

## Chapter 27

Walter is a professional photographer. He stops at Jesse's petrol station, where he is met by Jesse himself. Jesse explains that customers are no longer allowed to fill their cars with petrol themselves, and that Jesse will do this for Walter. Walter tells Jesse that it is crucial that he fill up the car with unleaded petrol quickly, since Walter is going to his son, Flynn's, wedding in Albuquerque; Walter explains that he will be the official photographer at the wedding. Jesse agrees, but mistakenly puts diesel rather than unleaded petrol into Walter's car.

Walter's car breaks down ten minutes after leaving the petrol station. Walter has to pay £500 in towage and repair costs. Walter also misses his flight to Albuquerque; that ticket cost £1,000. Walter then spends £2,000 on a flight to Albuquerque the following day, but arrives too late for his son's wedding. Walter was going to take photographs at the wedding for free; in order to replace Walter, Flynn hires a different photographer at a cost of £3,000. Walter is upset not to be at his son's wedding, and is angry to have missed the chance to impress Gus, a local businessman, who had promised to hire Walter as his official photographer for £1 million per year if Walter took good photographs of the wedding. Walter has a nervous breakdown as a result of all the stress.

### Advise Walter.

Walter (W) may bring a claim against Jesse (J) for compensatory damages, as J breached the contract by filling W's car with the wrong petrol. Each of the losses suffered by W following this breach will be examined in turn, the key question here being whether the losses are recoverable or not, applying the rules on remoteness (and other limitations to damages).

- 1) The towage and repair costs

The starting point for remoteness is *Hadley v Baxendale*, which has been refined by subsequent cases. The orthodox remoteness test ('the orthodox test') can be formulated as follows: loss is too remote in contract if the defendant could not have reasonably contemplated that type of loss as a serious possibility, had it thought about the breach at the time the contract was made (*Brown v KMR*).

At the time of making the contract, J must have reasonably contemplated that if he filled W's car with the wrong fuel, the car running on that fuel would break down and require repairs. This type of loss arises naturally from the breach and is not too remote. Applying this, W will be able to recover the £500.

- 2) The cost of the original air ticket and purchasing a second ticket

This type of loss does not arise naturally from the breach. However, the fact that W would miss his flight and would therefore have to buy another ticket 'may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it' (*Hadley*). W had clearly told J that he was in a hurry because he had to catch a flight to Albuquerque to attend his son's wedding. J is undisputedly aware of these 'special circumstances', and W missing his flight and having to purchase tickets for another one can be said to be a serious

**Comment [A1]:** This introduction is OK, but I do wonder whether it adds very much.

**Comment [A2]:** See also Lord Hoffmann in *The Achilles*.

**Comment [A3]:** Perhaps easiest here to separate Limb 1 from Limb 2?

**Comment [A4]:** Can W recover both?!

possibility arising from the breach (e.g. filling the car with the wrong fuel and causing it to break down). J cannot argue that this loss is too remote because he had not contemplated the *extent* of the loss (e.g. the cost of the tickets) because we are looking at the *type* of loss suffered (*Brown v KMR*).

**Comment [A5]:** See also *Victoria Laundry*?

However, this may be seen as a harsh result, making this case an 'unusual' one where the orthodox test is not enough (*The Sylvia*). This calls for an application of the 'assumption of responsibility' test introduced by Lord Hoffmann and Lord Hope in *The Achilles*. Although Lord Hoffmann's reasoning is questionable (part of it relied on an alleged 'understanding within the shipping industry' that charterers are only liable for loss incurred during the overrun period), subsequent cases such as *Supershield v Siemens* have confirmed that the traditional *Hadley v Baxendale* remoteness rules may be overridden by the approach in *The Achilles*. The 'assumption of responsibility' test asks whether J has accepted liability or responsibility for the loss, and is based on the construction of the contract rather than a default rule of policy (as in *Hadley*).

**Comment [A6]:** Why is this questionable? Fact-specific, or is the more general notion questionable?

J cannot really choose not to enter into this sort of contract, and to rely solely on the orthodox approach would be to give talkative customers such as W more protection than others. The responsibility that J can be said to have assumed is to fill W's car with unleaded petrol, quickly. Upon no construction of the contract would one be able to find a promise made by J that W will arrive at the airport on time.

**Comment [A7]:** Good.

It is likely that this loss is recoverable under the orthodox test, but not under Lord Hoffmann's 'assumption of responsibility' requirement. If the court finds this loss not to be remote, J may argue under mitigation that damages should not be awarded for loss that could reasonably have been avoided e.g. if W had taken reasonable steps to arrive at the airport on time (*British Westinghouse Electric*), although the burden of proof on J is a heavy one.

**Comment [A8]:** But of course always difficult to interpret the contract regarding what the consequences of breach should be.

**Comment [A9]:** This is perhaps not entirely clear, if J was not in a position to re-negotiate etc.

**Comment [A10]:** This last sentence could be better explained.

### 3) The cost of hiring a photographer

Firstly, the cost was incurred by W's son, Flynn, who is not privy to the contract between W and J (he was not envisaged in the contract and on the facts the parties did not intend to confer a benefit on him; *Scruttons*). Thus, Flynn does not have a claim against J for the £3,000.

**Comment [A11]:** Explain this.

Even if it can be said that this loss was suffered by W (e.g. W was paying for the wedding), it is absurd to say that, at the time of contract, J could reasonably foresee that if he did not fill W's car with the correct fuel, costs would be incurred by W for hiring a photographer (despite knowing that W is to be the photographer at the wedding), or that J assumed responsibility for the provision of a photographer for the wedding. This loss is too remote under both tests, and therefore cannot be recovered.

**Comment [A12]:** What if W told J this at the time of contracting? Can W recover for F's loss?

### 4) The missed opportunity to impress Gus (G)

Damages for breach of contract can be awarded for the loss of a chance (*Chaplin v Hicks*). However, such compensation is subject to the same limiting principles, including remoteness. The missed opportunity is an exceptional loss that did not arise naturally and was not in the contemplation of the parties at the time of contracting because J *did not know of* G and G's promise to hire W if W

took good photographs of the wedding (*Hadley; Victoria Laundry*). It is not loss that J could have reasonably contemplated if he had thought about the breach at the time of contracting, nor is it liability that J has accepted. Therefore, W will not be able to recover anything here either.

5) W's nervous breakdown

The general rule is that damages for mental distress cannot be recovered for breach of contract (*Addis v Gramophone*). It is unlikely that this case falls within either of the two exceptional categories, despite the loosening of both following *Farley v Skinner*. It is not an important object of this contract to provide pleasure and other forms of mental satisfaction (*Jarvis v Swan's Tours*), as J's business is to provide fuel, and therefore the first exception does not apply. W's mental distress cannot be said to be directly consequent on physical inconvenience or sensory discomfort caused by J's breach of contract either (*Farley v Skinner*); W's disappointment and stress comes from missing his son's wedding and the chance to impress the businessman, rather than J's failure to provide the correct type of fuel or the breaking down of W's car.

It is likely that W will only be able to recover compensatory damages for the towage and repair costs, as the other losses are too remote.

**Overall essay feedback: Very good – clear structure, and you address all the points well with appropriate authorities in support. First Class.**