Neutral Citation Number: [2011] EWCA Civ 644

Case No: A1/2010/2105

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
MR JUSTICE AKENHEAD
[2010] EWHC 1852 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2011

Before :

LORD JUSTICE PILL
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE JACKSON

Between :

Conarken Group Limited and Farrell Transport Limited	**Appellants**
- and -	
Network Rail Infrastructure Limited	**Respondents**

Andrew Bartlett QC, Jonathan Hough and James Purnell (instructed by **Greenwoods Solicitors**) for the **Appellants**
Jeffery Onions QC, David Drake and Alexander Polley (instructed by **Hay & Kilner Solicitors**) for the **Respondents**

Hearing dates : 5 & 6 April 2011

Judgment Approved by the court for handing down (subject to editorial corrections)

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LORD JUSTICE PILL :

1. This is an appeal, with permission of the trial judge, against a decision of Akenhead J dated 21 July 2010 whereby he awarded damages to Network Rail Infrastructure Limited ("the respondents") against Conarken Group Limited and Farrell Transport Limited ("the appellants"). In 1996 the railways came out of nationalised public ownership and were privatised. The privatisation involved the setting up of Railtrack as the company responsible for the rail track system and the introduction of companies which would operate the trains on that system. Train operating companies (TOCs) were awarded franchises to operate on different parts of the system. In 2002, Railtrack returned effectively to government ownership and became known as Network Rail.

2. In the first named case, the award was in the sum of £293,732.32 plus interest, and in the second £1,017,144.66 plus interest. In each case, physical damage had been caused to railway property owned by the respondents and caused by the negligent driving on the highway of drivers employed by the appellants. Liability for the cost of repairing the property was admitted; the issue was as to the extent of the appellants' liability for other losses claimed. The cases were brought as test cases, accidents of this kind regrettably being quite frequent.

3. In July 2002, the negligence of Conarken's driver at Howden, Yorkshire caused damage to the parapet walls of a railway bridge and rubble was strewn on the railway tracks. The line was closed for five days while repairs were carried out. On 10 May 2003, the negligence of Farrell's driver at Bathley Lane, Newark, resulted in the detachment of overhead electric cables which affected the use of the East Coast Main Line ("ECML") for about seven hours.

4. In addition to the cost of repairs, which in the Newark case was less than £5,000, the respondents claimed damages calculated on the basis agreed in contracts between them and TOCs using the respondents' tracks, known as Track Access Agreements. In the Newark case, damages of over £1,000,000 were claimed and ordered under this head. Schedule 8 of the contracts between the respondents and the TOCs provided a way of calculating what, as between the parties to the contracts, was the agreed financial loss suffered by the TOCs as a result of the incidents and the service disruptions that flowed from them. In the Newark case, almost all the sum so calculated was payable to GNER, who ran trains on the ECML. Small sums were payable to ten other TOCs. The major part of the schedule 8 loss at Howden was payable to Arriva with much smaller sums to three other TOCs.

5. The schedule 8 calculations included two elements known as MRE (marginal revenue effect) and the societal rate. As defined by the judge at paragraph 23 of his judgment:

> "The MRE is the estimated effect on the TOC's revenue of one minute of average lateness whilst the Societal Rate represents a payment rate per minute of average lateness in the context of the franchise performance regime between the TOC and the franchising authority."

We were told, as an indication of their relative importance, that of the very large sum paid to GNER following disruption of traffic on the ECML, 85% was MRE and 15% societal rate.

6. The societal rate arises from franchise agreements made between the franchising director (now the Department of Transport) and TOCs under the Railways Act 1993. These agreements are confidential and were not before the court. The respondents are not a party to them and do not know their terms. They provide benchmarks for calculating monetary penalties payable by the TOCs to the franchising director in the event of poor performance.

The issue

7. I put the issue in summary form. The respondents' claim based on the schedule 8 calculations is straightforward; it was foreseeable that the respondents would suffer a financial loss as a result of physical damage causing disruption of traffic on their tracks. That would involve a liability to TOCs. The respondents made Track Access Agreements with TOCs as to how the losses sustained by TOCs should be calculated. How the calculation is done is irrelevant to the issue between respondents and appellants. The liability of the respondents to pay sums to the TOCs under the contracts was a foreseeable and direct result of the negligent acts which damaged the respondents' apparatus.

8. The appellants submitted that, even if schedule 8 of the agreements between the respondents, whose property they damaged, and the TOCs, was, as between the parties to the contracts, a reasonable way of assessing loss, it does not bind the appellants. They are not party to the agreements and the agreements cannot bind them, as tortfeasors, to pay the contractual sums. Tortious principles apply, and on their application they are not liable to the respondents for the sums claimed.

9. Had the TOCs, whose property had not been damaged, been claimants, they could not have recovered damages from the appellants in tort. The judge agreed with that proposition stating, at paragraph 62(g):

> ". . . The reality is that, under the law as it now stands and has stood for many years, these Defendants would never have been liable in negligence to the TOCs for those losses because no property of the TOCs was physically damaged. The losses would therefore never have been recoverable directly by the TOCs."

That finding is not challenged by the respondents. The introduction of a contractual entitlement in the TOCs, as between them and the respondents, does not necessarily create a liability in the appellants, it was submitted.

10. Mr Onions QC, for the respondents, submitted that they suffered their own loss and are not recovering the TOCs' losses. How the respondents' losses are made up and how they would be categorised in the hands of a third party such as the TOCs is simply irrelevant. The respondents' losses are simply the contractual liabilities incurred as a result of incidents. How and why that contractual sum is precisely

calculated is a matter of detail in the determination of the particular extent of what is a recoverable type of loss, financial loss. It is irrelevant to a remoteness enquiry in tort.

11. The appellants do not challenge the reasonableness of the schedule 8 calculations as a way of assessing how loss is to be apportioned between the parties to the Track Access Agreements, of which schedule 8 is a part. That I understood to be the limit of the appellants' concession. They do not concede that whatever parties to the Track Access Agreements choose to put in them governs the extent of a tortfeasor's liability to the respondents.

12. I doubt whether Mr Bartlett would challenge the proposition expressed in this case by Moore-Bick LJ at paragraph 99. The issue, Moore-Bick LJ states, is "whether a loss in the form of a liability to make Schedule 8 payments to the TOCs under the Track Access Agreements was within the scope of the appellants' duty and not too remote in law to be recoverable". The issue is whether the mere presence, in an agreement between the respondents and the TOCs, is enough or whether the heads of damage in the Agreements must, before the tortfeasor is held liable, also be tested according to the tortious principles stated by Moore-Bick LJ.

Loss on the day, MRE and the societal rate

13. Liability to pay losses which occurred immediately upon the disruption, such as train crew overtime, additional fuel, buses and taxis for passengers is not in issue. That was explained by Mr Angus, the respondents' analysis and forecasting manager, at paragraph 40 of his statement. "When an incident occurs which causes delay or cancellation to trains, TOCs generally suffer relatively little loss of revenue on the day concerned." In his oral evidence, Mr Angus put it in this way:

> ". . . the amounts of those kinds of expenses are hugely relatively limited compared to a revenue loss. You can take 500 people going from London to Edinburgh and you are looking at £10,000, £20,000 worth of revenue on a train; if you have to hire a bus or two to get them there, it's pretty small beer."

14. Mr Angus added, at paragraph 42:

> "Most of the revenue lost from poor performance is therefore not suffered on the day in question. It is suffered in the future, as passengers affected by delays or cancellations (or indeed people who hear about experiences of delays and cancellations from others) are less likely to travel by rail in the future."

15. The concept of delay attribution was explained in the respondents' opening note for the trial. The respondents investigate the causes of delays and a staff of about 250 are employed in the procedure. A Delay Attributor investigates the cause of the loss of time and allocates it to the particular incident which is responsible. Computer systems are then used to calculate the appropriate consequences under schedule 8. The calculation of MRE is based on a document known as the Passenger Demand Forecasting Handbook. In his evidence, Mr Angus referred to the research on the impact of delays on rail passengers. As recorded by the judge at paragraph 32, Mr

Angus said "ultimately the product of the approach and formulae within schedule 8 clearly involves a reasonable assessment approach as to what the losses relating to delay are". This was a genuine pre-estimate of damage suffered by the train operating companies, submitted Mr Onions. It was not a penalty.

16. The judge summarised Mr Angus's evidence at paragraph 33:

> "He accepted that, although the MRE was unlikely to be perfect, it was the best available estimate of the effect of performance on passenger demand. He went on to consider the accuracy or reliability of the MRE in relation to the specific incident and explained, logically, that passengers are different. He described the "tipping point" at which an individual passenger's travelling behaviour begins to change compared with what it would have been if there had been no incident. One passenger might give up travelling on the railways as the result of one incident whilst, for another more hardened traveller, it might take 10 incidents spread over six months or a year."

The assessment depends, as Mr Bartlett QC for the appellants submitted, on potential customers being put off travelling by train by incidents such as this because of worries that they may recur.

17. MRE was said by Mr Angus to be "clearly about damage to people's perceptions as to how likely they are to arrive on time if they ever travel by rail again . . . It's simply about putting a value on the impact on their future demand".

18. The judge further described the arrangement at paragraph 35 of his judgment, by reference to the evidence of Mr Angus:

> "He concluded that the MRE component of the Schedule 8 payments was designed to compensate the TOC for loss of revenue although only a small proportion of this would relate to a loss of revenue on the day of the incident and most would be expected to occur in the future. He said that "the MRE reflects loss of revenue, loss of fares revenue gain by passengers to the operator". He also accepted that this loss of revenue is to a large extent predicated upon the perception of passengers in effect of the reliability of the rail service as affected by given and in particular the longer delays over and above the timetabled times. It is accepted even by the [appellants] that the MRE represents a genuine attempt based upon the findings of market research and economic forecasting methods to place a monetary value upon what is believed to be the commercial damage that may have been suffered by either or both the TOCs and Network Rail following delays to the rail service. The Societal Rate compensated TOCs for what they would have to pay the franchising authority; and there is no doubt that it relates to the TOCs' liability to the franchising authority (now the Department for Transport). This reflects incentives and

> disincentives imposed for policy and possibly political reasons."

19. The concept of societal rate was also explained in a document issued by the Office of Passenger Rail Franchising's Passenger Rail Industry Overview ("PRIO"), dated June 1996:

> "Franchise agreements will include a performance incentive regime . . . where the Franchising Director believes the market is too weak to motivate the relevant franchise operator to respond adequately to customer demands for a punctual and reliable train service."

Mr Angus said in evidence:

> "societal rate, in terms of the incentive placed by the DFT onto train operators is not the – was not, to my knowledge, the subject of extensive consultation within the industry. That is simply a – that is not to say there isn't a lot of work and thought behind it, I don't think these figures were plucked out of the air, but again, it is a different sort of mechanism. What sets the franchise agreement is essentially a mixture of government policy, what it would like to achieve, how much it is willing to pay to achieve it, and the mechanisms by which it wants to achieve it, a financial incentive or not, for instance, and that is largely about, essentially, government policy aims and its intentioned budget and the commercial side in terms of a franchising competition."

Mr Angus also described its purpose:

> "to sort of reflect the value or the sort of disbenefit – the disutility, an economist might say – that poor performance will have on commuters".

Authorities, submissions and discussion

20. Submissions were developed by reference to authority. Mr Bartlett submitted that there must be an analysis of the losses claimed to decide those for which the appellants should be responsible. Reliance is placed on the approach of Lord Nicholls of Birkenhead in *Kuwait Airways Corpn v Iraqi Airways Co (Nos. 4 and 5)* [2002] 2 AC 883, at paragraph 70:

> "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). To adapt the language of Jane Stapleton in her article 'Unpacking "Causation"' in Cane and Gardner (ed) *Relating to Responsibility* (2001), page 168, 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. In the ordinary language of lawyers, losses outside the limit may bear one of several labels. They may be described as too remote because the wrongful conduct was not a substantial or proximate cause, or because the loss was the product of an intervening cause. The defendant's responsibility may be excluded because the plaintiff failed to mitigate his loss. Familiar principles, such as foreseeability, assist in promoting some consistency of general approach. These are guidelines, some more helpful than others, but they are never more than this."

21. Reliance was also placed on the judgment of Sir Anthony Evans in *Mulvenna v Royal Bank Scotland Plc* [2003] EWCA Civ 1112, at paragraph 33. When considering remoteness, Sir Anthony Evans stated:

> "the chain of consequences is cut off as a matter of law, either because it is regarded as unreasonable to impose liability for that consequence of the breach (*The Pegase* [1981] 1 Lloyds Reports 175 Robert Goff J), or because the scope of the duty is limited so as to exclude it (*Banque Bruxelles SA v. Eagle Star* [1997] AC 191), or because as a matter of commonsense the breach cannot be said to have caused the loss, although it may have provided the opportunity for it to occur (*Galoo Ltd. V. Bright Grahame Murray* [1994] 1 WLR 1360)."

