DO DAMAGES DEPEND ON THE SAME PRINCIPLES THROUGHOUT THE LAW OF TORT AND CONTRACT?

The enquiry which has resulted in this article was provoked by the first argument of counsel for the owners of the Wagon Mound in *The Wagon Mound* (*No.*2),[1] as that argument was summarized by Lord Reid,[2] who delivered the judgment of the Privy Council. In that case Lord Reid did not find it necessary to consider whether or not damages depend on the same principles throughout the law of tort[2a] and contract, but he did say, "There has in recent times been much development of the law of tort and developments in the law of contract may not have proceeded on parallel lines."[3] The example he gave of a possible contrast between *Hughes* v. *Lord Advocate*[4] and *Hadley* v. *Baxendale*[5] is an indication that Lord Reid favoured the view that the principles are different, but it is an obviously cautious opinion.

It may well be that much can be said for ensuring that damages arising out of any given situation ought not to depend upon whether a claim is based upon breach of a contractual duty or of a tortious one. When it is otherwise, anomalies may arise. What is surprising, in view of the decisions in each field, is that Lord Reid could have entertained any doubt that the principles are different, whatever the ideal situation might be. Furthermore, it is submitted that the difference between the two sets of principles, far from being the result of recent developments, was in fact apparent in the nineteenth century, and this despite statements of high authority to the contrary,[6] and despite the reasoning in *The Wagon Mound* (No. 1).[7] Indeed in that case the Privy Council were at pains to ensure that the Polemis rule was rejected since it was out of the current of thought at the time it was decided because of its direct conflict with the rule in *Hadley* v. *Baxendale*.[8]

The appearance of *The Heron II*[9] caused the fear that this article may appear as the hindsight of a fool rather than the foresight of a reasonable man, but it is hoped that the material here discussed will appear sufficiently greater in its scope than the discussion in that case as to render that fear illusory.

1 [1966] 3 W.L.R. 448.
2 *Ibid.*, 507.
2a The principle upon which damages depend in tort which is referred to in all the cases upon which this article is based, is that relating to negligence and allied torts. The torts of strict liability are not taken into account in discussions of the point or in this article.
3. [1966] 3 W.L.R. 448, 508.
4. [1963] A.C. 837.
5. (1854) 9 Exch. 341.
6 e.g. Lord Esher in *The Notting Hill* (1884) 9 P.D. 105, 113 and in *The Argentino* (1888) 13 P.D. 191, 197; Greer L.J in *The Arpad* (1934) All E.R. Rep. 337.
7. [1961] A.C. 388, 420.
8. (1854) 9 Exch. 341.

The Heron II was chartered to carry 3,000 tons of sugar on a voyage which would normally take twenty days. The shipowner delayed for nine days and admitted liability for this breach of contract. The problem was to determine how much could be recovered. The sugar was to be delivered at Basrah, a port at which the shipowner knew there was a market for sugar. Because of this, he should have realised the price of sugar might well fluctuate from day to day, although he had no way of foretelling whether the fluctuation would be up or down. In fact, the price of sugar dropped by £1 7s. 3d. per ton during the delay. Earlier cases[10] were authority for limiting the damages to interest at a reasonable rate on the value of the consignment for the period of the delay. The House of Lords disapproved of this limit, holding that the general rule should be applied, i.e. that because the shipowner should have contemplated the charterer's selling the sugar as being "not unlikely" to occur, what was recoverable was the loss of profit on such a sale due to the delay, namely £1 7s. 3d. per ton. The decision was reached without the need for any comparison between the rules of contract and tort, but the comparison was none the less made. Four of their lordships[11] expressly stated that the rules in contract and in tort were different. The nature and extent of the difference revealed by their lordships will be examined in detail later in this article, but it is submitted that it is broadly this: that the degree of foresight needed to attach liability for a particular consequence of a breach of contract is greater than the degree of foresight needed to attach liability for a similar consequence resulting from the commission of a tort.

This difference, which does indeed result from recent developments in the law of tort, is not the only one. There is a far more important difference which is not of recent origin and which did not come before their lordships in *The Heron II*.[12] The difference is this, that while in tort the test of foresight is used to determine for what consequences, or sort of consequences, the wrongdoer shall be liable, and is *never* used to determine for what *value* of damage he shall be liable, in contract the test is used mainly, if not exclusively, for that latter purpose i.e. to decide for what *value* of damage the party in breach is to be liable. In tort the test of foresight is used with reference to kind, while in contract it is used with reference to quantum.

