CHAPTER ONE

GENERAL PRINCIPLES OF DAMAGES

I. INTRODUCTION

The purpose of an award of damages, it has often been said, is to put the party complaining in the position that he or she would have occupied if the wrong had not been done. The most widely quoted statement is that of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880), 5 App Cas 25 at 39 (HL (Sc)):

> I do not think that there is any difference of opinion as to its being the general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

But this principle, like all general principles that concern the law, is not self-applying. It has always been found that some restrictions must necessarily be placed on the search for perfect compensation. The law of damages constantly reveals a tension between, on the one hand, an investigation into precisely what position the plaintiff would have occupied if the wrong

had not been done (necessarily a hypothetical inquiry) and, on the other hand, the adoption of principles that are capable of consistent, fair, and reasonably inexpensive application. Consider the following statement of Dr Lushington, in a ship collision case, *The "Columbus"* (1849), 3 W Rob 158 at 162, 166 ER 922 at 923 (HC Admir).

> [N]ot only in this Court [the High Court of Admiralty] but in all other Courts, I apprehend the general rule of law is, that where an injury is committed by one individual to another … the party receiving the injury is entitled to an indemnity for the same. But although this is the general principle of law, all Courts have found it necessary to adopt certain rules for the application of it; and it is utterly impossible, in all the various cases that may arise, that the remedy which the law may give should always be the precise amount of the loss or injury sustained. In many cases it will, of necessity, exceed, in others fall short of the precise amount.

The chief limiting principles are remoteness, uncertainty, and mitigation. The plaintiff must establish, on the balance of probabilities, that he or she has suffered a loss and that the loss has been caused by the defendant's wrong. But if all such losses were to be compensated, defendants would be liable for very unexpected consequences. Willes J in *British Columbia and Vancouver's Island Spar Lumber & Saw-Mill Co Ltd v Nettleship* (1868), LR 3 CP 499 at 508, gave the example of

> a case said to have been decided about two centuries and a half ago, where a man going to be married to an heiress, his horse having cast a shoe on the journey, employed a blacksmith to replace it, who did the work so unskillfully that the horse was lamed, and, the rider not arriving in time, the lady married another; and the blacksmith was held liable for the loss of the marriage.

Willes J called the imposition of liability an "absurdity," and, since the 19th century, it has been recognized that a limit is necessary, but it has not been found easy to formulate a principle to explain and predict which kinds of losses will be classified as legally too remote and which will not.

The issues of remoteness and causation are also relevant with respect to the equitable remedy of compensation, and further material can be found in Chapter 10, Financial Relief in Equity, where that remedy is addressed specifically. There, consideration is given to the proposition that equitable compensation is not subject in quite the same way to the limitations on recovery resulting from principles of remoteness and causation that apply in the domains of contract and tort damages.

II. REMOTENESS

H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd

[1978] QB 791 (CA)

[The defendant sold a hopper for storing pig food to the plaintiff for the plaintiff's pigs. In installing the hopper, the defendant failed to open a ventilator, with the result that the pignuts became mouldy, and the pigs were affected by the intestinal infection known as E. coli.]

SCARMAN LJ (at 810-13): … The outbreak of E. coli, which did the damage, was, as found by the judge and now conceded by the defendants, caused by the mouldy condition of the nuts fed from the hopper. It is also conceded, as the judge also

found, that the lack of top ventilation in the hopper caused this condition. But it is the defendants' case that at the time of the contract the parties could not have reasonably contemplated that nuts, rendered mouldy by lack of hopper ventilation, would cause serious illness, such as E. coli, in the pigs that fed on them.

A formidable volume of expert evidence upon this point was deployed for the consideration of the judge. His findings as to the contemplatability of E. coli [were] as follows:

> I would not consider that I would be justified in finding that in the spring of 1971 at the time of the contract either a farmer in the position of the plaintiffs or a hopper manufacturer in the position of the defendants would reasonably have contemplated that there was either a very substantial degree of possibility or a real danger or serious possibility that the feeding of mouldy pignuts in the condition described by Mr. Parsons would cause illness in the pigs that ate them, even on an intensive farm such as that of the plaintiffs.

The plaintiffs, by their respondent's notice, challenge this finding. I have done my best to study the evidence as it appears from the detailed and lucid judgment under appeal. I confess that I think I might well have reached a different conclusion, but bearing in mind the inevitable limitations upon an appellate court's consideration of such a question and the great advantages available to the judge, and most assuredly used to the full by him, I think it would be wrong to disturb his finding.