22. In *Banque Bruxelles SA* Lord Hoffmann, with whom the other members of the court agreed, stated, at page 211H:

> "A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered."

Lord Hoffmann, at page 212B, cited the speech of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [1992] AC 605 at 627, which is cited below, at paragraph 30.

23. Mr Bartlett submitted that the appellants had no duty to prevent financial loss as such to the respondents. Their liability was limited to losses truly consequent on the physical damage. That did not extend to the possibility of customers experiencing or even hearing of the incident not coming back to the railway. What was reasonable as between the respondents and the TOCs as a formula for assessing what payment should contractually be made could not decide the boundaries of the appellants' tortious liability to the respondents. That required analysis of the nature of the

damages claimed. It was not enough to say that it was the kind of damage which may have been foreseen, that is financial loss, analysis of the losses claimed and the way in which they are calculated is necessary to decide the extent of the appellants' liability.

24. Mr Bartlett referred to the judge's finding at paragraph 62H:

> "It is irrelevant to consider what for instance the old British Rail, that is the organisation that historically owned the rail track and ran the train services before privatisation, would have been able to sue for. One needs to look at the position of Network Rail which only owns the rail track. The United Kingdom is one of a number of countries in the world which has moved from a nationalised and unified railway system to a privatised one. It would be unfortunate, at least, if the law was not able effectively to give redress to reflect the changed state of affairs of ownership and responsibility in relation to the organisation which owns the track (and bridges over and under it and level crossings). The law can give such redress consistently with established principle."

Equally, the respondents should not be better off by reason of the organisational change than British Rail would have been, Mr Bartlett submitted. They could not rely on the contract to establish a liability in tort against the appellants which would not otherwise have existed.

25. Mr Bartlett has not disputed the charges under schedule 7 of the agreements between the respondents and the TOCs, which deals with track charges. The tortfeasor is liable for the respondents' loss of revenue as a result of receiving fewer track charges while their tracks are not useable by TOCs. The objection is to what are described in schedule 7 as "additional permitted charges" which include amounts calculated in accordance with the provisions of schedule 8.

26. Mr Bartlett submitted that the appellants owed the respondents no duty in respect of their financial position under their contract with TOCs, or in respect of the reputation of the railways for reliability in the minds of the travelling public. These include policy-based penalties for lateness and predictions of losses to be suffered by TOCs over an indefinite period anywhere on the rail network by reason of customer reaction to the incident. The sums do not fairly or reasonably relate to the physical loss of use of their tracks suffered by the respondents.

27. The appellants should not have to pay for the financial consequences of "knock on" effects of the incidents on a range of companies across the rail network, some of which did not even run trains on the damaged track. Moreover, loss dependent on future customer choices driven not by the incident itself but by fear of future incidents was too remote to be recoverable. To define the kind of loss as the respondents' loss of revenue under the contract is too broad. The court has a responsibility to ensure that the scope of liability is kept within proper bounds. That was particularly important when, the respondent being in a monopoly position, there was no market by which the reasonableness of the amounts claimed can be judged.

28. Though the point does not fall for decision, Mr Bartlett also submitted that, even if the TOCs' equipment had suffered physical damage as a result of the incidents, it would not have been open to them to claim the sums provided in schedule 8. As defined, the sums claimed would have been too remote.

29. The court has been addressed on the concepts of foreseeability, scope of duty, causation, remoteness and reasonableness familiar in this area of the law. The boundaries of tortious liability ebb and flow and, however carefully calculated, the damage contemplated in schedule 8, and in particular the MRE element, is some way removed from physical damage causing a comparatively short loss of use of railway tracks.

30. Lord Bridge of Harwich, in *Caparo Industries plc* at page 627, stated the test to be applied:

> "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless. 'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.' see *Sutherland Shire Council v. Heyman*, 60 A.L.R. 1, 48, per Brennan J. Assuming for the purpose of the argument that the relationship between the auditor of a company and individual shareholders is of sufficient proximity to give rise to a duty of care, I do not understand how the scope of that duty can possibly extend beyond the protection of any individual shareholder from losses in the value of the shares which he holds. As a purchaser of additional shares in reliance on the auditor's report, he stands in no different position from any other investing member of the public to whom the auditor owes no duty."

31. At page 643F, Lord Oliver of Aylmerton rejected a submission that "appears to equate 'proximity' with mere foreseeability". That was a misinterpretation of the effect of the decision in *Anns v Merton London Borough Council* [1978] AC 728 and was decisively rejected in later cases. Lord Oliver also cited the decision of the High Court of Australia in *Heyman*. His citation included the following passage:

> "That is not to say that a plaintiff who suffers damage of some kind will succeed or fail in an action to recover damages according to his classification of the damage he suffered. The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it."

32. The incidents for which the appellants were responsible undoubtedly triggered the payments the respondents were required to make to TOCs under contracts with them. The payments were the direct consequence of the incidents. The contractual loss by

the respondents is a direct consequence of the injury to the tracks, as the judge found at paragraph 58 of his judgment. To hold that in itself as establishing liability on the appellants would, however, be to go back to *Re Polemis* [1921] 3 KB 560. That approach has been rejected. In *Overseas Tankship (U.K.) Ltd v Morts Dock & Engineering Co., Ltd. (The Wagon Mound No.1),* Viscount Simonds stated, at page 422:

> "For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be 'direct'".

Foreseeability is the starting point but, as later cases show, other concepts are involved.

33. I do not consider the present issue to be covered directly by authority. In *Rust v Victoria Graving Dock Company & Anr* [1887] LR 36 Ch D 113, a building estate was overflowed by a flood caused negligently. Cotton LJ, with whom Lindley LJ and Lopes LJ agreed, disallowed costs for reduced rentals in consequence of the prejudice against the neighbourhood caused by the flood. Cotton LJ stated, at page 131:

> "He said that there was a prejudice against the locality by reason of the flood, and that this would cause the houses even when put into repair to command a less rental than they would otherwise have done. In my opinion that is not a legitimate ground for giving damages. It is not damage which is the natural result of nor directly caused by the flood. It is entirely different from injury to the structures of the houses . . ."

34. In *West Leigh Colliery Co Ltd v Tunnicliffe & Hampson Ltd* [1908] AC 27, subsidence to a property had occurred owing to the working of minerals below. It was held that the depreciation in the market value of the property attributable to the risk of future subsidence should not be taken into account. Lord Macnaghten stated, at page 29:

> ". . . it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself."

Lord Loreburn LC stated, at page 34, that depreciation in present value caused by the apprehension of future subsidence was not recoverable.

35. I do not find cases cited that deal with the construction of insurance contracts helpful in the present context.

36. In *Voaden v Champion (The Baltic Surveyor)* [2002] 1 Lloyds LR 623, Rix LJ, with whom Schiemann LJ and Hale LJ agreed, cited with approval the statement of May J in *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 1 WLR 659, at 667:

> "But secondly, the damages to be awarded are to be reasonable, that is as between the plaintiff on the one hand and the defendant on the other."

37. Lord Justice Rix added, at paragraph 88:

> "I do not see why in the realm above all of remedies the common law cannot mould its principles flexibly to the needs of the situation, and as so often the test of reasonableness lies to hand as a useful tool."

38. In the *Argentino* [1888] LR 13PD 191, *Polemis* type reasoning was employed by Bowen LJ. The question was "what was the direct and actual damage done in the case of the *Argentino* . . . what was the direct and natural consequence of a collision to a ship which in fact enjoyed such good prospects of employment" (page 203). (The decision was affirmed in the House of Lords (1889) LR 14 App Cas 519).

39. In the *Naxos*, [1972] 1 Lloyds LR 149, Brandon J cited the *Argentino* and stated, at page 156:

> "I do not think it is fair, as against the defendants, to take the unusually high figure of the charter-party immediately following the delay and basing the calculation of loss on that figure. It seems to me that justice demands that the court should take an average of the voyages before and after in order to arrive at a representative figure for the earning capacity of the vessel at that period"

I find the case helpful only in that Brandon J applied a test of what "justice demands", which suggests the same "flexible" approach to issues such as the present as was adopted by Rix LJ in *The Baltic Surveyor*. In *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson Ltd* & Ors [1985] AC 210, Lord Keith of Kinkel stated, at page 241C:

> "So in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so."

40. *Dimond v Lovell* [2002] 1 AC 384 concerned the amount a claimant, whose car had been damaged as a result of the defendant's negligence, could recover having signed a form of agreement with a specialist vehicle hire company for the hire of a replacement car whilst hers was being repaired. It was held that the recoverable loss was the market rate for hiring a car from an ordinary car hire company and that the additional benefits which a specialist accident hire car company provides will not normally be recoverable. The relevance of the case is that the court was prepared to examine, as Mr Bartlett urges the court in the present case to do, the contract between the claimant and a third party, with a view to assessing what damages should be awarded. Lord Hobhouse, at page 407, stated:

> "The sum which she paid, having regard to what she was to get was, on the evidence, reasonable. But she cannot claim [against the tortfeasor] the whole cost as the cost of mitigating the loss of the use of her car."

41. In *Ehmler & Another v Hall* [1993] 2 EG 115, Nolan LJ, with whom Parker LJ and Kennedy LJ agreed, affirmed the principle stated by Lord Reid in *Hughes v Lord Advocate* [1963] AC 837 at 845:

> "It was argued that the appellant cannot recover because the damage which he suffered was of a kind which was not foreseeable. That was not the ground of judgment of the First Division or of the Lord Ordinary and the facts proved do not, in my judgment, support that argument. The appellant's injuries were mainly caused by burns, and it cannot be said that injuries from burns were unforeseeable. As a warning to traffic the workmen had set lighted red lamps round the tent which covered the manhole, and if boys did enter the dark tent it was very likely that they would take one of these lamps with them. If the lamp fell and broke it was not at all unlikely that the boy would be burned and the burns might well be serious. No doubt it was not to be expected that the injuries would be as serious as those which the appellant in fact sustained. But a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable."

In *Ehmler*, a car showroom was out of use having been damaged by the defendant's van. The showroom had been let by the claimant to a third party. Physical damage and consequential financial loss were foreseeable. Nolan LJ stated, at page 139:

> "That was enough, in my judgment, to make him liable in damage to whichever of those parties, under the contractual arrangements between them, in fact suffered from the particular loss for which damages are claimed."

Nolan LJ also warned against transplanting statements from *Rust* and "applying them to wholly different circumstances".

42. *Sandeman Coprimar SA v Transitos y Transportes Integrales SL & Others* [2003] 3 All ER 108 involved a claim for the loss by carriers of tax seals issued by the Spanish authorities to indicate that excise duty on imported whisky had been paid. The loss of the seals led to a claim based on the amount payable to the Spanish Tax Authorities under a guarantee that the seals would be used for their proper purpose or returned within 6 months. It was held that the relevant defendants could not reasonably have appreciated either the nature of the goods carried or the financial consequences of their loss.

43. Giving the judgment of this court, Lord Phillips of Worth Matravers MR held that the liability to make the guarantee payments was too remote to be recoverable from that

company as damages in negligence. The court found, at paragraph 28, that the financial loss in the case was not of the same type as the loss that occurs when dutiable spirits are stolen and duty has to be paid on them. The "charges" involved could not "embrace a single 'type' of damage when applying the common law test of remoteness" (paragraph 30). The case turned on foreseeability, but is relied on as demonstrating the willingness of the court to distinguish between different types of financial loss.

44. Of the cases cited, it is *Metrolink Victoria Pty Ltd v Inglis* [2009] VSCA 227 (Court of Appeal of Victoria) which most resembles the present case on the facts. Following a collision between a car and a tram, the tram company suffered a loss of profit arising from the operation of provisions of a Franchise Agreement governing the operation of the tram network which provided for operational performance penalties. The issue was whether the loss incurred was too remote (paragraph 9).

45. The loss had been categorised in the lower court as "the reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party". Giving the leading judgment for the majority, Redlich JA stated, at paragraph 83:

> "The categorisation applied by the court should not be so narrow as to require foreseeability of the precise manner in which the particular injury came about or of its extent. The precise damage need not have been foreseen, and it is sufficient if damage of the same kind as occurred could have been foreseen in a general way."

46. Redlich JA stated, at paragraph 95:

> "95. It is not always easy to discern the basis upon which the breadth of the relevant category is determined in the individual case. It does appear, however, that in the ordinary case a broad categorisation of the kind or genus of the loss will be appropriate. So it has been said that the liability of a defendant for shock is foreseeability of injury from the shock, the right to recover for injury by a fire is foreseeability of injury by fire (burning) and the right to recover for loss of business income is foreseeability of loss of business income. The adoption of a broad categorisation is consistent with the principle that it should not be necessary that the exact course of events which produced the injury was predictable or likely so long as the injury was foreseeable. It is furthermore supported by a number of cases referred to by the authors of *Causation and Remoteness of Damage*, [H Luntz, 4th Ed, 2002] which illustrate a general refusal of the courts to sub-divide bodily injury into harms of different kinds. It seems that those cases which descend to a further level of detail, such as *Doughty* and *Rowe v McCartney*, are those which involve an unusual injury or an injury which arises from a particularly unusual sequence of events.