This article will examine these two suggested differences between the principles upon which damages depend in tort and in contract without enquiring whether there are other differences to be discerned. The two suggested differences are:

9. [1967] 3 All E.R 686.
10. *The Parana* (1877) 2 P D. 118 and *The Notting Hill* (1884) 9 P.D. 105.
11. [1967] 3 All E.R. 686, Lord Reid at p. 691, Lord Hobson at p. 708, Lord Pearce at p. 709, and Lord Upjohn at p. 715.
12. [1967] 3 All E R. 686

(1) the difference in the degree of foresight demanded;
(2) the difference between applying foresight to kind of damage and applying it to quantum of damage.

The examination of these differences is divided into four sections:

(a) a suggestion that they are both manifestations of a basic difference in policy between the rules of tort and those of contract;
(b) an investigation of their nature and extent;
(c) the relevance, in contract, of the *injured party's* foresight of the consequence;
(d) examples of the differences at work.

(a) *The policy behind the rules.*

In both tort and contract, the wrongdoer is to be held responsible for the consequences of his wrongful acts, but as Fleming says,[13] "As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch to infinity . . . legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable activity and the grievous burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default."

The claim of the victim is stated in words applicable to both tort and contract by Lord Blackburn.[14] " . . . where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been it he had not sustained the wrong for which he is now getting his compensation or reparation."

Thus far the policies in tort and contract are the same. They differ in the formulation of the claim of the wrongdoer not to be held responsible for all the consequences of his default, no matter how widespread or bizarre those consequences may be.

In tort, the duty is imposed by law. The person under that tortious duty has no choice as to whether he will shoulder it or not. So his claim to relief cannot be formulated in terms of what he can expect at the time when he undertakes his duty. Rather it is relevant to consider the time at which he commits the act which is alleged to be the breach of duty. It is here that the limits are imposed.

13. Fleming, *The Law of Torts* (3rd ed. 1965), 176.
14. *Livingstone* v. *Rawyards Coal Co.* (1880) 5 App. Cas. 25, 39. c.f. Parke B. in *Robinson* v. *Harman* (1848), 1 Exch. 850, 855. Lord Upjohn in *The Heron II* [1967] 3 All E.R. 686, 714.

What the nature of those limits are will be examined later.[15] It suffices at this stage to notice that they are employed to protect the wrongdoer at the expense of the injured party, and so, since at no stage could the law require more of the injured party, his interests will not be lightly ignored.

In contract, on the other hand, the limits are employed at a different stage. The contractual duty is accepted voluntarily, presumably after an assessment of how onerous the duty will be, compared with the value of the consideration to be furnished in return. Once the duty is accepted, i.e., once the contract is made, the duty is strict. No amount of care will excuse a breach of that duty.

The limits are not invoked by enquiring as to the consequences which ought to be guarded against at the time when the purported breach occurs. The answer to any such enquiry would be simply that a party to a contract must guard against everything he has expressly or impliedly promised to guard against. We are taken back in time to the formation of the contract. We must ask how onerous the duty was which the party alleged to be in breach undertook. The exact limits of that duty may be expressly prescribed in the contract. The provision of a genuine estimate of liquidated damages or of a valid exclusion clause covering the alleged breach are examples of this. In such cases there is no need for other limits, and none are introduced. On the other hand, in the great majority of cases, no such express limits to the duty will be found in the contract. Then the extent of the duty must be gleaned from the surrounding circumstances when the duty was accepted. As in tort the limits to the duty are employed to protect the wrongdoer at the expense of the injured party, but in contract, unlike tort, the law makes demands of the injured party, and if those demands are not met, his interests will then be ignored with far more freedom then is ever possible in tort.

As has been said, the contractual duty is undertaken after a comparison of the value of the consideration and of how onerous the duty will prove. This latter factor has three facets, the difficulty of discharging the duty, the likelihood of failing to discharge the duty, and the consequences of that failure which will amount to the quantum of the compensation he will have to pay. Only if he thinks the value of the consideration outweighs this threefold combination will a party undertake the contractual duty. The first two facets are things of which he must judge alone, but the final one, the consequences of a breach of duty, may well be beyond his knowledge, and yet within the knowledge of the other party. Here it is that the law makes its demand of the injured party. If he knows of factors which may take the consequences of breach of contract beyond what is to be expected and hence make the quantum of compensation

15. See part (b) below.

greater than normal, the law demands that he disclose those factors to the other party in time for that party to consider them as he assesses whether or not it is worth his while to undertake the duty. The price of non-disclosure is that recovery will be limited. This then is a policy for establishing additional limits to recovery for breaches of contract which has no analogy in the policies underlying the rules of tort. It is submitted that this is the basic reason for both the differences in the actual rules discussed in part (b).

