REMOTENESS OF DAMAGE IN CONCURRENT LIABILITY CASES

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1. Introduction

(a) The general issue - remoteness distinguished from factual causation – a normative enquiry, a value judgment, about what the defendant's responsibility *ought to be* for losses s/he undoubtedly factually contributed to:

> *The second inquiry, although this is not always openly acknowledged by the courts, involves a value judgment ('...ought to be held liable...'). Written large, the second inquiry concerns the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable (the epithets are interchangeable) ... the inquiry is whether the plaintiff's harm or loss should be within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question. The law has to set a limit to the causally connected losses for which a defendant is to be held responsible.* (*Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19 per Lord Nicholls)

(b) The particular issue – traditionally the tests for remoteness of damage in contract and in tort (specifically, the tort of negligence) have been different – degree of foresight and timing

AND the difference is more obvious since the decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48.

- What is the appropriate remoteness test in professional negligence actions with concurrent liability in contract and tort? The tort test, the contract test, or a hybrid?

- Practical significance - is remoteness of damage (like limitation of actions) a further adventitious factor that gives a claimant an *advantage* by suing in the tort of negligence, rather than for breach of contract? Lord Goff raised this question in *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506:

"This [the difference in the limitation regimes] leads to the startling possibility that a client who has had the benefit of gratuitous advice from his solicitor may in this respect be better off than a client who has paid a fee. Other practical problems arise, for example, from the rules as to remoteness of damage, which are less restricted in tort than they are in contract..."

2. Back to basics - paradigms in negligence and breach of contract

TORT OF NEGLIGENCE:	BREACH OF CONTRACT:
1. Reasonable care	1.Strict liability
2. Obligation imposed by general law	2. Obligation voluntarily undertaken
3. Parties are strangers – law must allocate risk	3. Parties not strangers – contract *in order to* allocate risk and delineate scope/extent of responsibilities
4. Personal injury	4. Financial "loss" (of expected profit)
5. Remedy – claimant put back into position as if tort had not occurred	5. Remedy – claimant put into position as if contractual obligation had been performed

Where does liability in tort (under *Hedley Byrne v Heller*) in a concurrent liability professional negligence action fit?

Clear that *Hedley Byrne v Heller* liability is far closer to the breach of contract paradigm than to the negligence paradigm, as it is based on an objective assumption of responsibility, in circumstances 'akin to contract'.

3. An irrelevance - remoteness of damage in tort of negligence paradigm

Wagon Mound (No. 1) [1961] AC 388 - "foreseeability of the type of harm as necessary / sufficient test"

In practice, this has been interpreted into redundancy:

- Not exclusive:
    - Foreseeable third party interventions can nonetheless exonerate the defendant: *Topp v London Country Bus (South West) Ltd* [1993] 3 All ER 448
    - *SAAMCO* principle applies: *Darby v National Trust* [2001] EWCA Civ 189

- Not meaningful:

    - ‘Extent’ of damage does not have to be foreseeable as long as ‘type’ of damage is: *Smith v Leech Brain & Co Ltd* [1961] 3 All ER 1159

    - ‘Precise concatenation of events’ does not have to be foreseeable as long as ‘type’ of damage is: *Hughes v Lord Advocate* [1963] 1 All ER 705

    - Meaning of ‘type’ wholly watered down: *Page v Smith* [1995] 2 All ER 736

    - Infinitesimally unlikely events regarded as ‘foreseeable’: *Wagon Mound (No 2)* [1967] 1 AC 617

4. The courts’ approach in concurrent liability professional negligence actions

Most explicitly apply just the contract test (both pre and post *Achilleas*), eg:

Brown v KMR Services Ltd [1995] 4 All ER 598;
Nahome v Last Cawthra Feather [2010] PNLR 19

Others regard the tests as the same, but in substance adopt the contract test, eg:

Nationwide Building Society v (1) Dunlop Haywards Ltd and (2) Cobbetts (a firm) [2009] EWHC 254 (Comm)
Rubenstein v HSBC Bank plc [2012] EWCA Civ 1184

It is almost impossible to find a case which explicitly adopts the tort test. One example:

Brickhill v Cooke [1984] 3 NSWLR 396 – correctly decided?

This is unsurprising if we consider the *features* of the paradigm cases that explain the difference in the remoteness tests:

Contract

- Opportunity to adjust price / add terms etc so rule encourages parties to draw unusual risks to the other’s attention

- The parties delineate the extent and scope of the relevant obligations (cf *SAAMCO* incoherent in a common law duty of care case) – remoteness rule now explained in *The Achilleas* as part of the process of contractual interpretation

Tort

- The parties were strangers – so remoteness can only be an external rule, concerned only with fairness between the parties

- Why should that 'value judgment' external rule allocate to the injured claimant *any* risk of damage caused by the negligent defendant's unreasonable behaviour? The irrelevance of foreseeability?

5. Beyond foreseeability – how *Achilleas* issues might arise in professional negligence actions

- *SAAMCO* is invariably restrictive (loss irrecoverable even if foreseeable), whereas *The Achilleas* can also be expansive (loss recoverable even if unforeseeable) – *Supershield Limited v Siemens Building Technologies FE Limited* [2010] EWCA Civ 7.

- Relevance of status of client and degree of disparity of expertise? Is the client an amateur member of public or a sophisticated experienced business entity - *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184 para [123]

- Relevance of extent to which defendant's conduct fell below objective standard of reasonable care? *Henderson t/a Henderson Group Development v Wotherspoon & others* [2013] PNLR 28