96. It is important to bear in mind that the appropriate categorisation of the loss in a given case will be, in essence, a question of policy. In a case which involves an uncommon kind of damage, it may be useful to narrow the category of damage beyond simply 'economic loss' or 'physical injury', so as to require that the tribunal of fact be given the opportunity to consider its reasonable foreseeability.

97. In the present case, the narrow category chosen by the learned Magistrate is not appropriate as the loss alleged to have been suffered by Metrolink is not that which is of an unusual kind. I observe that much has been made by the respondent before this Court, and before the judge below, of the complexity of the Franchise Agreement. In the modern world, however, complexity of contracts, and the provision of items such as key performance indicators and other performance targets, could hardly be said to be unusual.

98. There is nothing unusual about the expectation that Metrolink would receive remuneration for the operation of its part of the tram network or that it would lose revenue in the event that it could not operate a part of its service. There is no reason of policy that compels a different approach to the recovery of losses calculated by reference to targeted performance obligations which have not been met because of the inability to conduct the service, and losses arising from the same cause which are to be calculated under a different remuneration structure. That this remuneration might be reduced or increased depending upon the operator's ability to provide the service is unremarkable. That the mechanism by which remuneration for this service is determined might be complex, and be calculated according to a number of key performance indicators, is similarly neither unusual, nor is its complexity a reason to treat it differently from a more simple form of remuneration. For this very reason, the respondent was compelled to concede that it was reasonably foreseeable that fares would be lost as a consequence of interruption to the operation. For liability to be dependent upon foreseeability of 'a reduction in benefit' or the 'imposition of a penalty', is to lose sight of the fact that these are contractual mechanisms which are part of the manner in which the overall remuneration for the provision of the service is calculated. To require foresight of this is to require what was described in *Hughes* as foresight of 'the concatenation of the circumstances which caused the loss' or as in *Cambridge Credits*, as 'the precise manner of its occurrence'.

99. For these reasons I conclude that the learned Magistrate erred in defining too narrowly the kind or genus of the loss suffered by Metrolink. The appropriate categorisation was

> simply one which required foreseeability of 'revenue lost as a result of the inability to operate the tram service'."

47. Williams AJA agreed with Redlich JA.

48. Mr Bartlett submitted that the law in this jurisdiction is different in taking into account factors in addition to the foreseeability held crucial in Victoria. He also submitted that the present case is distinguishable on the facts both with respect to MRE and the societal rate. He relied on the dissenting judgment of Neave JA, presiding. Neave JA stated:

> "10. There are no settled legal criteria for categorising the kind or genus of a loss suffered by a plaintiff. The breadth or narrowness of the categorisation may determine whether the damages suffered by the plaintiff are held to be reasonably foreseeable. As Redlich JA acknowledges in his reasons, the categorisation of the type of harm suffered by the plaintiff, is ultimately a question of policy. This is because the concept of remoteness of damage (like the anterior duty of care question) is used to define the outer limits of the liability of a negligent defendant.
>
> 11. The relevance of policy in categorising the type of harm suffered does not mean that determination of the question whether a particular kind of loss is too remote depends simply on the discretion of individual judges. In cases which have considered whether the scope of the duty of care should be expanded to cover a new type of harm, courts have proceeded incrementally and cautiously, reasoning by analogy from decided cases. The same approach must necessarily apply in deciding the kind or genus of loss suffered by the plaintiff and consequently whether a particular kind of loss is not compensable because it is too remote.
>
> 12. It is axiomatic that a loss may not be too remote simply because a reasonable person could not foresee the precise manner in which it occurred.
>
> . . .
>
> 20. However, even assuming that the loss should be regarded as a financial loss consequent upon property damage and that a duty of care was owed by the respondent to avoid causing such loss, in answering the remoteness question I consider that the magistrate correctly described the kind of genus of loss as 'the reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party'.
>
> 21. The policy considerations which are taken into account in considering whether there is a duty of care to avoid causing

> purely economic loss also have some relevance in determining the remoteness question. Therefore, in categorising the kind or genus of financial loss consequential on property damage it is appropriate to take a view which is narrower than the broad categorisation of loss adopted in the area of personal injury. In this case, a broad categorisation of the kind or genus of loss suffered by Metrolink would expose a person who negligently damages a tram to an unacceptably broad range of potential liability.
>
> 22. In my opinion the categorisation of the genus of loss suffered by Metrolink as a loss of business income or a loss of revenue is too broad because it would mean that any loss arising as the result of disruption of a contract made with a third parties was potentially compensable. A loss suffered as the result of failure to meet performance targets under a contract with the State government is a loss of a different character to the loss of fares caused by a tram becoming inoperative because it is damaged.
>
> 23. This approach does not wrongly require a defendant to have foreseen the 'precise concatenation of circumstances which brought about the loss'. Nor is it based on the complexity of the contractual terms in the Franchise Agreement. Rather it recognises that a loss caused by the operation of a contract with a third party which covers the operation of the whole tram network is a loss of quite a different kind from loss of fares or the cost of repairing the tram."

49. Foreseeability and remoteness are, in my judgment, to be considered together. Foreseeability, as an abstract concept, is not determinative. An imaginative person may foresee extremely broad consequences as potentially resulting from his actions. In considering whether consequences are too remote to create a liability in negligence, reasonableness has a part to play.

50. Mr Onions QC, for the respondent, placed great reliance on the decision of this court in *Andreae v Selfridge Company Ltd* [1938] Ch 1. Building operations had been conducted in such a way as by noise and dust to interfere with the reasonable and comfortable use of the claimant's business as a hotel proprietor. The main issue in the case was the extent of reasonable damage and the central finding was that the tortfeasor should not be penalised by throwing into the scales against it losses caused by operations which it was legitimately entitled to carry out and would involve some dust and noise.

51. Sir Wilfrid Greene MR, with whom Romer LJ and Scott LJ agreed, stated, at page 10:

> "The nuisance from dust is, to my mind, established, and it is further established quite clearly by the evidence that, in the case of the second operation, the plaintiff's clients were seriously inconvenienced, that clients left, and that other clients declined to come. That seems to me to be the general effect of

> what took place. When the clients came to the hotel and were shown the rooms in July, and found all the windows shut because of the dust, it does not require very much imagination to suppose that a thing of that kind would deter any one from going to the hotel. I think that, on the evidence, there is proof of a substantial loss of actual customers, with, in the background, the inevitable repercussion that has on the reputation of an hotel. On the other hand, in this case, as in the other case, one must be careful not to penalize the defendant company by throwing into the scales against it the loss of clients caused by operations which it was legitimately entitled to carry out. It can be made liable only in respect of matters on which it has crossed the permissible line."

52. The Master of the Rolls considered the difficulty of proving such damage and added, at page 11:

> "This is eminently a case where a jury, or a judge sitting alone, should use common sense and their knowledge of affairs in relation to the evidence which is given."

53. In *Muirhead v Industrial Tank Specialities Ltd* [1986] 1 QB 507 the claimant was a wholesale fish merchant whose lobsters were damaged because of defective water pumps manufactured and supplied by the defendants. The damages awarded included the loss of lobsters at cost and a sum for loss of profit on intended sales. What came within the definition of "intended sales" was not further analysed. There was no suggestion that further sums should be payable because prospective customers would fear similar incidents in the future. Robert Goff LJ stated at page 533E:

> "I therefore conclude that the third defendant should be held liable to the plaintiff, not in respect of the whole economic loss suffered by him, but only in respect of the physical damage caused to his stock of lobsters, and of course any financial loss suffered by the plaintiff in consequence of that physical damage. To that extent, I would allow the appeal."

54. Loss of profit was also awarded as a "foreseeable consequence of physical loss" in *Shell U.K. Limited & Ors v Total UK Limited & Anr* [2010] EWCA Civ 180 where the issue was whether such a claim could be made by a beneficial owner.

55. The loss of future custom was acknowledged as a proper head of damage in *Andreae* and the loss of "intended sales" in *Muirhead*. But, as Mr Bartlett pointed out, the assessment was not based, as is the assessment in the present case, on the possibility of further similar incidents; it was based on a loss of reputation resulting from the incident proved. Mr Onions described as extraordinary the appellants' challenge to the claim based on loss of future business but has not produced authority which approximates to the loss claimed here, a loss based substantially on future decisions of customers based on a fear that future incidents of delay will occur. The reasoning in *Rust* supports the appellants' submission.

56. In *Lagden v O'Connor* [2004] 1 AC 1067, the issue was whether a court is precluded from considering the injured party's lack of means as being a factor too remote to be taken into account. Lord Hope of Craighead considered the *Liesbosch* [1933] AC 449 and stated, at paragraph 61:

> "It is clear that the law has moved on, and that the correct test of remoteness today is whether the loss was reasonably foreseeable."

57. Lord Walker of Gestingthorpe, at paragraph 102, agreed as had Lord Nicholls of Birkenhead, at paragraph 8. However, Lord Walker added a qualification:

> ". . . on a claim in contract or tort, [impecuniosity] may on examination prove to be too remote."

Whether remoteness is to be regarded as a separate test or is to be incorporated into the test of what is reasonably foreseeable, an examination of the circumstances is required.

58. Acknowledging that the law has to draw a line, Lord Denning MR in *Lamb v Camden London Borough Council* [1981] QB 625, at 636, stated:

> "Sometimes it is done by limiting the range of the persons to whom duty is owed. Sometimes it is done by saying that there is a break in the chain of causation. At other times it is done by saying that the consequence is too remote to be a head of damage. All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide."

59. Watkins LJ stated, at page 647:

> "A robust and sensible approach to this very important area of the study of remoteness will more often than not produce, I think, an instinctive feeling that the event or act being weighed in the balance is too remote to sound in damages for the plaintiff. I do not pretend in all cases the answer will come easily to the enquirer. That the question must be asked and answered in all these cases I have no doubt."

60. Mr Onions put the respondents' claim with attractive simplicity. Their tracks are revenue earning assets and were damaged by the appellants. The question, he submitted, is whether it is reasonably foreseeable that the respondents will suffer financial loss as a result of a contract making their assets available. They do not run trains on the tracks; the TOCs do so under contracts with them. Their loss, as a result of the physical damage, is the sum they have to pay to the TOCs under the contracts. Such financial loss to the respondents was foreseeable if their tracks were damaged. There was no other way to quantify them. The respondents cannot quantify them, submitted Mr Onions, because they do not run the trains.

61. Mr Onions submitted that the claim should be characterised not as economic loss by the TOCs but as the respondents' loss as a result of their contract with TOCs. It was a

reasonable sum representing the results of loss of use of the tracks. Mr Onions accepted that a policy factor was undeniably involved in assessing their reasonableness.

62. It was submitted that the appellants cannot ignore reality and treat sums claimed by the respondents as if they were the losses of the TOCs. That is to ignore the reality of the situation which has followed the denationalisation of the railways. He described as absurd the suggestion that the court must "look through" the contractual arrangement. It was foreseeable that losses such as those calculated by reference to schedule 8 would occur. He relied on the *Daressa* [1971] 1 Lloyds Law Reports 60. Brandon J stated:

> "It seems to me that in 1961 when this collision happened, it was or ought to have been, well known to a person in the position of the master of a foreign-going ship that governments in general often subsidize transport industries, whether on land, on sea, or in the air. It follows, in my view, that the master of the Daressa could reasonably have foreseen two things: first, that any ship with which he collided might be operating with the assistance of a Government operating subsidy; and, second, that if she was prevented from operating by being detained for repairs, her owners might lose such operating subsidy during detention.
>
> In the result, assuming, in favour of the defendants, that reasonable foreseeability of loss of subsidy in particular, as distinct from loss of earnings in general, is a condition of recovery by the plaintiffs, I find that such condition is, as a matter of fact, fulfilled in this case."

63. It may be queried whether the knowledge of a lorry driver may be equated with a person in the position of a master of a ship. However, it would be unsatisfactory, in my view, if liability to the injured party were to depend, in circumstances such as the present, on whether the negligence was that of a person with the knowledge to be expected of a person in the position of a master of a ship, or a haulage manager, on the one hand, or a lorry driver on the other.

64. Mr Onions submitted that, Network Rail being a monopoly, there is no market in which the reasonableness of its charges can be assessed. That being so, the rates in schedule 8, agreed between the respondents and the TOCs as reasonable, represent the actual loss suffered by the respondents. In the absence of a market rate, they cannot be said to be unreasonable.