(b) *The nature and extent of the differences.*

As has been stated, the principles upon which damages depend, in both tort and contract, are aimed at striking a balance between the claim to full reparation by the innocent party on the one hand and the need to limit the wrongdoer's obligation to compensate for consequences which are unacceptably widespread or bizarre.

The first question, logically, is to determine what will amount to full reparation, and only secondly need one ask if limits need to be applied to lessen that reparation. In practice, of course, this logical sequence often may quite properly be ignored since, if it is clear that some limit will be implied, it is wasted effort to decide what would be the extent of reparation were it not for those limits.

If it is necessary to determine what is full reparation, the problem raised is pure causation. Of course, only those consequences which were directly caused by the default can possibly be the subjects of compensation.[16] It is not suggested that the principles of causation are in any way different in tort and contract, nor could it be expected that they would be, in view of the fact that the policy of attempting full reparation is identical in both fields.[17]

When it comes to the problem of applying limits to full reparation, however, just as there are differences in the policies underlying tort and contract,[17] so there are differences in the principles by which damages are to be determined.

It is not suggested the principles are totally different. There are obvious similarities and overlaps. For instance in both fields there are limits justified by a direct appeal to public policy, and although the details of policy are different in each instance, and of course vary from time to time, the principle remains constant. Examples of such policy decisions in tort are the refusal to allow recovery for negligent misstatements in cases prior to *Hedley Byrne* v. *Heller*,[18] *Weller's Case*,[19] and *Margarine Union* v. *Cambay*

16. *Weld-Blundell* v. *Stephens* [1920] A.C. 956. *Clark* v. *Kirby Smith* [1964] 1 Ch. 506.
17. See part (a) above.
18. [1964] A.C. 465. c.f. *Le Lievre* v. *Gould* [1893] 1 Q.B. 491, *Chandler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.
19. *Weller* v. *Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569 in which case Widgery J. held certain economic loss could not be recovered despite the defendant's admission that they could have foreseen it.

Prince.[20] Examples from contract are the exclusion of recovery for injured feelings or reputation resulting from a breach of contract,[21] and the rule in *Bain* v. *Fothergill*.[22]

It is not these isolated limits which are of importance to the discussion but the general principles applicable to all cases. There is no doubt that the ability to foresee the actual consequences of a default is basic to the general limits in both fields, but its uses must be examined separately in each.

In tort there is no doubt that, in general, if the consequences of a default can be reasonably foreseen, damages are recoverable. Conversely, if no injury is foreseeable, no damages are recoverable.[23] In bringing greater precision to these concepts, two major problems have been examined by the courts in tort cases:

1. How great a degree of foresight is needed if liability is to follow?
2. How accurately need a man with reasonable foresight be able to predict the consequence of a default?

The first of these problems is scarcely answered by stating that the consequences must be reasonably foreseeable. However the introduction of the qualifier "reasonable" points to the existence of some foresight less than reasonable. The standard of foresight demanded of the reasonable tortfeasor has risen sharply in recent years. Part of Lord Atkin's renowned statement in *Donoghue* v. *Stevenson*[24] states the law as he saw it in 1932: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be *likely*[25] to injure your neighbour". Lord Clauson, in 1943, put the test this way: would a reasonable person "have had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which took place might well be expected."[26] In 1951 came *Bolton* v. *Stone*.[27]

In that case, a batsman hit a cricket ball out of the ground and onto an adjoining side road. Such a feat occurred once every few years. On this occasion the ball injured a passer-by who sued the cricket club. Clearly the occurrence was foreseeable in the sense that it was a conceivable possibility. Lord Porter held this to be not enough; "there must be sufficient probability to lead a reasonable man to anticipate it."[28] Lord Reid, after quoting the passage

20. [1967] 3 All E.R. 775.
21. *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488. *Withers* v. *General Theatre Comp. Ltd.* [1933] 2 K.B. 536.
22. (1874) L.R. 7 H.L. 158. For details and other examples of these policy limitations see Treitel, *The Law of Contract* (2nd ed. 1966) 668-672.
23. *Fardon* v. *Harcourt-Rivington* (1932) 146 L.T. 391.
24. [1932] A.C. 562, 580.
25. Italics added.
26. *Glasgow Corporation* v. *Muir* [1943] A.C. 448.
27. [1951] A.C. 850.
28. *Ibid.*, 858.

