that only in exceptional cases should the defendant be partially exonerated because of the victim’s pre-existing condition, and that in any event the defendant should bear the burden of proof in this respect.

tortfeasor]”.³¹

(4) French courts are careful to ensure adequate compensation for the plaintiff. In the annotated case, the victim was especially vulnerable to injury to the left eye, since he had already lost vision in the right eye. That is a stable and consolidated pre-existing condition, for which the defendant should not have to answer, as outlined above. As the court noted, however, that condition had not been reflected in any incapacity to work in practice: the victim had continued to work and thus had not received any compensation from social security for the loss of his right eye. The fault of the defendant caused the victim to lose sight in his left eye as well. The court based its assessment not on the medical condition of the victim, but rather on his economic situation: the defendant had not *aggravated* the victim’s condition, but rather had *changed the nature* of the victim’s condition. Since the victim had gone from no to full incapacity to work as a result of the accident, the defendant was liable for the full extent of the incapacity to work.³²

(5) It should be noted that the social chamber of the Cour de cassation, ruling on work accidents, follows a somewhat different path, which is more generous towards defendants.³³

*House of Lords*³⁴ **4.E.27., 4.G.28.**
Liesbosch Dredger v. Edison Steamship
(The Liesbosch)
 and
*BGH, 5 July 1963*³⁵

PREDISPOSITION TO ECONOMIC LOSS

The defendant is not liable under English law for damage which results from the plaintiff’s weak economic position. In similar cases under German law, the defendant is liable.

A. House of Lords, *The Liesbosch*

4.E.27.

Replacement dredger

Facts: The Liesbosch, a dredger owned by the plaintiff, was moored at Patras harbour. The Edison, a

³¹ Viney and Jourdain, *Conditions* at 301-2, para. 434; Jourdain at 160/17-8, para. 84-6.

³² See other similar cases referred to by Viney and Jourdain, *Conditions* at 303, para. 434 and Jourdain at 160/18, para. 87.

³³ See Cass. Ass. plén., 27 November 1970, D 1971.Jur.181, JCP 1971.II.17063.

³⁴ [1933] AC 449.

³⁵ VersR 1963, 1161. Translation by A. Hoffmann and Y.P. Salmon.

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steamship owned by the defendant, ran into the moorings of the Liesbosch, carried her into the open sea and could not free her until it was too late to prevent her from sinking. The defendants admitted liability for the incident; only the extent of liability was at issue. The plaintiffs required their dredger for the performance of a contract with the Patras Harbour Commission, which provided for heavy penalties in case of delay. Since the plaintiffs had engaged their resources in that contract, they were financially not in a position to buy a replacement dredger for the Liesbosch. Instead, they had to hire one, which proved to be a more expensive option in the long run. The defendants refused to pay for the additional expense involved in hiring a replacement dredger instead of buying a new one.

Held: The court of first instance ruled in favour of the plaintiffs. The court of appeal reversed that decision and ruled in favour of the defendant. The House of Lords upheld the judgment of the court of appeal but remitted the case for further consideration.

Judgment: LORD WRIGHT³⁶: “[T]he claim made by the [plaintiffs]... is that all their circumstances, in particular their want of means, must be taken into account and hence the damages must be based on their actual loss, provided only that... they acted reasonably in the unfortunate predicament in which they were placed, even though but for their financial embarrassment they could have replaced the Liesbosch at a moderate price and with comparatively short delay. In my judgment, the [plaintiffs] are not entitled to recover damages on this basis. The [defendants’] tortious act involved the physical loss of the dredger: that loss must somehow be reduced to terms of money. But the [plaintiffs’] actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the [defendants’] acts, and, in my opinion, was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because ‘it were infinite for the law to judge the cause of causes,’ or consequences of consequences. Thus, the loss of a ship by collision due to the other vessel’s sole fault may force the shipowner into bankruptcy, and, that again, may involve his family in suffering, loss of education, or opportunities in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case if the [plaintiffs’] financial embarrassment is to be regarded as a consequence of the [defendants’] 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...

...Nor is the [plaintiffs’] financial disability to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor labourer or a highly paid professional man. The former class of circumstances goes to the extent of actual physical damage, and the latter consideration goes to interference with profit-earning capacity; whereas the [plaintiffs’] want of means was, as already stated, extrinsic.

I agree with the conclusion of the [court of appeal] that the [court of first instance] proceeded on a wrong basis, and that the damages must be assessed as if the [plaintiffs] had

³⁶ The other Law Lords agreed with Lord Wright.

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been able to go into the market and buy a dredger to replace the *Liesbosch*...”

B. BGH, 5 July 1963

4.G.28.