65. The real issue, Mr Onions submitted, is foreseeability of the type of loss. The drivers must have known that financial damage would result from the loss of use of the tracks and no further classification is required. There is no need to consider how the loss is made up or how it would be characterised in the hands of a third party. There may in some cases be difficulty in proving financial loss but it is not, in principle, irrecoverable. There is no principle that loss of custom attributable to physical injury is irrecoverable.

66. As to the concept of reasonableness on which Mr Bartlett relies, Mr Onions submitted that there is no room for a vague concept of justice or fairness. The court must decide what the true loss is. There is no overriding test of fairness or reasonableness, it was submitted. The judge has correctly decided reasonableness in the respondents' favour at paragraphs 62(c).

67. Mr Onions submitted that the loss which may be claimed is loss consequent on the physical damage. It was inappropriate to put a gloss on the word "consequent", though it was accepted that such a gloss has on occasions been put. In *SCM (United Kingdom) Ltd v WJ Whittal & Son Ltd* [1971] 1 QB 337, Lord Denning MR used the expression "truly consequential" at page 342 and Winn LJ used the same expression at page 346. In *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27, Lord Denning MR used the expression "truly consequential" at page 34 and Lawton LJ "the immediate consequence" at page 47. Lord Denning added, at page 36D:

> "At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of *duty*, they do it as matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the *damages* recoverable - saying that they are, or are not, too remote - they do it as matter of policy so as to limit the liability of the defendant."

Conclusions

68. The losses claimed satisfy the requirement of being a direct consequence of the tort. The liability of the respondents to pay sums to the TOCs is the direct consequence of the tort which occasioned the damage to the tracks. However, it has also to be considered whether the appellants are bound by the assessment of damages in the contracts between the respondents and the TOCs and, if not, whether the damages claimed are reasonably foreseeable (*Wagon Mound*).

69. Attractive as is the simplicity of a solution by which the tortfeasor is liable to pay whatever the respondents and the TOCs agree as between them to be reasonable compensation, such an agreement does not, in my judgment, necessarily bind the appellants, as tortfeasors, to pay the agreed sum to the respondents. It is not open to a party to dictate to the whole world the extent of tortious liability and what is reasonably foreseeable and not too remote in order to achieve what it regards as a satisfactory contract with a third party. It could lead to ever more ingenious attempts to attribute possible losses to a tort and would be inimical to the simple solution desired. There could be sound contractual reasons for providing passengers with compensation, for example, for the consequences of lost business, or medical appointments, or job interviews but such consequences are likely to be too remote to charge to a third party in tort.

70. Making a contract does not confer a licence on the respondents to charge to a tortfeasor whatever types of financial loss, and whatever quantification of financial loss, is included in the agreement provided it is reasonable between the contracting parties. That is particularly so when the terms of the contract are influenced by "government policy aims", as stated by Mr Angus. A policy to impose wide ranging

damages on tortfeasors on the roads could be provided by statute but should not be imposed by a contract between a government agency and a third party.

71. Courts have been prepared to analyse contractual arrangements between the victim and a third party when deciding the extent of the tortfeasor's liability. With differing results, that was done in *Dimond* and *Sandeman*. In *Dimond*, for example, the claimant chose to contract with a specialist vehicle hire company. The additional cost could not be recovered from the tortfeasor. It makes no difference, in my judgment, that the respondents are monopoly suppliers of the use of railway tracks and there cannot be said to be a market. The courts will intervene to assess the reasonableness, as between the claimant and the tortfeasor, of the losses specified in the contract between the claimant and a third party.

72. The extent of the appellants' liability should be determined on ordinary tortious principles. The issue is not concluded because the loss to the respondents is a direct consequence of the tort. The requirement of reasonable foreseeability must also be established (*Wagon Mound*). In deciding whether the damage claimed is reasonably foreseeable in the circumstances of a particular case it is necessary to analyse the scope of the duty incumbent on the defendant and the remoteness of the damage claimed. What is reasonably foreseeable cannot in my judgment be determined without having regard to remoteness. The two must be considered together because remoteness is a factor in deciding what is reasonably foreseeable. Whether a particular head of damage is reasonably foreseeable depends in part on how remote it is.

73. It is in my judgment too simplistic in circumstances such as the present to say that, if a *kind* of loss, financial loss, is reasonably foreseeable to one who causes physical damage, all financial loss foreseeable is recoverable. Whether one conducts the analysis by considering what is "*reasonably*" foreseeable or by other tests specified in the cases cited in this judgment, analysis is necessary, and a judgment made.

74. Differing tests appear in the cases. The scope or extent of the duty was considered in *Caparo Industries* and *Heyman*, a value judgment considered in *Kuwait Airways*, the demands of justice in *Naxos*, reasonableness in *Peabody* and *Voaden*, policy in *Metrolink* and *Spartan Steel*. Analysis is required and a judgment made. The court is the arbiter of what loss should be imposed. As Lord Morris of Borth-y-Gest stated in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, at 1039C:

> "If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise the Court must not shrink from being the arbiter."

75. That applies equally to decisions on reasonable foreseeability and remoteness. In performing that task, an objective test is applied to what is reasonably foreseeable. The answer should not depend on how imaginative a particular tortfeasor is, or on whether the driver was the haulage manager, or, for example, a recent immigrant who may have little idea about denationalisation and its effects.

76. When making that judgment, *Rust* and *West Leigh* are the cases most helpful to the appellants because losses claimed to result from fear of the risk of future events was

held not recoverable. However, such a principle cannot inflexibly be applied in wholly different circumstances (*Ehmler*). The courts have been prepared, in appropriate circumstances, to consider loss of income from a loss of reputation resulting from the tort (*Andreae*) and loss of profit on intended sales (*Muirhead*).

77. Circumstances not dissimilar from the present case were considered in *Metrolink* and the different conclusions reached, following what was, with respect, careful reasoning on each side, illustrates the difficulty of deciding on which side of the boundary the present case falls.

78. It is in my judgment too simplistic in circumstances such as the present to say that because a *kind* of loss, financial loss, is reasonably foreseeable to one who causes physical damage, all financial loss agreed between the victim and a third party is reasonably foreseeable. Had there been no such contract, analysis of the headings under which the alleged loss is claimed, and the manner in which it is calculated, would be necessary. The existence of the contract does not, in my judgment, remove the need for such analysis.

79. It is accepted that the sums claimed are, as between the respondents and the TOCs, reasonable. It does not follow that the figures must be accepted because the respondents are monopoly suppliers of the use of rail tracks and there is no market against which to judge the reasonableness of the figures. However, schedule 8 has obviously been drafted responsibly and with a view to achieving a fair result, in the public interest, as between the parties to it. There is a public interest in a punctual and reliable train service.

80. The care taken with the exercise must weigh substantially in the balance when deciding whether the public interest in making just provision for compensation by tortfeasors is also served. On the other hand, there are, in my judgment, limits to the influence that "government policy aims" (Mr Angus) reflected in an agreement made between Network Rail, a public body, and a third party should be imposed upon a tortfeasor not party to the contract. Policy aims, as so expressed, do not necessarily determine the extent of tortious liability.

81. I have come to the conclusion that the appellants should be liable for each of the heads claimed, that is the societal rate component and the MRE component.

82. It was reasonably foreseeable that, if the respondents' apparatus was damaged, the services of the TOCs, and their value to the public, would be diminished and that arrangements would have been put in place by the franchising authority to penalise the TOCs for the diminution in their services. Two contracts are involved, the contract between the respondents and the TOC, and the franchising arrangement between the franchising authority and the TOC, but the complexity does not render the resulting loss to the respondents too remote from the physical damage.

83. The MRE component is, in my judgment, also recoverable in the circumstances. It depends on a medium to long term assessment of passenger choices over the network. Whether the "tipping point" of deterring potential rail passengers is reached depends not only on the disruption caused by the tort itself but, as claimed, on an assessment of potential passengers' fears that there will be further disruptions in the future. Provided a genuine attempt has been made to assess future loss of income from this

cause, and on the evidence I am satisfied it has, a bar is not placed on recovery by reliance on passenger psychology with its fears of a repeat of the index event. That is enough to decide the issue in this case.

84. To put it in that way does, however, demonstrate the door that is opened by claims of this kind. When deciding on the "tipping point" for passengers, should account also be taken of other aspects of passenger psychology, for example, the greatly increased price of petrol which would discourage transfer from rail to road or to overcrowding on trains, which would create for passengers a tipping point quite unconnected with the tort? Moreover, if schedule 8 included, in the context of good customer relations, provision for payment of compensation to TOC passengers for the financial consequence of their missing a business appointment or a job interview, that would not normally be recoverable from a tortfeasor. Analysis of schedule 8 may be required to determine the extent of tortious liability.

85. In this case, the appellants have not sought to challenge the detail and further issues do not arise. I mention these to demonstrate the problems that arise from a principle that parties to contracts, such as Track Access Agreements, can themselves determine the extent of the tortious liability to one of them of a third party. I consider the appellants' arguments on remoteness to be far from absurd. They are soundly based and cogent but, accepting the care with which calculations have been made, the MRE component in schedule 8 of the Track Access Agreements falls on the side of recoverability.

86. That being so, the appellants have not sought a more detailed analysis of the sums awarded by the judge. I would dismiss this appeal.

LORD JUSTICE MOORE-BICK :

87. The circumstances giving rise to these appeals have been described by Pill L.J., whose account I gratefully adopt. They raise an important question concerning the scope of the loss recoverable by Network Rail Infrastructure Ltd ("Network Rail") in respect of damage to its fixed assets and the consequent interruption in its ability to make affected sections of track available to train operating companies ("TOCs") providing rail services to the public.

88. Since the privatisation of the railway network ownership of the fixed assets in the form of track, signals and related property has been separated from the operation of train services. The fixed assets are currently owned by Network Rail, whereas rail services are provided by independent companies which obtain access to the network under Track Access Agreements with Network Rail. The availability of the track is liable to be affected by a wide variety of events, including points and signal failures, accidents, breakdowns of trains and bad weather, and as all those who travel regularly by rail know, the loss of availability of the track in one particular locality, even for a relatively short period of time, can cause significant disruption to services across a wide area and thus to many services operated by one or more TOCs. Under the Track Access Agreements Network Rail remains responsible to the TOCs for the continuing availability of the track and is obliged to pay sums calculated in accordance with an agreed formula in respect of periods during which it is unavailable. These are known as "Schedule 8 payments" and are calculated in the manner which Pill L.J. has described. If the cause of the interruption lies with one of the TOCs (for example, if it

is due to an obstruction caused by the breakdown of a train), Network Rail is entitled to recover payment at an agreed rate.

89. The appeals in the present case arise out of two separate incidents, each of which resulted in part of the rail network being unavailable for use as a result of physical damage to the track or other parts of the infrastructure. In one case damage was caused to overhead power lines, which interrupted the use of the main East Coast line for several hours; in the other damage was caused to a bridge and the track which it spanned, which resulted in the closure of the line in question for five days. In each case Network Rail became liable to make payments to various TOCs under the terms of the relevant Track Access Agreements. In these proceedings it seeks to recover the amount of those payments from those who caused the damage to its property.

90. As Pill L.J. has explained, the Schedule 8 payments are designed to compensate those of the TOCs whose services were disrupted for the financial effects of that disruption. No property belonging to any of the TOCs was damaged; their loss is purely financial. The dispute in this case concerns the extent to which the drivers whose negligence resulted in damage to the property of Network Rail are to be held liable for the loss which it suffered in the form of its liability to make Schedule 8 payments to the TOCs.

91. The judge took as his starting point the following passage in the speech of Lord Hoffmann in *South Australia Asset Management Corporation v York Montague Ltd* [1996] UKHL 10, [1997] A.C. 191:

> "14. A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605. The auditors' failure to use reasonable care in auditing the company's statutory accounts was a breach of their duty of care. But they were not liable to an outside take-over bidder because the duty was not owed to him. Nor were they liable to shareholders who had bought more shares in reliance on the accounts because, although they were owed a duty of care, it was in their capacity as members of the company and not in the capacity (which they shared with everyone else) of potential buyers of its shares. Accordingly, the duty which they were owed was not in respect of loss which they might suffer by buying its shares. As Lord Bridge of Harwich said, at p. 627:
>
> > "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."
>
> In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed.

> 15. How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: *Gorris v. Scott* (1874) L.R. 9 Ex. 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. Most of the judgments in the *Caparo* case are occupied in examining the Companies Act 1985 to ascertain the purpose of the auditor's duty to take care that the statutory accounts comply with the Act. In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking."

92. He then examined three cases in which this court has considered the scope of a tortfeasor's liability for economic loss, *SCM (United Kingdom) Ltd v W.J. Whittall and Son Ltd* [1971] 1 Q.B. 337, *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 Q.B. 27 and *Muirhead v Industrial Tank Specialities Ltd* [1985] Q.B. 507, which in his view establish that in an action for negligence a claimant can recover not only in respect of the physical damage or injury caused by the defendant's carelessness but also in respect of the economic loss consequential upon it. He then considered *Ehmler and another v Hall* [1993] 1 EGLR 137 and the decision of the New South Wales Court of Appeal in *Rail Corporation New South Wales v Fluor Australia Pty Ltd* [2009] NSWCA 344. Those decisions led him to the conclusion that there is no reason in principle why loss of use, loss of profit or loss of revenue can not be recovered, provided that it is consequential upon the physical damage in question and closely associated with it.