from Lord Atkin's speech set out above, allowed that the statement has been criticized as too wide and continued, "but I am not aware that it has been stated that any part of it is too narrow. Lord Atkin does not say 'which you can reasonably foresee could injure your neighbour': he introduces the limitation 'would be likely to injure your neighbour'."[29]

The problem of what standard of foresight should be demanded recently arose in *Wagon Mound* (*No.* 2)[30], the facts of which case are too well known to need recall. Few would differ from the view of Manning J.[31] that the chain of events leading from the escape of oil to the disastrous fire was made up of "improbability heaped upon improbability". In view of this, Walsh J., the trial judge, held that although there was a real risk, it was one which could properly be called remote and was as such not reasonably foreseeable. Lord Reid, delivering the judgment of the Privy Council, admitted this to be a possible interpretation of the authorities, but rejected it.[32] Even such an unlikely consequence cannot be disregarded unless there is some other sufficient reason for so doing. In *The Heron II*, Lord Reid stated the rule as follows: "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."[33] This formulation can leave little doubt that Lord Atkin's statement in *Donoghue* v. *Stevenson*[34] is indeed too narrow to be an accurate statement of the modern law.

So much for the first problem raised in tort. The second problem—how accurately need a man with reasonable foresight be able to predict the consequence of a default if liability is to follow—must now be considered. Lively controversy still surrounds this question, but the answer seems to lie between two extremes, the rule in *Re Polemis*[35] on the one hand, and certain statements in *Wagon Mound* (*No.* 1)[36] on the other. The rule stated in the former case is that, once injury of any sort is reasonably foreseeable, a person is liable for all the direct consequences of his act. In the latter case the necessity of liability for all the consequences of an act, however grave, following a finding that some trivial injury should have been foreseen is denied. It is said a man must only be responsible for the probable consequences of his act.[37] Whether either of these extremes is correct, or whether the true answer lies

29. *Ibid.*, 865.
30. [1966] 3 W.L.R. 498.
31. In his judgment in the Full Court of N.S.W. in *The Wagon Mound* (*No.* 1) [1961] S.R. N.S.W. 688, 718.
32. [1966] 3 W.L.R. 498, 512.
33. [1967] 3 All. E.R. 686, 692.
34. [1932] A.C. 562, 580.
35. *In re Polemis and Furness Withy & Co. Ltd.* [1921] 3 K.B. 560.
36. [1961] A.C. 388.
37. *Ibid.*, 422-423.

in the compromise that reparation must be made for all damage, no matter how unforeseeable it may be, provided it is of a foreseeable kind,[38] is a problem which is of no relevance to the present topic. This is because, whichever of these limits is applied, even the strictest one suggested in *Wagon Mound* (*No.* 1),[39] it has never been suggested that it would be in the slightest degree relevant to enquire if the amount of compensation which will have to be paid is greater or less than the amount which can reasonably be foreseen. If the ships damaged by the oil from the Wagon Mound had turned out to be research ships worth many times the value of any foreseeable ship, could the owners of the Wagon Mound have claimed this as a reason for reducing the compensation they had to pay? Surely not. The cases of the eggshell skull in personal injury and of Lord Justice Scrutton's "shabby millionaire" in the field of pecuniary loss resulting from personal injury are too well known to allow such an argument. They are representative, as Fleming says,[40] "of the truism that a tortfeasor cannot invoke the plea that he had no reason to expect his casualty to be so expensive". In tort, then, for each item considered, damages are recoverable in full or not at all. Recovery is not limited by reference to reasonable quantum.

In contract, no one doubts that *Hadley* v. *Baxendale*[41] is the source of the general rule for computing damages. No court would entertain any suggested formulation which ran contrary to the famous test formulated by Alderson B. in that case.[42] He said that compensation should be made for loss "such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."[43]

It has been asserted there are two differences between the rules discussed as applicable to tort and this rule. They will be examined in turn.