But it is necessary to note the essence—and the limits—of the finding. It is a finding that the parties could not reasonably be supposed to have had in contemplation that there was a serious possibility of mouldy nuts causing illness in the plaintiffs' pigs. It is not a finding that they could not reasonably have had in contemplation that a hopper unfit for its purpose of storing food in a condition suitable for feeding to the pigs might well lead to illness.

The judge's other findings of fact may be summarized as follows. He found that there was a warranty—its existence is not disputed by the defendants—to the effect that the hopper should be reasonably fit for the purpose of storing pignuts in a condition suitable for feeding to the plaintiffs' pigs. He found that the hopper, being unventilated, was not so fit; and this defect was a breach of the warranty, and that the pignuts were unfit by reason of the breach. He found that the plaintiffs' loss was caused by the breach of warranty. Upon the basis of these findings, the judge held that since the first question is whether "the damage" claimed arises in the ordinary course of things from the breach, "there is no need to have recourse to the question of the presumed contemplation." He then considered the meaning of the implied term "pleaded and admitted" that the hopper should be reasonably fit for the purpose of storing pignuts to be fed to the plaintiffs' pigs and reached the conclusion, which I respectfully think was inevitable, that it meant that, in so far as proper storage could achieve it, the hopper would keep the pignuts in a condition such as not to make the plaintiffs' pigs ill. He stressed the importance to be attached to the particular nature of this herd of pigs—a very different set of animals from the ordinary farmyard pig—and to the intensive nature of the plaintiffs' farming operation, all of which matters were made known to the defendants before contract. He stated his conclusion in these words:

> On this interpretation the inevitable conclusion from the findings I have already made would be that this hopper was not reasonably fit for that purpose and that this caused the nuts to become toxic and that the illness of the pigs was a direct and natural consequence of such breach and toxicity, and that the plaintiffs do not have to prove that the toxicity or its results were foreseeable to either party. To put

> it another way, once the question of foreseeability of the breach is eliminated, as it is by the absolute warranty, the consequences of the breach flow naturally from it.

Mr. Drake criticises strongly this part of the judgment. He says it is based on a misunderstanding of *Hadley v. Baxendale*, 9 Exch. 341; 156 ER 145 and he referred us to the well-known passage in Lord Reid's speech in *C. Czarnikow Ltd. v. Koufos*, [1969] 1 AC 350 (HL (Eng.)) where he said that it is not enough that in fact the plaintiff's loss was directly caused by the defendant's breach of contract. Lord Reid said, at p. 385:

> The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.

Notwithstanding his choice of language, I think the judge was making the approach which, according to Lord Reid, is the correct one. He was saying, in effect, that the parties to this contract must have appreciated that, if, as happened in the event, the hopper, unventilated, proved not to be suitable for the storage of pignuts to be fed to the plaintiffs' pigs, it was not unlikely, there was a serious possibility, that the pigs would become ill. The judge put it this way:

> The *natural* result of feeding toxic food to animals is damage to their health and may be death, which is what occurred, albeit from a hitherto unknown disease and to particularly susceptible animals. There was therefore no need to invoke the question of *reasonable* contemplation in order to make the defendant liable (my emphasis).

The judge in this critical passage is contrasting a natural result, i.e. one which people placed as these parties were would consider as a serious possibility, with a special, specific result, i.e. E. coli disease, which, as he later found, the parties could not at the time of contract reasonably have contemplated as a consequence. He distinguished between "presumed contemplation" based on a special knowledge from ordinary understanding based upon general knowledge and concludes that the case falls within the latter category. He does so because he has held that the assumption, or hypothesis, to be made is that the parties had in mind at the time of contract not a breach of warranty limited to the delivery of mouldy nuts but a warranty as to the fitness of the hopper for its purpose. The assumption is of the parties asking themselves not what is likely to happen if the nuts are mouldy but what is likely to happen to the pigs if the hopper is unfit for storing nuts suitable to be fed to them. While, on his finding, nobody at the time of contract could have expected E. coli to ensue from eating mouldy nuts, he is clearly—and, as a matter of common sense, rightly—saying that people would contemplate, upon the second assumption, the serious possibility of injury and even death among the pigs.

And so the question becomes: was he right to make the assumption he did? In my judgment, he was: see *Grant v. Australian Knitting Mills Ltd.*, [1936] AC 85 (PC (Aust.)), and particularly the well-known passage in the speech of Lord Wright at pp. 97-100.