93. The judge then considered the scope of the defendants' duty of care. He held that it extended to taking reasonable care to avoid causing damage to the property of others on or near the highway and to avoid causing all those heads of loss and damage which have been accepted in the past as being recoverable, including the costs of repairs to the property in question and any loss of profit, use or revenue. He held that the losses representing the sums paid or allowed to the TOCs in relation to the delays caused in the two accidents were recoverable by Network Rail from the appellants because the type of loss was within the scope of the duty which they owed to Network Rail and were the reasonably foreseeable consequence of their negligence. His reasons for reaching that conclusion are to be found in paragraph 62 of his judgment, which is worth quoting at length. He said (omitting certain immaterial passages):

> "62. (b) On any proper analysis, the sums payable to the TOCs were payable for the loss of use or availability of the rail tracks in question. This was the price, contractually agreed between Network Rail and the TOCs, which was payable in circumstances amongst

others in which the rail tracks could not be used by reason of the negligence of drivers who damaged bridges or electricity cables over those rail tracks. One of the main uses to which Network Rail put the rail tracks was to license the TOCs to operate them.

(c) It cannot be said, and indeed it has not been argued as such, that the sums payable to the TOCs pursuant to the TAAs represented a penalty or were unreasonable or did not represent anything other than a best assessment basis of the loss to the TOCs of the use of the rail tracks for the period in question. . . .

(d) The loss of use can also legitimately be considered as a loss of revenue because in reality, by having to pay or allow the licensee TOCs the Schedule 8 sums, Network Rail's revenue from the TOCs was being reduced by the exactly the same amount.

(e) A key factor in the calculation under Schedule 8 is the amount of rail track or train delay caused in these cases by the negligently caused damage. That delay is made of the times reasonably taken for initial assessment by the emergency services and Network Rail of the accidents and damage and for the necessary and reasonable associated remedial works. There are no mitigation arguments left in this case as to whether Network Rail acted anything other than reasonably in these regards.

(f) The Defendants' negligence (that is, their breaches of duty causing physical damage and the need for the concomitant remedial works) therefore directly caused the delays which directly led to Network Rail not being in a position to make available the rail tracks in question for the periods of the delays, the direct financial consequence of which was that Network Rail had to pay or allow their licensees the Schedule 8 sums.

(g) The fact that within the calculation of those allowances there may have been or were included sums which the TOCs could not have claimed in negligence as against these Defendants is immaterial because it is necessary to consider in this case the position of Network Rail which clearly did have the right to sue for negligence in respect of the physical damage to its property. The reality is that, under the law as it now stands and has stood for many years, these Defendants would never have been liable in negligence to the TOCs for those losses because no

property of the TOCs was physically damaged. The losses would therefore never have been recoverable directly by the TOCs. If the Defendants' arguments are right, the one innocent party, Network Rail, cannot recover its very real losses incurred directly in consequence of the Defendants' carelessness.

(h) It is irrelevant to consider what for instance the old British Rail, that is the organisation that historically owned the rail track and ran the train services before privatisation, would have been able to sue for. One needs to look at the position of Network Rail which only owns the rail track. . . .

(i) Where one has, as here, a duty of care the scope of which includes losses demonstrably consequential upon the physical damage, it must, objectively speaking, have been reasonably foreseeable by tortfeasors in the position of these defendants that, if they seriously damaged bridges over rail tracks or overhead electric cables providing electricity to the railways, the railway services could or would be disrupted for a period of time whilst remedial work was being done. Thus, a loss of use and of revenue was a reasonably foreseeable consequence of the negligence in this case. It is argued that objectively speaking the tortfeasors in this case could not reasonably have foreseen either that payments would be due to the TOCs for the loss of use or that the payments would include incentives. However, this is not material in circumstances where a loss of use is reasonably foreseeable and the loss of use is readily quantifiable in money terms. It is not necessary for the precise loss or machinery by which the loss is ascertainable to be foreseen or foreseeable. In any event, it can hardly be said that a loss of use or indeed a loss of revenue was not objectively speaking reasonably foreseeable by tortfeasors in the position of these Defendants; as was said in the *Metrolink* case, there was nothing unusual about the facts that Network Rail would receive payment and revenue for providing the rail track for use by rail companies or that it would lose revenue if it did not provide the track. The fact that Schedule 8 provides a somewhat complex formula for determining the value or cost for the non-provision of the rail track is immaterial.

(j) There is nothing as a matter of policy which can readily be deployed to gainsay either a duty of care

existing or the scope of that duty extending to compensation for the loss of use, . . .

(k) . . . Schedule 8 is either or akin to a liquidated damages or demurrage clause which relates to certain types of delays on the rail tracks to the train services. The rates payable where there is delay attributable to one party or the other were negotiated to reflect what the parties thought realistically represented the likely losses which each should reasonably bear in the case of delay.

(l) I can not see any or much significant difference in principle between the current case and the negligent driver who drives into a building which houses a shop which is licensed by the owner to a third person. The owner can sue the negligent driver for damages which would include the loss of the sums due from the licensee or compensation payable for the licensee not being able to trade from the premises whilst the requisite reasonable remedial works are done.

(m) In my view, the Defendants too often in their arguments have confused the losses actually suffered by the TOCs with the losses actually suffered by Network Rail. The former are substantially immaterial in the context of cases brought by Network Rail against the defendants . . . "

94. On behalf of the appellants Mr. Andrew Bartlett Q.C. submitted that the scope of a tortfeasor's liability to the owner of property for damage caused by his wrongful act should not extend beyond the consequences properly attributable to the physical damage, in this case the costs of repairs and the loss directly attributable to Network Rail's own inability to make use of the line. By contrast, what Network Rail seeks to recover in the present case, he argued, are potential losses suffered by the TOCs resulting from a public loss of confidence in the service, together with penalties for delays in services imposed under their agreements with the franchising authority. Neither of those, he submitted, fairly represents the loss actually suffered by Network Rail, being losses of a kind quite different from a loss of use of the tracks themselves. The real cause of the liability to make Schedule 8 payments were the terms of the Track Access Agreements. The liability to make payments of that kind was not reasonably foreseeable by those using the roads and therefore fell outside the scope of their duty of care, or was too remote in law to be recoverable. Alternatively, he submitted that it would not be fair or reasonable to hold motorists liable for what could be very substantial losses of that kind.

95. As the authorities to which the judge referred show, the law has long been concerned to ensure that a reasonable limit is placed on the extent of the consequences of a wrongful act for which the perpetrator can be held liable. That is partly because it has recognised that the consequences of an act or omission may be very far-reaching and that it is unreasonable to hold a person responsible for those that he could not

reasonably have been expected to guard against. As Lord Hoffmann observed, the scope of the duty in each case depends upon the purpose of the rule imposing the duty and the purpose of the rule that one must take reasonable care not to cause harm to other people or their property is to impose responsibility on people for governing their actions in a way that prevents reasonably foreseeable harm. However, in this context "pure" economic loss, that is, financial loss suffered otherwise than as a consequence of damage to the person or property of the claimant, poses particular difficulties because of the broad network of economic links that exist in any developed society. The dangers inherent in allowing a claimant to recover in respect of pure economic loss were recognised in the latter part of the nineteenth century and lie at the root of the decision in *Cattle v The Stockton Waterworks Company* (1875) L.R. 10 Q.B. 453 and many later decisions. Such claims have been rejected, except in those cases in which financial loss is in the most immediate contemplation of the wrongdoer, for reasons of policy rather than principle.

96. However, this is not a case in which the claimant is seeking to recover in respect of economic loss divorced from physical damage to property. The appellants accept that they caused damage to Network Rail's property and that its unavailability for use by TOCs gave rise to a liability to make Schedule 8 payments under the Track Access Agreements. The only question is whether the loss represented by that liability is recoverable from those who caused the physical damage which put the track out of use.

97. Mr. Bartlett put his argument in a number of ways, but at the root of them all lay the submission that Network Rail is not entitled to recover in respect of the kind of losses that the Schedule 8 payments represent, namely, a future loss of revenue resulting from a decline in passenger confidence and an obligation to make payments under the franchise agreements in respect of poor performance. In effect, he sought to treat the losses in respect of which the TOCs were entitled to be compensated as if they were Network Rail's own losses. Indeed, one of his submissions was that Network Rail would not be entitled to recover in respect of a future loss of business if it were operating rail services for its own account, especially if that were based on a rather speculative assessment of a reduction in public confidence in the reliability of the railways. It should therefore not be better placed simply because it is providing the infrastructure which enables the TOCs to do so. He also relied on the fact that since, as was common ground, the TOCs could not themselves have recovered damages in respect of pure economic loss of that kind, it would not be right to enable Network Rail to render such a loss recoverable simply by entering into contracts with the TOCs to indemnify them.

98. I think it worth reminding oneself at this point that it has been accepted by all concerned, including the appellants, that the Schedule 8 payments represent the best assessment in financial terms that can be made of the commercial damage caused to the TOCs by disruption to rail services. As Pill L.J. has explained, they comprise two elements, the "marginal revenue effect" ("MRE"), which is an estimate of the financial effect on the business operations of the TOCs concerned, and the "societal rate", which is the name given to the penalty payable by the TOCs to the franchise director, but there is no dispute that they represent a genuine and reasonable attempt to calculate the financial losses suffered by the TOCs. Nor was it argued that they exceed the amount that Network Rail could properly be held liable to pay the TOCs in

damages if it had undertaken to ensure that the relevant section of the rail network would remain available for use at all times (which in substance is the effect of the Track Access Agreements). In other words, as the judge observed, they are similar to liquidated damages provisions of the kind that are commonly found in commercial contracts relating to areas of activity in which the effects of delay or the interruption of performance are difficult to quantify in financial terms. That is important, because it means that the extent of Network Rail's liability to the TOCs, and therefore of this head of loss, cannot be regarded as too remote on the grounds that it exceeds any reasonable assessment of the amount of loss actually caused by the loss of availability of the track. That some financial loss would be likely to result from the suspension of services, whoever was operating them, is, I think, obvious.

99. In my view it is wrong to approach the question that arises in this case through an analysis of the Schedule 8 payments, as if the claimants in these cases were the TOCs (who have suffered no damage to their property), rather than Network Rail (which has). The judge was right, therefore, to hold in paragraph 62 of his judgment that the way in which the Schedule 8 payments have been calculated is irrelevant. All that matters for present purposes is that they represent a genuine and reasonable attempt to assess the damage caused to the TOCs by the closure of the lines and the consequent disruption to services. It was not in dispute that economic loss resulting from physical damage is recoverable and in any event that is well established by existing authorities. This court accepted as much in *SCM v Whittall* and subsequent cases, despite its insistence on the irrecoverability of "pure" economic loss. In my view the judge was right, therefore, to approach the case by asking himself whether a loss in the form of a liability to make Schedule 8 payments to the TOCs under the Track Access Agreements was within the scope of the appellants' duty and not too remote in law to be recoverable.

100. Any asset of a commercial nature is capable of being used to generate revenue, either by being put to use directly by the owner or by being made available for use by others in return for payment. Buildings, lorries, ships and aircraft are just examples of a type whose variety is endless. That is part of everyday experience. Whether an ordinary member of the public can be taken to be aware of the particular arrangements established for the use of the rail network is in my view immaterial, since he can certainly be expected to be aware that the rail network is a commercial asset which can be used to generate revenue for its owner in one way or another. It might be by running its own services, or by allowing others to do so for a fee, or a combination of the two. Under the current arrangements Network Rail generates revenue by making the network available to the TOCs for a fee and any payment it is liable to make to the TOCs in respect of periods when the network is unavailable represents a net loss of revenue. It is immaterial for these purposes whether the fee is reduced or suspended in respect of periods during which the track is unavailable, whether part of it has to be refunded or whether payments have to be made under provisions broadly similar to a liquidated damages clause. In each case it suffers a net loss of revenue.

101. I think it is clear, therefore, that two types of loss flow naturally from any damage to the infrastructure that renders the track itself unavailable for use: the cost of repair and the loss of revenue attributable to the loss of availability of the track itself. Both are in my view within the scope of the duty of the motorist, or indeed anyone else, to exercise reasonable care not to cause physical damage to the infrastructure. Subject to

the limitations imposed by the rules relating to remoteness, therefore, all such loss is in principle recoverable from the person who caused the damage. The rules concerning remoteness of damage confine the scope of the tortfeasor's liability to that which was reasonably foreseeable as the consequence of his wrongful act: *Overseas Tankship (UK) Ltd v Morts Docks & Engineering Co. Ltd, The 'Wagon Mound' (No.1)* [1961] A.C. 388.