The first difference is in the degree of foresight demanded if liability is to follow. In contract, following Baron Alderson's test, the consequence must either be reasonably considered as following naturally from the breach, or be within the reasonable contemplation of the parties as the probable result of the breach. How unusual may a consequence be without falling outside the ambit of compensation? Could there be a consequence which is "reasonably foreseeable", as that is understood in tort, and yet which is not "within the reasonable contemplation of the parties as the probable

38. *Hughes* v. *The Lord Advocate* [1963] A.C. 837.
39. [1961] A.C. 388.
40. Fleming, *The Law of Torts* (3rd. ed. 1965), 188.
41. (1854) 9 Exch. 341.
42. Lord Reid in *The Heron II* [1967] 3 All. E.R 686, 690.
43. (1854) 9 Exch. 341, 354.

result of the breach", as that is understood in contract? If so, this clearly points to a difference between the rules of contract and tort.

The meaning of "within the reasonable contemplation of the parties as the probable result of the breach" underwent a considerable expansion in the ninety years following *Hadley* v. *Baxendale*.[44]

In 1887, the doubt was whether a probable result was compensable if it was not inevitable, as is shown by Lord Esher, M.R. who, speaking of Baron Alderson's test, said that the consequence need be contemplated by the parties "not as the inevitable but as 'the probable result of the breach'."[45]

In 1928, the rule was noteably less strict. In *Re Hall and Pim*[46] compensation was allowed for a result which could have been predicted as being equally likely to occur or not. Viscount Dunedin stated, "I do not think that 'probability' . . . means that the chances are all in favour of the event happening. To make a thing probable, it is enough, in my view, that there is an even chance of its happening."[47] Lord Shaw was prepared to allow compensation if the circumstances made "losses or damage a not unlikely result of the breach".[48]

In 1948, the House of Lords decided *The Monarch*.[49] The performance of a contract was delayed and in the meantime, World War II broke out, rendering performance impossible. The question was whether the intervention of war was a consequence which fell within the contractual rule. All the learned Lords held that it did and, with the exception of Lord Porter, none appeared to have any serious doubt about it. However, in formulating the rule a great variety of expressions were used. Lord Wright kept to the familiar contractual formula,[50] but Lords Porter and Uthwatt used the phrase "reasonable foreseeability" without any apparent consideration of whether these words, taken from the test in tort, were appropriate to contract.[51] Lord Du Parcq thought it enough if reasonable men could foresee the damage as at least a "serious possibility"[52] or, later, as a "real danger".[53]

At this stage, as we have seen, the rule in tort was that formulated by Lord Atkin in his speech in *Donoghue* v. *Stevenson*.[54] The rule in contract must have looked identical in practice. In 1948 it may well have been impossible to visualise any consequence, "reasonably foreseeable as likely to result" from a breach which

44. (1854) 9 Exch. 341.
45. *Hammond* v. *Bussey* (1887) 20 Q.B.D. 79, 88. See also *The Parana* (1877) 2 P.D. 118.
46. [1928] All. E.R. Rep. 763.
47. *Ibid.*, 767.
48. *Ibid.*, 769.
49. *Monarch Steamship Co. Ltd.* v. *Karlshamms Oljefabriker* [1949] A.C. 196.
50. *Ibid.*, 221.
51. Lord Porter *ibid.*, 214-215; Lord Uthwatt *ibid.*, 231.
52. *Ibid.*, 233.
53. *Ibid.*, 234.
54. [1932] A.C. 562, 580.

was not also "reasonably contemplatable as the probable result" of that breach. Small wonder that Asquith L. J. sought to rationalise the law by making the two rules, apparently equivalent in practice, equivalent also in form. This he did when delivering the judgment of the Court of Appeal in *Victoria Laundry* v. *Newman Industries*[55] where he set out a series of rules applicable to contract cases of which the following extracts are relevant to this issue:—

Rule (2) "The aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach."

Rule (5) " . . . it is not necessary that he should actually have asked himself what loss was liable to result from a breach . . . . It suffices if . . . a reasonable man [would] have concluded that the loss in question was liable to result."

Rule (6) " . . . it is enough . . . if the loss . . . is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result."