I would agree with *McGregor on Damages* (London: Sweet & Maxwell, 13th ed., 1972) at pp. 131-132 that

> ... in contract as in tort, it should suffice that, if physical injury or damage is within the contemplation of the parties, recovery is not to be limited because the degree of physical injury or damage could not have been anticipated.

This is so, in my judgment, not because there is, or ought to be, a specific rule of law governing cases of physical injury but because it would be absurd to regulate damages in such cases upon the necessity of supposing the parties had a prophetic foresight as to the exact nature of the injury that does in fact arise. It is enough if upon the hypothesis predicated physical injury must have been a serious possibility. Though in loss of market or loss of profit cases the factual analysis will be very different from cases of physical injury, the same principles, in my judgment, apply. Given the situation of the parties at the time of contract, was the loss of profit, or market, a serious possibility, something that would have been in their minds had they contemplated breach?

It does not matter, in my judgment, if they thought that the chance of physical injury, loss of profit, loss of market, or other loss as the case may be, was slight, or that the odds were against it, provided they contemplated as a serious possibility the type of consequence, not necessarily the specific consequence, that ensued upon breach. Making the assumption as to breach that the judge did, no more than common sense was needed for them to appreciate that food affected by bad storage conditions might well cause illness in the pigs fed upon it.

As I read the judgment under appeal, this was how the judge, whose handling of the issues at trial was such that none save one survives for our consideration, reached this decision. In my judgment, he was right, upon the facts as found, to apply the first rule in *Hadley v. Baxendale* or, if the case be one of breach of warranty, as I think it is, the rule in section 53(2) of the *Sale of Goods Act 1893* without inquiring as to whether, upon a juridical analysis, the rule is based upon a presumed contemplation. At the end of a long and complex dispute the judge allowed common sense to prevail. I would dismiss the appeal.

LORD DENNING MR (at 801-03):

The Law as to Remoteness

Remoteness of damage is beyond doubt a question of law. In *C. Czarnikow Ltd. v. Koufos*, [1969] AC 350 (HL (Eng.)) the House of Lords said that, in remoteness of damage, there is a difference between contract and tort. In the case of a *breach of contract*, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of making the contract, would *contemplate* them as being of a very substantial degree of probability. (In the House of Lords various expressions were used to describe this degree of probability, such as, not merely "on the cards" because that may be too low: but as being "not unlikely to occur" (see pp. 383 and 388); or "likely to result or at least not unlikely to result" (see p. 406); or "liable to result" (see p. 410); or that there was a "real danger" or "serious possibility" of them occurring (see p. 415).)

In the case of a *tort*, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of the tort committed, would *foresee* them as being of a much lower degree of probability. (In the House of Lords various expressions were used to describe this, such as, it is sufficient if the consequences are "liable to happen in the most unusual case" (see p. 385) or in a "very improbable" case (see p. 389); or that "they may happen as a result of the breach, however unlikely it may be, unless it can be brushed aside as far-fetched" (see p. 422).)

I find it difficult to apply those principles universally to all cases of contract or to all cases of tort: and to draw a distinction between what a man "contemplates" and what he "foresees." I soon begin to get out of my depth. I cannot swim in this

sea of semantic exercises—to say nothing of the different degrees of probability—especially when the cause of action can be laid either in contract or in tort. I am swept under by the conflicting currents. I go back with relief to the distinction drawn in legal theory by Professors Hart and Honore in their book *Causation in the Law* (Oxford: Clarendon Press, 1959), at pp. 281-287. They distinguish between those cases in contract in which a man has suffered no damage to person or property, but only *economic loss*, such as loss of profit or loss of opportunities for gain in some future transaction: and those in which he claims damages for an *injury actually done* to his person or *damage actually done* to his property (including his livestock) or for ensuing expense (*damnum emergens*) to which he has actually been put. In the law of *tort*, there is emerging a distinction between economic loss and physical damage: see *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*, [1973] QB 27 (CA) at pp. 36-37. It underlies the words of Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] AC 728 (HL (Eng.)) at 759 recently, where he classified the recoverable damage as "material, physical damage." It has been much considered by the Supreme Court of Canada in *Rivtow Marine Ltd. v. Washington Iron Works and Walkem Machinery & Equipment Ltd.*, [1974] SCR 1189 and by the High Court of Australia in *Caltex Oil (Australia) Pty. Ltd. v. Dredge Willemstad* (1976), 136 CLR 529.