102. For these reasons I am unable to accept that in principle the scope of Network Rail's recoverable loss should be limited to the costs of repairs to its property and any loss of revenue resulting from interruption to its own passenger or freight services. Network Rail does not operate rail services of any kind, but that does not provide a good reason for rendering the financial loss flowing from the interruption of its inability to make the track available to others irrecoverable. The fact that in the present case the loss took the form of a liability to make payments under the Track Access Agreements does not render it irrecoverable, since liability depends only on foreseeability of the kind of loss suffered rather than the manner in which it was caused. In *Ehmler v Hall* [1993] 1 EGLR 137 a car driven by the defendant crashed into a car showroom owned by the plaintiff but let to a third party. The showroom became unusable for several weeks, during which the tenant ceased to be liable for rent under an express provision of the lease. This court held that the plaintiff was entitled to recover damages in the amount of the lost rent as financial loss flowing from the physical damage to the building. It did not matter that the defendant might not have foreseen that the lease would contain a clause of that nature, provided that he could foresee financial loss of some kind. There is no material distinction between that case and the present, the loss of revenue taking the form of loss of rent rather than the payment of a sum in compensation for the unavailability of the property. Applying the established principles that govern causation and remoteness of damage in tort, it is difficult to see why the loss of revenue represented by the Schedule 8 payments should not be recoverable.

103. Mr. Bartlett placed considerable reliance on two authorities, *Rust v Victoria Graving Dock Co.* (1887) L.R. 36 Ch.D. 113 and *West Leigh Colliery Co. Ltd v Tunnicliffe & Hampson Ltd* [1908] A.C. 27, which, he submitted, supported the conclusion that reduction in value resulting from loss of market reputation (that being, in his submission, the true nature of the loss sustained by the TOCs) was not recoverable.

104. For the reasons I have given I do not think that it is relevant to enquire into the precise nature of the loss incurred by the TOCs as a result of the disruption to services caused by these incidents, provided (as is accepted to be the case) that the compensation to be paid in respect of it represents a genuine estimate of its amount. Moreover, in the light of the decision in *Ehmler v Hall* I do not think that either of those cases can be regarded as authority precluding a right to recover damages in a case such as the present. Quite apart from that, however, neither case seems to me to be dealing with a situation comparable to that which we have to consider.

105. In *Rust v Victoria Graving Dock* water from a dock overflowed as a result of the defendant's negligence and flooded an area in which the plaintiff was building houses. Some of the houses were in the possession of the plaintiff, some had been built by the plaintiff under building leases and some were still in the course of construction under building agreements. Some parts of the land had not yet been built on at all. The referee to whom the assessment of damages was referred awarded

damages for, among other things, the loss arising from reduced rental over a period of four years in respect of the houses in the possession of the plaintiff arising from prejudice against the area resulting from the flood. That part of his award was set aside on the grounds that such a loss was not the natural result of, or directly caused by, the flood. In substance, therefore, the case involves the application of the principle that a tortfeasor is liable only for the loss naturally and directly caused by his wrongful act. As such it seems to me to be best understood as an application of what subsequently became known as the rule in *Re Polemis* (*In re An Arbitration between Polemis and another and Furness, Withy and Co. Ltd.* [1921] 3 Q.B. 560), rather than authority for a wider proposition that loss of business flowing from customer dissatisfaction can never be the subject of an award of damages. (The rule in *Re Polemis* was, of course, later superseded by the decision in *The 'Wagon Mound' (No.1)*.)

106. In *West Leigh Colliery Co. Ltd v Tunnicliffe & Hampson Ltd* the respondent sought to recover damages for the loss of value of its land caused by subsidence resulting from the appellant's mining operations. The House of Lords, applying its earlier decision in *Darley Main Colliery Co. v Mitchell* (1886) 11 App. Cas. 127, held that the surface owner cannot recover for loss of market value resulting from the perceived risk of further subsidence. The cause of action was said to subsist in the damage represented by the actual subsidence and therefore an action for damages could be maintained only if and when such subsidence occurred. The decisions reflect the difficulty of identifying the damage done by progressive mining operations and the desirability of enabling the surface owner to bring a series of actions as further damage occurs. I am not persuaded that they are authority for the wider proposition that loss caused by a reduction in value of property resulting from physical damage to a part of it is never recoverable. That may depend to some extent on how one defines the property in question.

107. *Andreae v Selfridge & Co. Ltd* [1938] Ch. 1, on which Mr. Jeffery Onions Q.C. relied, is an interesting example of a case in which the plaintiff was held to be entitled to recover damages for loss of revenue resulting in part from customer dissatisfaction. The plaintiff occupied part of an island site in London on which she ran a hotel. The defendant acquired the rest of the site which it redeveloped, inevitably causing some inconvenience through the creation of dust and noise. The business of the hotel was adversely affected even after the redevelopment had been completed. Although Sir Wilfred Greene M.R. emphasised the importance of not readily attributing the whole of the plaintiff's loss to that part of the defendant's operations that constituted a nuisance, the court held that she was entitled to recover damages representing loss of profits resulting from the loss of custom of guests who stopped using the hotel altogether as a result of the building operations. Their failure to return could be described as attributable to a loss of goodwill, but that did not render the loss irrecoverable in principle. Financial loss caused by damage to property was also held to be recoverable in *Muirhead v Industrial Tank Specialists*, in which the plaintiff recovered the profit that he would have earned on the sale of the lobsters that were lost as a result of the defendant's negligence.

108. Other authorities on which Mr. Bartlett relied are in my view explicable in their own terms and do not support the proposition that loss of future revenue, if not otherwise too remote, is not generally recoverable. Thus, the insurance cases to which we were

referred, *AS Screenprint Ltd v British Reserve Insurance Co. Ltd* [1999] Lloyd's Rep. I.R. 430, *Rodan v Commercial Union Assurance Co. Plc* [1999] Lloyd's Rep. I.R. 495, *James Budgett Sugars Ltd v Norwich Union Insurance Ltd* [2002] EWHC 968 (Comm), [2003] Lloyd's Rep. I.R. 110, *Pilkington UK Ltd v CGU Insurance Plc* [2004] EWCA Civ 23, [2004] EWCA Civ 23 and *Horbury Building Systems Ltd v Hampden Insurance N.V.* [2004] EWCA Civ 418, [2004] 2 C.L.C. 453 all turn on the terms of the policies and the application of the well-recognised distinction for insurance purposes between physical loss and damage and financial loss. *Dimond v Lovell* [2002] 1 A.C. 384 was concerned (so far as material for present purposes) with a problem of a different kind, namely, whether a claimant whose car had been damaged was entitled to recover as part of her loss that part of the amount she had paid to a hire company under an agreement for a replacement vehicle which was referable to additional services over and above the hire of the car itself. The House of Lords held that, although it was reasonable for her to have contracted for the additional services, she could not recover the cost of them, but I do not think that the decision has any bearing on the issue that arises in this case.

109. The judge referred to *Rail Corporation New South Wales v Fluor Australia Pty Ltd.* In that case, as in this, train services were provided by a train operating company, the State Rail Authority of New South Wales ("SRA"), using track owned by Rail Corporation New South Wales ("RailCorp") under a form of track access agreement. Rolling stock belonging to SRA was damaged as a result of a derailment caused by the negligence of a sub-contractor, Alpcross, engaged by the main contractor, Fluor, to carry out work on the track on behalf of RailCorp. RailCorp paid a substantial sum to SRA pursuant to the compromise of a claim made by SRA under the indemnity contained in the track access agreement and brought proceedings against Alpcross for damages. Since there was no contract between RailCorp and Alpcross the claim had to be made in tort. One issue which the court had to determine was whether the payment to SRA was pure economic loss and therefore irrecoverable in an action for negligence against Alpcross. The court held that the defects in the track caused by the negligence of Alpcross represented physical damage, that the damage caused the derailment with consequent economic loss being suffered by RailCorp and that RailCorp's loss constituted by its payment to SRA was not, therefore, "pure" economic loss, but was loss consequent upon negligent damage to RailCorp's own property and therefore recoverable (paragraph 129). As Akenhead J. pointed out, however, the case is not on all fours with the present because the payment made by RailCorp to SRA under the compromise was in respect of physical damage to the property of SRA and injuries to the passengers. The case is therefore of limited assistance, but it does tend to support what I consider to be the correct approach to the question we have to decide.

110. The case which comes closest to the present is *Metrolink Victoria Pty Ltd v Inglis* [2009] VSCA 227, in which the Victoria Court of Appeal considered the question of remoteness of damage in the context of a collision between a tram operated by the plaintiff and a car negligently driven by the defendant. Metrolink operated trams under a franchise agreement with the State of Victoria under which it became liable to pay penalties when services were delayed. The effect of the collision was to prevent services from running on the line in question until the car had been removed and as a result Metrolink incurred a liability to pay a penalty. The defendant admitted liability for the collision, but argued that the liability to pay an operational penalty was too

remote to be recoverable. The question for decision was whether such a loss was recoverable from the negligent driver. The court held by a majority that it was.

111. Much of the argument in that case turned on the classification of the kind of loss that was foreseeable as a result of such a collision, but before turning to examine that question it is interesting to note that the court accepted that the issue was one of remoteness of damage. The question then was how properly to classify the kind of loss that was a foreseeable consequence of the defendant's negligent driving. The magistrate by whom the claim had been decided at first instance held that the kind of damage in respect of which Metrolink sought to recover was "the reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party" and that damage of that kind was too remote because it was not reasonably foreseeable. However, the Victoria Court of Appeal held by a majority (Redlich JA and Williams AJA, Neave JA dissenting) that the loss which could reasonably be foreseen as a consequence of a collision should be classified more broadly as "revenue lost as a result of the inability to operate the tram service", and allowed the appeal.

112. The judgments in that case emphasise the importance of careful classification of the kind of damage that the claimant seeks to recover and the kind of damage that is reasonably foreseeable as a consequence of the wrongful act. The broader the classification of the foreseeable loss, the greater the scope of the recoverable loss. Neave JA was strongly influenced by the need to ensure that wrongdoers are not exposed to an unduly broad range of financial losses. She considered that a loss suffered as the result of a failure to meet performance targets was of a different class from a loss of fares caused by a tram's becoming inoperative. She was therefore in favour of confining the defendant's liability to the loss of fares and the cost of repairing the tram. The majority, however, considered that a broader classification was appropriate for two reasons: first, because it was more consistent with the principle that it is not necessary for the exact course of events which produces the injury to be predictable, provided the injury is foreseeable; and second, because the damage suffered was not in fact of an unusual kind.

113. In my view the reasoning of the majority is persuasive. The case differs from the present in as much as Metrolink was both the owner of the tram and the operator of the service under the franchise agreement. It was in the position of the TOCs rather than Network Rail and was not making its commercial assets available for use by others as a means of generating revenue. However, if the wrongdoer can reasonably foresee that the property in question may be used by the owner to generate revenue, the kind of loss he can reasonably foresee as resulting from a wrongful act which causes damage to that property is loss of revenue.

114. By way of reinforcing his primary submissions Mr. Bartlett relied on a number of cases in which it has been said that damages should be reasonable as between claimant and defendant. These, he submitted, support the proposition that it would be unfair in the present case to require the careless drivers, who probably had no inkling of the details of the arrangements between Network Rail and the TOCs, or between the TOCs and the franchising authority, to bear the substantial losses represented by the Schedule 8 payments.

115. The first of these was *The 'Argentino'* (1889) L.R. 14 App. Cas. 519. In that case the owners of the vessel *'Gracie'* brought an action for damages following a collision with the *'Argentino'* which caused her to lose her next engagement as a result of the need to undergo repairs. The issue in the case was whether loss of profit was too remote to be recoverable. The House of Lords held that it was not, because it flowed directly and naturally from the collision. At various points in their speeches members of the House referred to the "ordinary and fair earnings" as providing the recoverable measure of damages, but only, as far as I can see, to limit recovery to the loss that would ordinarily flow from the wrongful act. One does not find in the case any support for a more general principle of the kind suggested by Mr. Bartlett.

116. *The 'Naxos'* [1972] 1 Lloyd's Law Rep. 149 was another case of collision damage. The plaintiffs' vessel *'Aliartos'* was damaged in a collision with the *'Naxos'* for which the *'Naxos'* was solely to blame. They carried out temporary repairs, after which the *'Aliartos'* performed four more charters. She was then fixed on a particularly profitable charter, but it was necessary for her to carry out permanent repairs at some point and the owners chose to do them before she started on that charter. As a result she was delayed by five days in entering service under the new charter, but she was able, nonetheless, to perform it. The owners sought to recover for five days' lost earnings by reference to that enhanced charter rate, but Brandon J. held that damages should be assessed by reference to the vessel's average rate of earnings over a longer period. Although he said that it would not be fair to the defendant to take the unusually high charter rate, that was not, as I read it, because he was applying any overriding rule of fairness, but because it was necessary to determine what the owners had actually lost as a result of the vessel's being out of service for five days during a prolonged period of trading. The charter in question, which the vessel had not been prevented from performing, was not truly representative of her profit-earning capacity, which had to be assessed over a longer period.