Damage to sole lorry

Facts: The plaintiff was a transport contractor, whose only lorry was damaged in an accident for which the defendant admitted responsibility. The parties disagreed on the quantum of damages. As a result of the accident, the plaintiff could not perform his contracts for the duration of the repairs to the lorry (two months). Thereafter the plaintiff did not have and could not obtain enough money to pay the repair bill, and accordingly could not recover his lorry. He had to give up his transport business and take up employment with a large company as a lorry driver. The plaintiff claimed from the defendant the difference between his earnings as an independent transport contractor and his wages as a lorry driver.

Held: The court of first instance allowed the plaintiff’s claim. The court of appeal reversed the decision of the court of first instance and dismissed the claim. The BGH reversed the judgment of the court of appeal and remitted the case for further consideration.

Judgment: “First and foremost, the court of appeal cannot be followed when it held that the loss of earnings suffered by the plaintiff after the first two months as well as the loss of the transport business are not ‘causally connected with the accident’. It is true that the ultimate cause of the plaintiff’s inability to derive revenue from [the use of] the lorry, after it was repaired, is that the repair workshop did not return it, because the bill for the repairs could not be fully settled. However, this does not exclude that the accident, for which the defendant is responsible, would also be a *conditio sine qua non* for that injury. Without the accident, the lorry would not have been damaged and hence the plaintiff would not have been deprived of the possibility to use the lorry and to derive revenue from [such use]. The accident thus also contributed to the injury. But that does not suffice to find that there is a causal link between the accident and the injury.

Consequently, the liability of the defendant depends on whether the abovementioned consequences of the injurious conduct were adequate and thus imputable to the defendant. As the [plaintiff] rightly argues, this question must be answered in the affirmative as well, because these consequences did not occur under particularly unique and quite improbable circumstances to which no attention would be paid if events had followed a normal course. The owner of the repair workshop has every right to retain a repaired vehicle until the payment of the bill (§ 647 BGB), and it is common practice to do so... Finally, it does not run against common experience that the holder of a vehicle would be unable... to pay the full amount of a repair bill right away. These circumstances, which have contributed in causing the plaintiff’s damage, can be significant for the purposes § 254 BGB, but they can neither exclude nor interrupt the causal link between the accident and the loss of earnings suffered by the plaintiff. The part of the claim of the plaintiff which is still disputed cannot therefore be dismissed on the ground that the damage in question was not ‘causally connected with the accident’.”

Notes

(1) At first sight, predisposition to economic loss, because of a weak economic position, should not be analyzed differently from predisposition to physical injury,

because of frail health or otherwise. In both cases, the injury is aggravated because of the plaintiff's pre-existing condition. In the first annotated case, for instance, the plaintiffs were short of liquidity, which forced them to rent a replacement dredger instead of buying a new one, an option which ended up being more expensive in the long run. Nonetheless, in the first annotated case, the House of Lords distinguished "thin-skull" cases, on the ground that impecuniosity was an "extraneous" or "extrinsic" factor, as opposed to weak health, and it accordingly held that the defendant should not be liable for the loss which resulted from the plaintiff's impecuniosity. The first annotated case has been criticized in legal writing, and the distinction made by the House of Lords with the "thin-skull" cases has been put in question.³⁷ The authority of the annotated case has been undermined in subsequent decisions, to the extent that it can be questioned whether it is still representative of the state of the common law of England, although it has never been overruled.³⁸

(2) In Germany, the BGH has followed another route, as the second annotated case shows. There the situation was in many ways similar to the first annotated case: the defendant was at fault in damaging the plaintiff's only lorry, and because the plaintiff was not in a very strong economic position, he had to abandon his business when he could not afford the repairs to the lorry. The BGH finds first that the conduct of the defendant was a *conditio sine qua non* of the plaintiff giving up his business (*Kausalität im natürlichen Sinne*). Moving to adequacy, the BGH found that the conduct of the defendant was also an adequate cause of the ultimate injury to the plaintiff, since the course of events was not unforeseeable (it was to be expected that the repair shop would not wish to return the lorry before payment of the repairs and that the plaintiff would not have enough money to pay).³⁹ In the end, the BGH was still willing to allow the defendant to invoke the impecuniosity of the plaintiff, but only as a possible form of *Mitverschulden* within the meaning of § 254 BGB.⁴⁰ English legal writers would similarly like to see the scope of the first annotated case restricted to situations where the impecunious plaintiff has acted unreasonably in failing to mitigate losses.⁴¹

³⁷ See *Clerk & Lindsell on Torts* at 401-3, para. 7-193 to 7-195; Markesinis and Deakin at 200.

³⁸ Rogers at 222-4, citing *Dodd Properties Ltd v. Canterbury City Council* [1980] 1 WLR 433, CA, as an example of a case which distinguishes the annotated case in such a way as to leave little room for its further application. See also *Martindale v. Duncan* [1973] 1 WLR 57, [1973] 2 All ER 355, CA.

³⁹ See also Staudinger-Medicus, § 249 at 42, para. 53.

⁴⁰ On *Mitverschulden*, see Chapter VII, 7.1.2.

⁴¹ Markesinis and Deakin at 200.