Loss of Profit Cases

I would suggest as a solution that in the former class of case—loss of profit cases—the defaulting party is only liable for the consequences if they are such as, at the time of the contract, he ought reasonably to have *contemplated* as a *serious* possibility or real danger. You must assume that, at the time of the contract, he had the very kind of breach in mind—such a breach as afterwards happened, as for instance, delay in transit—and then you must ask: ought he reasonably to have *contemplated* that there was a *serious* possibility that such a breach would involve the plaintiff in loss of profit? If yes, the contractor is liable for the loss unless he has taken care to exempt himself from it by a condition in the contract—as, of course, he is able to do if it was the sort of thing which he could reasonably contemplate. The law on this class of case is now covered by the three leading cases of *Hadley v. Baxendale*; *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 KB 528 (CA); and *C. Czarnikow Ltd. v. Koufos*. These were all "loss of profit" cases: and the test of "reasonable contemplation" and "serious possibility" should, I suggest, be kept to that type of loss or, at any rate, to economic loss.

Physical Damage Case

In the second class of case—the physical injury or expense case—the defaulting party is liable for any loss or expense which he ought reasonably to have *foreseen* at the time of the breach as a possible consequence, even if it was only a *slight* possibility. You must assume that he was aware of his breach, and then you must ask: ought he reasonably to have foreseen, at the time of the breach, that something of this kind might happen in consequence of it? This is the test which has been applied in cases of tort ever since *The Wagon Mound* cases, [1961] AC 388 (PC (NSW)), and [1967] 1 AC 617 (PC (NSW)). But there is a long line of cases which support a like test in cases of contract.

[Orr LJ agreed with Scarman LJ.]

The appeal was dismissed.

Kienzle v Stringer

1981 CanLII 1851, 35 OR (2d) 85 (CA)

ZUBER JA: This is an appeal by the plaintiff from a judgment of Mr. Justice Cromarty [14 RPR 29] awarding the plaintiff the sum of $17,459.48 plus costs on a solicitor-and-client basis.

The sole issue at trial and on this appeal is the quantum of the plaintiff's damages. The defendant Stringer is a solicitor and the plaintiff was his client; from this relationship there flowed the problems that now confront this Court. Even though liability is not an issue, some reference to the facts is necessary to understand the problems raised on this appeal.

The plaintiff's parents Otis and Catherine Kienzle were the owners of a farm in the Town of Norwich in the County of Oxford (the "Oxford farm"). Catherine Kienzle died in 1943, leaving her husband and three children: the plaintiff and his two sisters Annie Ashbaugh and Velma Allin. No steps were taken in the estate of Catherine Kienzle until 1973 when letters of administration were issued to her husband. However, before any further steps were taken, Otis Kienzle died a widower on June 22, 1974. In 1977, letters of administration in the father's estate and letters of administration *de bonis non* in the mother's estate were issued to Annie Ashbaugh.

Shortly before the death of Otis Kienzle, the plaintiff, at his father's request, began working with him on the Oxford farm. He continued to work the farm up until his father's death and thereafter until the time of trial. In 1974 he rented an additional 78 acres of nearby land to work with the Oxford farm to render the operation economical.

In 1977, the plaintiff elected to buy the Oxford farm and offered the sum of $55,000 which was accepted by Mrs. Ashbaugh as administratrix of both estates. The defendant who had acted as the solicitor for both estates also acted as solicitor for the plaintiff. The defendant prepared a deed dated July 12, 1977 conveying the Oxford farm from Annie Ashbaugh as administratrix of both estates to the plaintiff. Mrs. Ashbaugh did not join in the conveyance in her personal capacity. Mrs. Allin did not join in the conveyance at all. In due course, each sister was paid one-third of the $55,000 and the plaintiff also received his one-third share. The defendant certified in the traditional language that the plaintiff had "a good and marketable title."

The title to the Oxford farm was neither good nor marketable. Since three years had expired since the date of Otis Kienzle's death and no appropriate steps had been taken, title to the farm had vested in the three next of kin, the plaintiff and his two sisters. The deed of the administratrix without the concurrence of the two sisters in their personal capacities was of little or no value.

The plaintiff, however (at least for the time being), was unaware of his title problems but encountered others. He found that it was increasingly difficult to operate the Oxford farm on a profitable basis and as a result planned to buy a larger farm. In the spring of 1978 he found such a farm in the Kincardine area (the "Kincardine farm") which he agreed to buy at a price of $119,800. This agreement was conditional upon his being able to sell the Oxford farm. Shortly thereafter he received and accepted an offer to sell the Oxford farm at a price of $76,000. In anticipation of these two sales, the lease for the 78 acres near the Oxford farm was not renewed.