This formulation has been uniformly acclaimed by courts and text-book writers alike, and its popularity may well have been that it underlined the apparent unity of the law. This very feature was the one singled out by Lords Reid and Upjohn in *The Heron II* as the reason for criticising the case,[56] while the other three Lords, who expressly approved of Asquith L. J.'s formulation, explained it so as to show that the significance hitherto attached to it as unifying the law, was misplaced.[57]

The degree of foresight needed is not the same in contract and tort. While the area of liability has been expanded in tort so that its bounds are now those set out in *Wagon Mound* (*No.* 2),[58] as has been shown,[59] the area of contractual liability, despite the diverse formulations of the rule, has remained static at least since *Re Hall and Pim*.[60] That is the result of dicta in *The Heron II*.[61] For example, Lord Reid said, "It is generally sufficient that that event would have appeared to the defendant as not unlikely to occur . . . I do not find in that case,[62] or in cases which preceded it, any warrant for regarding as within the contemplation of the parties any event which would not have appeared to the defendant, had he thought about it, to have a very substantial degree of probability."[63]

55 1949 2 K B 528, 539-540
56. Lord Reid 1967 3 All E R. 686, 694. Lord Upjohn *ibid.*, 717.
57 Lord Morris *ibid*, 700. Lord Hobson *ibid*, 708. Lord Pearce *ibid*, 112
58. 1966 3 W L R 498
59 See pp 123-124 above.
60 1928 All E R Rep 763
61. 1967 3 All E R 686
62 Referring to *Re Hall and Pim* 1928 All. E R Rep 763.
63 1967 3 All. E R 686, 693

Lord Upjohn makes a plea that, once the tests in tort and contract are acknowledged to be different, the concept of "foresight" be reserved for tort while that of "contemplation" be reserved for contract.[64] With respect, this seems a sound idea. If "reasonable foresight" is used in both fields to mean different things, confusion is certain to arise in any but the most agile minds.

Why the tests are different has already been discussed. The additional policy for limiting damages in contract is at work. In *Victoria Laundries* v. *Newman Industries*[65] the facts were as follows: the defendants had contracted to supply the plaintiffs, who were launderers and dyers, with a boiler for use in their business. The plaintiffs had indicated that they wanted urgent delivery, but on the appointed day the boiler was damaged and considerable delay was occasioned while the defendants had it repaired. The delay led to the plaintiffs losing certain government contracts which would have been far more lucrative than was at all likely. The very heavy loss of profits flowing from the loss of these contracts (£262 per week) could not be recovered. Why did the court protect the wrongdoer at the expense of the injured party? Because its policy of disclosure had not been heeded. When the suppliers of the plant were deciding whether or not to undertake the duty, they were at liberty to assess the probable consequences of failure. They did not have to take into account possible but highly unlikely results of the sort which occurred, because, if the buyers wished to hold them to compensate such losses they should have disclosed their likelihood. The tort test in *Wagon Mound* (*No.* 2)[66] would be quite unsuitable to further this policy. This view is supported in part, if not fully, by authority.[67]

The second alleged difference between the rules of tort and contract is that in tort the rule of foresight is applied to the kind of damage, not its quantum, whereas in contract the main use of the contemplation rule is to limit quantum. As has been said,[68] in tort, for each separate item, damages are recovered in full or not at all. A consideration of the policy discussed in part (a) above leads one to expect a different result in contract. In tort, the way the default occurs may be all important, but in contract it is the extent of the duty shouldered at the time of contract which is vital. The extent of this duty is measured at least as much by the amount to be paid in compensation as by the way in which the compensation becomes payable. The cases show that these expectations are well founded. Two will suffice as examples.

64. *Ibid.*, 716.
65. [1949] 2 K.B. 528.
66. [1966] 3 W.L.R. 498.
67. Lord Reid in *The Heron II* [1967] 3 All. E.R. 686, 692; Lord Upjohn *ibid.*, 716; Blackburn J. in *Cory* v. *Thames Ironworks Co.* (1868) L.R. 3. Q.B. 181, 190-191.
68. See p. 125 above.

In *Victoria Laundry* v. *Newman Industries*[69] the court found that it was reasonable for the suppliers to foresee that the boiler would be used to create profit. In Lord Upjohn's terminology, no doubt they contemplated (or should have contemplated) loss of profits as the not unlikely result of their delay in delivering the boiler.

It was equally possible to contemplate that the profit might have been made either by using the boiler in a laundering or dyeing process. The thing which could not be contemplated was the *quantum* of loss which was in fact suffered. No one could have expected government contracts worth £262 per week. However the launderers were allowed a claim for lost profits, not the amount they may well have been able to show they had suffered, but a conjectural amount, far less in quantum: the amount which the suppliers should have contemplated as the natural loss of profits to result from their breach. The launderers were denied greater recovery because they had failed to reveal the special circumstances which were to magnify their claim.