117. Perhaps the best case from Mr. Bartlett's point of view is *Voaden v Champion (The 'Baltic Surveyor')* [2002] EWCA Civ 89, [2002] 1 Lloyd's Rep. 623, in which Rix L.J., with whom Schiemann and Hale L.JJ. agreed, referred with approval to the dictum of May J. in *Taylor (C.R.) (Wholesale) Ltd v Hepworths Ltd* [1977] 1 W.L.R. 659, that "damages ought to be reasonable as between claimant and defendant". The question facing the court in *'The 'Baltic Surveyor'* was how to assess damages in a case where a partly worn piece of equipment that has been damaged by the defendant's wrongful act cannot be replaced otherwise than by the purchase of a new one. In such a case the claimant may be substantially better off if damages are awarded at a rate which reflects the full cost of the replacement, an outcome that can quite properly be described as unreasonable. The equipment in that case was a pontoon which had been sunk by the defendant's vessel. It could be replaced only by fabricating a new pontoon which had a much longer life than remained in the one that had been lost. The court approved the approach of assessing damages by discounting the cost of a new replacement pontoon by an amount sufficient to reflect the age and wear of the original.

118. The real challenge in all such cases is to identify the true measure of the loss suffered by the claimant for which he is entitled to be compensated. That does not depend on broad notions of how much the defendant should be called upon to pay, but upon a fair assessment of what the claimant has actually lost and the application of

established principles relating to scope of duty and remoteness of damage. The authorities do not in my view support the existence of an independent or overriding principle that damages must be reasonable as between the claimant and the defendant, although that broad concept underlies and is reflected in the principles of causation, remoteness of damage and the right to full compensation as they have been developed through the cases. It is perhaps not surprising, therefore, that Mr. Bartlett was in some difficulty when invited to explain the nature and scope of the principle for which he was contending. The correct application of established principles enables the courts to ensure that the liability of the wrongdoer is limited to that which he ought fairly and reasonably to bear: see the observations of Lord Nichols in *Kuwait Airways Corpn v Iraqi Airways Co. (Nos 4 & 5)* [2002] 2 A.C. 883 at paragraphs 69-70.

119. Having considered the various arguments advanced by the appellants, I am of the view that the judgment below was correct. For the reasons I have given, which are substantially the same as those of the judge, I agree that the appeal should be dismissed.

LORD JUSTICE JACKSON :

120. This judgment is in three parts namely:

Part 1. Introduction,

Part 2. The Law,

Part 3. Application to the Present Appeal.

Part 1. Introduction

121. This case raises, yet again, the vexed question of when damages can be recovered in tort in respect of economic loss.

122. I gratefully adopt Pill LJ's summary of the facts. I also agree with Pill and Moore-Bick LJJ's conclusion that this appeal should be dismissed. Nevertheless, because of the importance of the issues under debate and the excellence of the legal argument on both sides, I wish to state in my own words how I arrive at the same conclusion as my Lords.

Part 2. The Law

123. I shall now review the principal authorities which were cited and debated during the hearing.

124. In *Rust v Victoria Graving Dock Company* (1887) 36 ChD 113 the owner of a housing estate claimed damages in respect of a flood which covered his property as a result of the defendant's negligence. At first instance the plaintiff recovered not only repair costs and immediate loss of rental income, but also future loss of rental income because tenants would fear a recurrence of the flood. The Court of Appeal disallowed that last element of the damages. At 131 Cotton LJ (giving the judgment of the court) said this:

> "We found it difficult to see how, when the houses were put into repair, there could be a depreciation of rental, and in order that we might ascertain on what ground *Mr. Clifton* had given this sum, we asked him to attend here as he did yesterday, and state his views and his ground for giving this sum. He said that there was a prejudice against the locality by reason of the flood, and that this would cause the houses even when put into repair to command a less rental than they would otherwise have done. In my opinion that is not a legitimate ground for giving damages. It is not damage which is the natural result of nor directly caused by the flood. It is entirely different from injury to the structure of the houses, and in my opinion (and I believe the rest of the court agree) that sum of £332 must be struck out."

125. In *The Argentino* (1888) 13 PD 191 the owners of a vessel damaged in collision were unable to deploy that vessel on a lucrative voyage to the Black Sea which had previously been arranged. Instead they substituted a smaller vessel for that voyage. The Court of Appeal rejected the argument that the plaintiffs' loss should be assessed by reference to the reduced profit made on the voyage to the Black Sea. The Court of Appeal held that the measure of damages was such "as would represent the ordinary and fair earnings of such a ship as the *Argentino,* having regard to the fact that she was put up as one of Westcott & Laurence's line of steamers trading to the Black Sea, and advertised to sail as such".

126. That decision of the Court of Appeal was upheld by the Privy Council see (1889) 14 AC 519. At 523 Lord Herschell said this:

> "I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But, further than this, I agree with the Court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision."

127. In *West Leigh Colliery Company Limited v Tunnicliffe & Hampson Limited* [1908] AC 27 a property owner made a claim against a mining company for damage caused by subsidence. The House of Lords held that the assessment of damages should not include any diminution in market value caused by fear of future subsidence: see, in

particular, the speech of Lord Macnaghten at 29 to 30 and the speech of Lord Loreburn L.C. at 34.

128. In *Re Polemis* (1921) 3 KB 560 a plank, which had been negligently placed by the charterer's employee above the hold of a ship, fell and caused a spark. This ignited petrol vapour in the hold. The entire ship was destroyed in the resultant fire. The Court of Appeal held that the charterers were liable for the loss of the ship. It is unclear whether the *ratio* of this decision is (a) that the fire was a direct consequence of the negligence or (b) that the type of damage (namely physical harm to property) was foreseeable.

129. In *Andreae v Selfridge & Company Limited* (1938) ChD 1 building works carried out by the defendant interfered with the running of the plaintiff's hotel, in particular by noise and dust. The Court of Appeal recognised future loss of business as a recoverable head of damage, although on the evidence causation of that loss had not been proved to the full extent found by the judge. At 8-9 Sir Wilfrid Greene M.R. said this:

> "Therefore, the Court is necessarily compelled to take some broad common-sense view of the situation, having regard to the evidence. One has to remember various things. People who go to hotels do not like having their nights disturbed. One has to remember that hotel custom is obtained, and, indeed, very largely kept, by recommendation. Those are matters of common knowledge. One also must not assume that, when a guest goes away from an hotel, he is satisfied only because he has not made a complaint at the office. Various matters of that kind must be remembered. On the other hand, there are in this case other circumstances, such as the lack of action taken. If there was a real outflow of guests, one would have expected action to be taken at the time. I take the view, that there was an injury done to the business at that time, an injury which did have a deleterious effect on its recovery; but having regard to the fact that I approach the matter on a different principle from that on which the learned judge approached it, the actual injury in that respect is, in my view, very much smaller than he found."

130. In *The Wagon Mound* (No. 1) [1961] AC 388 the defendants negligently allowed furnace oil to spill into the sea. This fouled the slipways of the plaintiffs' wharf. The plaintiffs continued welding operations on their wharf and a fragment of molten metal set the wharf alight. The plaintiffs failed in their claim for fire damage because the oil was difficult to ignite and the fire was unforeseeable. It should be noted that a different conclusion was reached in a subsequent action brought by shipowners in respect of the same fire. This was because in the later action, on different evidence, the fire was held to be foreseeable: see *Wagon Mound* (No. 2) [1967] 1 AC 617.

131. In *Hughes v Lord Advocate* [1963] AC 837 workmen in an Edinburgh street negligently left an open manhole covered by a tent and surrounded by paraffin lamps. An eight year old boy entered the tent and knocked a lamp into the manhole. There was an explosion in which the child suffered severe burns. The House of Lords held

that the employers of the workmen were liable for the child's injuries. Lord Reid put the matter concisely at 845:

> "The appellant's injuries were mainly caused by burns, and it cannot be said that injuries from burns were unforeseeable. As a warning to traffic the workmen had set lighted red lamps round the tent which covered the manhole, and if boys did enter the dark tent it was very likely that they would take one of these lamps with them. If the lamp fell and broke it was not at all unlikely that the boy would be burned and the burns might well be serious. No doubt it was not to be expected that the injuries would be as serious as those which the appellant in fact sustained. But a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable."

132. In *S.C.M. (United Kingdom) Ltd v W.J. Whittall and Son Limited* [1971] 1 QB 337 the defendants' employees damaged an electric cable which served the plaintiffs' typewriter factory. As a result electricity to that factory was cut off for seven hours and molten material in the plaintiffs' machines solidified. Extensive damage was caused to those machines. The plaintiffs also lost one day's production. Thesiger J held that the defendants were liable not only for the repair costs but also for the plaintiffs' loss of production on the day of the power failure. The Court of Appeal upheld that decision. Lord Denning M.R. said at 341-342:

> "It is well settled that when a defendant by his negligence causes *physical* damage to the person or property of the plaintiff, in such circumstances that the plaintiff is entitled to compensation for the physical damage, then he can claim, in addition, for economic loss consequent on it. Thus a plaintiff who suffers personal injuries recovers his loss of earnings: and a shipowner, whose ship is sunk or damaged, recovers for his loss of freight. If and in so far as Mr. Dehn is entitled to claim for the material damage, then he can claim for the loss of production which was truly consequential on the material damage."

133. At 344 Lord Denning added:

> "The law is the embodiment of common sense: or, at any rate, it should be. In actions of negligence, when the plaintiff has suffered no damage to his person or property, but has only sustained economic loss, the law does not usually permit him to recover that loss. The reason lies in public policy. It was first stated by Blackburn J in *Cattle v Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453, 557, and has been repeated many times since. He gave this illustration: When a mine is flooded by negligence, thousands of men may be thrown out of work. None of them is injured, but each of them loses wages. Has each of them a cause of action? He thought not. So here I

> would ask: When an electric cable is damaged, many factories may be stopped from working. Can each of them claim for their loss of profit? I think not. It is not sensible to saddle losses on this scale on to one sole contractor."

134. Thus the decision in *S.C.M.* was that the plaintiffs could recover damages for loss of production consequent on damage to their machinery. However, the plaintiffs could not recover damages for loss of production consequential on the power cut.

135. In *The "Naxos"* (1972) 1 Lloyds L. Rep. 149 the plaintiffs' vessel was damaged in a collision caused by the defendants' negligence. After the collision the plaintiffs entered into a charter with a much higher rate of profit than usual. The plaintiffs then lost five days' use of the vessel while she underwent repairs necessitated by the collision. Brandon J assessed damages by reference to the vessel's normal rate of profit, not the unusually high rate which had been negotiated for one particular voyage.

136. In *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27 the defendants' employees negligently damaged an electric cable which served the plaintiffs' factory. The plaintiffs hastened to pour molten metal out of their furnace, in order to prevent the metal solidifying and damaging the furnace. The Court of Appeal (Edmund Davies LJ dissenting) held that the plaintiffs were entitled to recover their loss of profit on that melt, but not their loss of profit on four further melts which the power cut prevented the plaintiffs from carrying out. Lord Denning M.R. stated that the law restricted recovery for economic loss as a matter of policy. The courts may effect such restriction in particular cases either by saying that no duty was owed or by saying that the damage was too remote. The court should now look beyond those labels and focus on the relationship between the parties in order to determine whether as a matter of policy, economic loss should be recoverable. Lawton LJ noted the difficulty of reconciling the earlier cases on recovery of economic loss. He agreed with Lord Denning that the extent of such recovery was a question of policy in each case.

137. In *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 1 WLR 659 the plaintiff claimed damages in negligence for the destruction of its building by fire. The plaintiff was holding the property for its development potential and never intended to use the building for its original purpose, namely as a billiard hall. May J rejected a claim for damages based on reinstatement costs, noting that two principles were in play: first, the principle of restitution; secondly, the principle that damages must be reasonable as between plaintiff and defendant.

138. In *Muirhead v Industrial Tank Specialities Ltd* [1986] 1 QB 507 the plaintiff fish merchant engaged the first defendant to install a tank for the storage of lobsters. The second defendant supplied pumps for the tank. The third defendant manufactured and supplied the electric motors for the pumps. The electric motors were defective and failures occurred, which on one occasion caused the loss of all the plaintiff's lobsters. The Court of Appeal held that the plaintiff could recover in respect of the physical damage to the lobsters and any financial loss suffered in consequence of that physical damage. However, the plaintiff could not recover the whole of the economic loss which he had suffered.