The plaintiff was, of course, unable to convey good title to the Oxford farm. Mrs. Ashbaugh, having received her one-third of the $55,000 was prepared to convey her one-third to the plaintiff. However, Mrs. Allin was not prepared to do so. As a result, the sale of the Oxford farm collapsed. The plaintiff then lacked the funds to complete the purchase of the Kincardine farm and that purchase was lost.

The learned trial judge awarded the plaintiff the amount of money necessary to buy out the Allin interest ($15,509.48), the return of the legal fees paid to the defendant ($1,200) and legal fees paid to another solicitor who attempted to unravel the title problems ($750). The plaintiff claims, however, that he is entitled to much more, namely damages for loss of income when the plaintiff was obliged to remain on the Oxford farm while it was no longer a viable operation without the additional leasehold property and damages for the lost purchase of the Kincardine farm the value of which had risen to $164,000 at the time of trial.

The learned trial judge was of the view that he was bound by the case of *Messineo v. Beale* (1978), 20 OR (2d) 49 (CA), and that his award of damages was therefore limited to the difference between the contract price and the market value of what was received. I take it to be clear as well that the market value spoken of is the market value at the time of the transaction, otherwise rising values would wipe out the plaintiff's damages but leave him with his problems unresolved. On this premise the trial judge calculated the plaintiff's damages to be $15,509.48. In addition, he awarded a certain amount for legal costs already described.

In my respectful view, *Messineo v. Beale* is not authority for such a broad proposition. In *Messineo v. Beale*, the plaintiff agreed to buy several parcels of property, among them a particular piece called Murch's Point. The defendant's solicitor searched the title, closed the transaction and presented to the plaintiff a deed which included Murch's Point. A month later it was discovered that the purchaser had not received title to Murch's Point because the vendor had never owned it. However, the value of the land received exceeded the purchase price. The plaintiff was therefore awarded only nominal damages.

In my respectful opinion, *Messineo v. Beale* decides only that the defendant did not *cause* the plaintiff any damage. Since the vendor did not own Murch's Point, the defendant's solicitor did not cause its loss. The solicitor caused the plaintiff to complete a transaction that he would otherwise have avoided but no loss resulted from this. The plaintiff could have resold as soon as he discovered that he had not obtained Murch's Point and would have suffered no loss at all. It would have been far different if the vendor had owned Murch's Point and the solicitor had omitted the property from the deed or in some other way had caused the plaintiff to lose the property. In that case, the plaintiff's damage would have been the value of the missing property despite the fact that the value of what he had received was greater than the purchase price.

It appears that in many of the cases, as a matter of fact, the damages amount to no more than the difference between the purchase price and the market value of what is received, but I find no case binding on this Court compelling the acceptance of such a measure as a rule of law.

In my view the law should not support a rule which gives exceptional protection to solicitors from the general principles of damages which flow from either contractual or tortious responsibilities.

One problem that intrudes but briefly in this case is whether the liability of the solicitor is based in contract alone or in tort as well. (See again, *Messineo v. Beale*.) However, in this case, the question is of little consequence. Liability is admitted, no limitation period intervenes; the sole question is the question of damages. The extent of recovery for damages from breach of contract is described in the classic words of Baron Alderson in *Hadley v. Baxendale* (1854), 9 Exch. 341 at p. 355, 156 ER 145 at p. 151:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract

> should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

In tort, the measure is reasonable foreseeability. It is, I think, apparent that neither of these tests is a measure of precision and I number myself among those who are unable to see any real difference between them. (See *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*, [1978] QB 791 (CA).)

For the purpose of simplicity, I shall use the term "reasonable foreseeability" as embracing the test in both tort and contract. Using this measure, we come to the case at hand. There is no denial that the plaintiff is entitled to the sum of money needed to put the title to the Oxford farm in good order. It was disclosed on this appeal that it actually required $750 more (for her costs) to settle with Mrs. Allin than the sum of $15,509.48 estimated by the trial judge. This item of damages must, therefore, be increased. The plaintiff is, of course, entitled to the other items allowed by the trial judge.