In *Cory* v. *Thames Ironworks Co.*[70] the plaintiff sued for damages resulting from delay in delivering the pontoon of a floating boom derrick they had bought. The sole question was quantum of damages. The suppliers admitted they realised it was highly likely that the pontoon was being purchased with a view to its being used in a profit making way. The mode of using the pontoon which a reasonable man would have contemplated, and which the suppliers did contemplate, was as a coal store in the bulking trade, and used in this way the pontoon would have realised profits over the period of delay which were assessed at £420. In fact Cory never used it as a coal store. They used it, as they always intended they would, in a way quite beyond anyone's contemplation, as an integral part of a revolutionary method of loading and unloading coal barges. This use would have yielded the unforeseeable profit of something like £4,000 during the period of delay.

What would Cory have recovered under the tort rules? All or nothing. It may be that a Court would hold that the loss of profits in using the pontoon as intended was not reasonably foreseeable and hold the suppliers not liable at all. Otherwise they might hold that the kind of consequence suffered was loss of profitable use of the pontoon, which was a reasonably foreseeable type of loss. On this view the suppliers would be liable in full. The fact that the loss was unforeseeably high, £4,000, would not be to the point. It is suggested that, in tort, one could not reach the conclusion that the damages should be £420, the reasonably foreseeable quantum of loss which would have occurred had the pontoon been used in a way it never was used and never was intended to be used. Yet this is precisely

69. [1949] 2 K.B. 528.
70. (1868) L.R. 3 Q.B. 181.

the result which was achieved by an application of the rules of contract.

It was admitted on all hands that £4,000 could not be recovered. It was not the quantum of loss to be contemplated, and no disclosure of special circumstances had been made by Cory, which was hardly surprising, in view of the price of £3,500 they had paid for the pontoon. On the other hand they did claim the loss which would have flowed from the consequence the suppliers did contemplate, namely £420. The suppliers objected that it was irrecoverable because Cory had never suffered that loss. That was the loss he would have suffered, if his intentions had been completely different from those he in fact held. This argument was rejected. Cory had suffered a direct loss far greater than anything which could have been contemplated. Even though the exact nature of the loss of profits was beyond contemplation, this did not prohibit recovery But the quantum recovered was limited. It was limited to the amount which the suppliers could reasonably contemplate as the extent of the duty which they undertook when they contracted to deliver the pontoon by a fixed date. Cory recovered £420.[71]

(c) *The relevance, in contract, of the injured party's foresight of the consequence.*

The basic reason suggested for the difference between the rules of contract and tort is the policy of disclosure in contract. The claim of the injured party is limited because he did not disclose the special features which were to increase the quantum of damage beyond the reasonably contemplatable maximum. The imposition of such a limit would be grossly unjust, unless the injured party had reason himself to contemplate the existence of such special features. If justice is to be done, when special features occur to swell the damage which are equally unforeseeable both to the guilty and the innocent party, then the policy of disclosure should be ignored, and a test analogous to that in tort applied.

The cases discussed above[72] all concern situations where the court's policy of penalizing non-disclosure was employed to the full, because the innocent parties all knew, or should have contemplated, the increased quantum of damage at the time they made their various contracts.

In *Great Lakes Steamship Co.* v. *Maple Leaf Milling Co.*[73] the situation was quite different. The defendants had a depot at the

71. A further example is *Horne* v. *Midland Ry. Co.* (1873) L.R. 8 C.P. 131, where quantum was limited to the amount reasonably foreseeable by the guilty party, after allowance had been made for partial disclosure of the special circumstances by the innocent party.
72. *Hadley* v. *Baxendale* (1854) 9 Exch. 341; *Victoria Laundry* v. *Newman Industries* [1949] 2 K.B. 528; *Cory* v. *Thames Ironworks* (1868) L.R. 3 Q.B. 181; *Horne* v. *Midland Ry. Co.* (1873) L.R. 8 C.P. 131.
73. (1924) 41 T.L.R. 21.