139. In *Ehmler v Hall* (1993) 1 EGLR 137 a van driven by the defendant crashed into a car showroom, which was owned by the plaintiff but let to Mr Dagistan. Mr Dagistan was unable to use the car showroom for eight weeks and, as he was entitled to do under clause 6 (3) of the lease, he withheld payment of rent for eight weeks. The Court of Appeal held that the plaintiff was entitled to recover the eight weeks lost rent as damages. Nolan LJ (with whom Kennedy and Parker LJJ agreed) distinguished *Rust v Victoria Graving Dock Co.* At 138-9 Nolan LJ said this:

> "Mr Briden advanced two further arguments. One was that, because the damage to the premises would have been repaired long before the end of the nine-year lease, this was a case in which the plaintiffs had suffered no physical loss, but were claiming for a pure economic loss. This argument, however, seems to me again to involve transplanting some of the statements from the judgment in the *Rust* case and applying them to wholly different circumstances. The plaintiffs, unlike Mr Rust in respect of heading (B), suffered from physical damage to their building, which was an income-producing asset. The fact that the cost of repairs to the building was covered by insurance is neither here nor there. The loss of rent arising out of the damage to the building was consequential upon that damage: it was not pure economic loss.
>
> Finally, Mr Briden suggested that, although the defendant could reasonably be expected to foresee that the showroom was being put to commercial use and that accordingly he might have to compensate the tenant for loss of profits whose computation would include any rent which the tenant might have to pay during the period of repair, the defendant could not have been expected to foresee the effects of clause 6(3), this being an unusual clause in a lease. Therefore, he said, the loss to the plaintiffs lay beyond the limits of reasonable foreseeability and was too remote to be recovered. In my judgment, however, this suggestion falls foul of the principle stated by Lord Reid in *Hughes v Lord Advocate* [1963] AC 837, at p845, that a negligent defendant "can only escape liability if the damage can be regarded as differing in kind from what was foreseeable". Thus, it is clear that the defendant could not be expected to foresee the precise terms of the lease, but he could reasonably be expected to foresee that his negligence would cause physical damage and consequential financial loss to the owner or tenant of the premises. That was enough, in my judgment, to make him liable in damages to whichever of those parties, under the contractual arrangements between them, in fact suffered from the particular loss for which damages are claimed."

140. *Dimond v Lovell* [2002] 1 AC 384 was a credit hire claim of a kind which has become increasingly common in recent years. The claimant's car was damaged in an accident. The claimant hired a replacement car at enhanced cost from a hire company which did

not require payment before the conclusion of her claim. The House of Lords held that only the normal hire rate, not the enhanced hire rate, would be recoverable. At 407 Lord Hobhouse said this:

> "This leads on to the question of mitigation. I agree with my noble and learned friend, Lord Hoffmann, that the judge and the majority of the Court of Appeal approached this question in the wrong manner. What Mrs Dimond was paying for here was more than the cost of hiring a car for a week. It was reasonable for her to pay the additional sum in order to obtain the additional benefits enjoyable under the scheme even though the accident hire company were under no legal obligation to do more than provide her with a car on credit. The sum which she paid, having regard to what she was to get was, on the evidence, reasonable. But she cannot claim the whole cost as the cost of mitigating the loss of the use of her car. The cost of that was, on the evidence, only about £24 per day. The remainder of what she paid was attributable to other matters and therefore should not be included in the cost of mitigation. This is the preferred way of looking at this aspect of the dispute between the parties on this point but there are other ways which lead to the same conclusion. One is that preferred by Judge LJ in the Court of Appeal. The excess cost was not reasonably incurred as the cost of hiring the substitute car. Mrs Dimond's right of recovery is limited to the reasonable cost, that is to say the lesser sum. Another way of looking at the matter is to say, as does my noble and learned friend, that, if the whole cost is to be brought into account, then the benefits must be brought into account as well."

141. In *The "Baltic Surveyor"* [2002] EWCA Civ 89; [2002] 1 Lloyds LR 623 the Court of Appeal was assessing damages for the negligent destruction of the claimant's pontoon. That pontoon was of some age and the claimant would have gained a substantial benefit if the damages enabled him to purchase a new pontoon. The Court of Appeal held that the claimant could only recover the actual value of the pontoon which had been lost. Rix LJ, with whom Hale and Schiemann LJ agreed, said this at paragraph 88:

> "In such circumstances the test of reasonableness has an important role to play. This role goes further than the proposition that replacement from new has to be *absurd* for it to be rejected as the measure of loss. The loss has to be measured, and where what is lost is old and second-hand and coming towards the end of its life, it is not prima facie to be measured by the cost of a brand-new chattel, even where the maker cannot supply a closer replica of what has been lost; and where such a measure would not be a reasonable assessment of what has been lost, it should not be used. As May J said in *Taylor v Hepworths*, cited with approval in *Dominion Mosaics v Trafalgar Trucking* and (at 356G and 369G) in *Ruxley v*

> *Forsyth*, damages ought to be reasonable as between claimant and defendant. I do not see why in the realm above all of remedies the common law cannot mould its principles flexibly to the needs of the situation, and as so often the test of reasonableness lies to hand as a useful tool. It may also be possible to speak in terms of proportionality, a closely analogous but not necessarily identical test: see Lord Lloyd in *Ruxley v Forsyth* at 367B and 369H"

142. In *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 the House of Lords considered the proper measure of damages for the conversion of six aircraft. The House of Lords held that the claimant was entitled to recover the cost of regaining the aircraft from Iran, the reasonable cost of repairing and overhauling the aircraft on their return, the cost of chartering substitute aircraft and any loss of profit; but that the claimant could not recover the finance costs of replacing the aircraft with superior models. Lord Nicholls gave the leading speech, with which Lord Steyn, Lord Hoffmann and Lord Hope agreed. In the course of that speech Lord Nicholls gave valuable guidance in relation to the ascertainment of recoverable damages in tort:

> "69. How, then, does one identify a plaintiff's "true loss" in cases of tort? This question has generated a vast amount of legal literature. I take as my starting point the commonly accepted approach that the extent of a defendant's liability for the plaintiff's loss calls for a twofold inquiry: whether the wrongful conduct causally contributed to the loss and, if it did, what is the extent of the loss for which the defendant ought to be held liable. The first of these inquiries, widely undertaken as a simple "but for" test, is predominantly a factual inquiry. The application of this test in cases of conversion is the matter now under consideration. I shall return to this in a moment.
>
> 70. 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). To adapt the language of Jane Stapleton in her article "Unpacking 'Causation'" in *Relating to Responsibility*, ed Cane and Gardner (2001), p 168, 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. In the ordinary language of lawyers, losses outside the limit may bear one of several labels. They may be described as too remote because the wrongful conduct was not a substantial or proximate cause, or because the loss was the product of an intervening cause. The defendant's responsibility may be excluded because the

> plaintiff failed to mitigate his loss. Familiar principles, such as foreseeability, assist in promoting some consistency of general approach. These are guidelines, some more helpful than others, but they are never more than this.
>
> 71. In most cases, how far the responsibility of the defendant ought fairly to extend evokes an immediate intuitive response. This is informed common sense by another name. Usually, there is no difficulty in selecting, from the sequence of events leading to the plaintiff's loss, the happening which should be regarded as the cause of the loss for the purpose of allocating responsibility. In other cases, when the outcome of the second inquiry is not obvious, it is of crucial importance to identify the purpose of the relevant cause of action and the nature and scope of the defendant's obligation in the particular circumstances. What was the ambit of the defendant's duty? In respect of what risks or damage does the law seek to afford protection by means of the particular tort? Recent decisions of this House have highlighted the point."

143. *Lagden v O'Connor* [2004] 1 AC 1067 was another credit hire case. In this case the House of Lords, distinguishing *Dimond v Lovell*, held that the claimant could recover the reasonable additional charges of a credit hire company, if his impecuniosity was such that he could not otherwise have obtained a replacement car. In reaching this decision the House of Lords departed from its earlier decision in *Owners of Liesbosch Dredger v Owners of SS Edison (the Liesbosch)* [1933] AC 449. Lord Hope (with whom Lord Nicholls and Lord Slynn agreed) noted that the law had moved on since 1933. The wrongdoer must take his victim as he finds him. This applies to the victim's economic state as well as his physical or mental vulnerability.

144. In *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180; [2011] QB 86 the beneficial owners of property recovered damages for economic loss consequential on the destruction of that property. At paragraph 142 Waller LJ, giving the judgment of the court, said this:

> "If, therefore, such property is, in breach of duty, damaged by the defendant, that defendant will be liable not merely for the physical loss of that property but also for the foreseeable consequences of that loss, such as the extra expenditure to which the beneficial owner is put or the loss of profit which he incurs."

145. The common law rules and principles which regulate the recoverability and assessment of damages form a vast and rippling skein, to which many judges and jurists have contributed over the last two centuries. I would not presume to offer a comprehensive review of that skein. I do, however, suggest that four principles relevant to the present appeal can be discerned from the authorities:

i) Economic loss which flows directly and foreseeably from physical damage to property may be recoverable. The threshold test of foreseeability does not require the tortfeasor to have any detailed knowledge of the claimant's

business affairs or financial circumstances, so long as the general nature of the claimant's loss is foreseeable.

ii) One of the recognised categories of recoverable economic loss is loss of income following damage to revenue generating property.

iii) Loss of future business as a result of damage to property is a head of damage which lies on the outer fringe of recoverability. Whether the claimant can recover for such economic loss depends upon the circumstances of the case and the relationship between the parties.

iv) In choosing the appropriate measure of damages for the purposes of assessing recoverable economic loss, the court seeks to arrive at an assessment which is fair and reasonable as between the claimant and the defendant.

146. Judges and jurists recognise the impossibility of formulating any single set of rules defining the extent to which loss and damage caused by torts should be recoverable. Thus, they sometimes invoke "common sense" or "policy" or the consideration of what is "fair and reasonable" as explaining the restrictions upon recovery imposed in an individual case: see, for example, *S.C.M*, *Spartan Steel* or *Kuwait Airways*. Although Hart and Honoré on "Causation in the Law" (2nd Edition, 1985) was not cited by counsel, it can be seen that the role of common sense is analysed in chapter 2 of that work. It seems to me that the occasional appeals by judges or scholars to "common sense" or "policy" or what is "fair and reasonable" underline that no single set of rules is comprehensive or can be inflexibly applied.

147. With the benefit of this review of the authorities, I now return to the present appeal.

Part 3. Application to the Present Appeal

148. The railway lines owned by Network Rail are revenue generating assets. It is now a matter of common knowledge that Network Rail owns the lines and that TOCs operate railway services using those lines. The grant or the renewal of franchises for TOCs is sometimes a matter of public comment and debate.

149. It is plainly foreseeable that if railway lines are damaged, Network Rail will suffer a loss of revenue. There is nothing remarkable about the revenue losses which occurred in this case. If the main line running from London Kings Cross to the North of England and Scotland is put out of action for most of the day, it is hardly surprising that Network Rail suffers a loss of revenue of about £1 million. Nor is it surprising that if a smaller railway line is put out of action for five days, Network Rail suffers a loss of revenue of about £127,000.

150. In my view, this action should be characterised as a simple claim for loss of income consequent upon damage to revenue earning property. This is a well established category of recoverable economic loss. Network Rail's loss is the direct consequence of physical damage and it is a type of loss which is readily foreseeable.

151. Obviously a negligent driver approaching a railway bridge or level crossing, or the employer of such a driver, will know nothing of the detailed arrangements existing between Network Rail and the TOCs. Nor does he need to possess such knowledge, in

order to be fixed with liability for Network Rail's loss of revenue while the rail track is unusable as a result of negligent driving.

152. The present litigation has involved a minute scrutiny of the formulae and calculations which are used to assess compensation for TOCs in respect of periods when railway lines are unavailable. There is nothing unusual or untoward in any of those formulae or calculations. It is hardly surprising that they are complex.

153. Absent some exceptional circumstance or obviously unreasonable feature in the claimant's business arrangements, in my view it is not appropriate for the court to explore in detail the build-up of any loss of revenue following damage to revenue generating property. It is sufficient for the claimant to prove that the loss of revenue has occurred.

154. The law of tort should, so far as possible, be clear and simple. This court should not superimpose a requirement for expensive legal inquiry upon categories of case where there is an established entitlement to recover economic loss.

155. The exploration of the build-up of Network Rail's revenue loss in the present case has not revealed any exceptional circumstance or unreasonable feature of Network Rail's business arrangements. The resultant figures do not appear surprising or disproportionate. It is now accepted that Network Rail's schedule 8 payments to the TOCs are arrived at on the basis of a reasonable assessment of the TOCs' losses flowing from the temporary closure of the lines. It is true that Network Rail's payments under schedule 8 include compensation for the TOCs' future loss of fares. That circumstance, however, cannot detract from Network Rail's claim against the defendants for loss of revenue.

156. In the result, therefore, I agree with the conclusion of Pill and Moore-Bick LJJ that this appeal must be dismissed.