The first substantial item of consequential loss asserted by the appellant flows from the fact that the appellant, relying on the marketability of the Oxford farm, shut down the effective operation of that farm by letting go the surrounding leasehold property. When the sale fell through, the plaintiff was obliged to keep the Oxford farm without being able to do much with it. Even his credit position had been adversely affected by the discovery of the faulty title. His profit from the Oxford farm dropped drastically. The plaintiff, however, was obliged to mitigate his damages and could not simply stay in this position forever. In my view, a reasonable period for him to untangle himself from the web in which he found himself would be a period of one year and for that period his loss of profits should be assessed at $10,000. This loss is directly and immediately connected to the defective title and consequent lack of marketability of the Oxford farm, and would have occurred if the plaintiff had chosen only to sell the Oxford farm without any plan to purchase another farm. I conclude, therefore, that this loss is within the ambit of reasonable foreseeability.

The far more difficult problem that arises is the lost profit on the purchase of the Kincardine farm. Mr. Cherniak asked that the appellant's award be increased to reflect this loss. The contract price of the Kincardine farm was $119,800; by the time of trial it had advanced to $164,000, a difference of $44,200. During this same period, the value of the Oxford farm rose from $76,000 to $100,000. Mr. Cherniak claims on behalf of his client the loss on the Kincardine sale, diminished by the gain on the retention of the Oxford farm, *i.e.*, $20,200.

The question that then arises is whether or not this loss is "reasonably foreseeable" and it becomes apparent that this measure is far from precise.

It may be helpful to recognize that in using the terms "reasonably foreseeable" or "within the reasonable contemplation of the parties" courts are not often concerned with what the parties in fact foresaw or contemplated. (I leave aside those cases where the disclosure of special facts may lead to the conclusion that a party has assumed an extraordinary risk.) The governing term is reasonable and what is reasonably foreseen or reasonably contemplated is a matter to be determined by a court. These terms necessarily include more policy than fact as courts attempt to find some fair measure of compensation to be paid to those who suffer damages by those who cause them. (See Barry J. Reiter & John Swan, *Studies in Contract Law* (Toronto: Butterworths, 1980) at p. 61, study 3, Katherine Swinton, "Foreseeability: Where Should the Award of Contract Damages Cease?")

In the ordinary course, a client relies on his solicitor to guarantee the title that he certifies. The fee charged is calculated upon the sale price of the title certified and arguably the size of the risk assumed. It is not unreasonable to add to that risk consequential damages immediately concerned with the failure of marketability.

This reliance, however, does not or should not extend to the loss of profits from secondary transactions which may be fuelled by funds expected from the marketing of the subject real property. This range of secondary transactions is unpredictable and limitless and so are the losses that may flow therefrom. If the ambit of reasonable foreseeability takes us into this area of secondary transactions it is difficult, if not impossible, to know where a boundary may be found. In my view, the damages that flow from the loss of profits from a secondary bargain lie on the far side of a Rubicon that should not be crossed; reasonable foreseeability takes us only to the shore. I except again those cases in which particular disclosure may lead to the assumption of additional risks. In this case, of course, there was no such disclosure that the Oxford farm was to be the basis of future purchases.

I conclude that the plaintiff should not recover his loss resulting from his inability to purchase the Kincardine farm.

In declining to extend the ambit of the plaintiff's recovery to the Kincardine transaction I have chosen not to rely upon the weakest reason for so doing, *i.e.*, the plaintiff's impecuniosity. That classic argument would say that the plaintiff should have completed the purchase of the Kincardine farm by drawing upon his theoretically limitless funds; the fact that he had no such funds is not the fault of the defendant. But, in this case, the plaintiff's financial problems were in large part caused by his title problems. However, it is not necessary to decide whether impecuniosity alone would have precluded the plaintiff from recovering his Kincardine loss and I say no more about it.

For the foregoing reasons, I would allow in part the plaintiff's appeal and would vary the trial judgment by increasing the amount awarded by $10,750. The appellant is entitled to his costs of this appeal.

Sir Robin Cooke, "Remoteness of Damages and Judicial Discretion"

(1978) 37 Cambridge LJ 288

The purpose of the law is to ensure, as far as money can, that the plaintiff is in the same position as he would have enjoyed if his rights had not been violated by the defendant. Any damage of which the defendant's tort or breach of contract is a substantial cause is prima facie recoverable. Nevertheless, as between the parties it may be just, on the facts of any given case, to limit the damages by excluding certain heads; and in determining that question in any given case the court should have regard to a range of considerations. The main relevant considerations have already emerged from the case law and are somewhat as follows:

(i) The degree of likelihood that such damage, or damage of broadly the same kind, would be caused by such an act or omission. In all cases this should be considered from the point of view of a reasonable man in the defendant's position immediately before the act or omission in question; but in contract an assessment as at the date of the contract will also be relevant.