easterly end of Lake Erie, where, as the winter approached, the water level was likely to drop as much as 3 feet, just before the lake froze. The plaintiffs had a ship to be unloaded there, and because such a drop in the water level would cause their ship to rest on the bottom, they stipulated for speedy unloading. The defendants did not bother to unload quickly, probably because they knew the bottom of the lake was rock which had been carefully levelled. They did not expect the ship would be damaged if it did rest on the bottom. Before the ship was unloaded, the water level dropped, the ship rested on the bottom, and the lake froze. Unfortunately, and quite unknown to anyone, a large anchor lay on the bottom where the ship grounded and as a result she was damaged to the extent of some $40,000. The defendants were liable for breach of their promise to unload speedily. The quantum of damage was enormously greater than either party could possibly have contemplated, yet no policy can be suggested for limiting recovery to what the defendants should have contemplated. The plaintiffs never could have disclosed the presence of the anchor. Yet if the rule in *Hadley* v. *Baxendale*,[74] however interpreted, were applied, the plaintiffs could not recover the full loss. The Privy Council held that the breach of contract was the immediate cause of the damage and that "the precise nature of the damage incurred by grounding is immaterial,"[75] and awarded the full amount of damages, over $40,000. The problems of the rule in *Hadley* v. *Baxendale* were apparently not discussed. On the view adopted in this article, they were not relevant.[76]

(d) *Examples of the differences at work.*

At this stage it is proposed to examine the results of these differences as the rules of contract and tort are applied to various hypothetical fact situations in each of which an injured party claims compensation for loss of earnings resulting from a personal injury.

If an average man is injured through careless driving and as a result must spend ten days off work, it is clear he can recover from the driver any loss of earnings he may suffer during those ten days.

If an average man engages a surgeon to perform a minor operation, but due to the surgeon's admitted carelessness, he has to spend ten days longer off work than would normally be the case, it is reasonably clear that he too can recover his loss of earnings, if he brought his action upon his contract with the surgeon. That is a consequence which the surgeon should contemplate as a

74. (1854) 9 Exch. 341
75. (1924) 41 T.L.R. 21, 23.
76. It is submitted that this explanation of the case is preferable to the allegation that there are special rules of remoteness in contract applicable to direct physical consequences of breach. Treitel, *The Law of Contract* (2nd. ed. 1966), 665.

not unlikely result of his breach of contract in failing to take proper care in the conduct of the operation.

If a pop-singer with a gigantic earning power were injured as a result of careless driving and was unable to appear for ten days, he too could recover his actual loss of earnings from the driver. The fact that the quantum of loss is unforeseeable is irrelevant.

Suppose such a pop-singer were to engage a surgeon as in the earlier example. If he uses his real name, rather than his stage name, and does not disclose his true identity to the surgeon, how much will he recover from the surgeon if he brings his claim in contract? The surgeon could not reasonably contemplate the actual loss of earnings, although he ought to contemplate some lesser amount. It is submitted that the singer would recover no more than the maximum loss of earnings which could normally be expected to result from ten days' incapacity, however such figure may be assessed.

If the singer brought an action against the surgeon in tort, how could the position be distinguished from the similar action against the driver in the earlier example? In tort, it is submitted, he would recover the full extent of his loss.

Here is a serious anomaly. That two different amounts should be recovered in contract and tort is unfortunate. The seriousness of the anomaly is apparent when it is remembered that in some cases the existence of a contractual relationship extinguishes the tort duty.[77]

Suppose an architect contracted to design a house for a member of a group of pop-singers, but had no reason to guess the occupation of his client. The design was so inferior that the ceiling fell upon the members of the group, injuring them and incapacitating them for a month. Is it the case that all the group but the owner of the house can recover their loss of earnings in full in tort, while the unhappy owner is confined to the reasonable earnings a month might be expected to bring? A surprising result but one which may be contemplated as a not unlikely consequence of the authorities.

Although it is anomalous that different results may follow according to whether an action is brought in contract or in tort, it may be preferable to accept the anomaly rather than to adopt any other solution. To cure the anomaly, either recovery in tort actions must be limited by reference to quantum, to bring tort in line with contract, or recovery in contract must be freed from limit by reference to quantum. It is submitted there is no justification for adopting the former course: to do so would be to invite a possible tortfeasor to speculate as to whether it is more profitable to prevent the breach of duty or to commit the breach and pay for the consequences that are not unlikely, knowing he will be shielded from an unexpectedly high claim. It would, of course, leave the "egg-shell skull" case

77. *Bagot* v. *Stevens Scanlon & Co.* [1964] 3 All E.R. 577.

at risk in all cases where the normal man would not be seriously injured. On the other hand to expand recovery in contract, by allowing recovery even for consequences beyond the contemplation of the party in breach and yet known to be likely by the other party, would be to abandon the only sanction the courts have developed to encourage the frank disclosure of relevant but unusual factors known to one party at the time of the contract as likely to aggravate the quantum of damage. It is submitted that the present divergence between the principles in contract and tort, although it may give rise to anomalous results in a small minority of cases, is preferable to the alternatives.

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