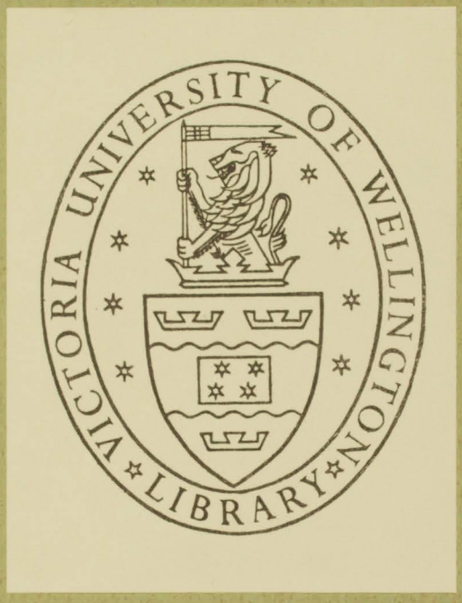
IXMa MARTYN, R. Clearlite Holdings Ltd. v. Auckland City Corporation.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CLEARLITE HOLDINGS LTD v AUCKLAND CITY CORPORATION

LEGAL WRITING REQUIREMENT SUBMITTED FOR THE
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In the Supreme Court Mahon J. recently considered whether the plaintiff in a case of private nuisance could succeed if the damage for which he sought compensation resulted from an act on his own land. The case, Clearlite Holdings Ltd v Auckland City Corporation,[1] also raised the issues of strict liability and remoteness of damage.

The second defendant, referred to as "the contractor" throughout Mahon J.'s judgment and this case note, was contracted by the Auckland City Corporation to lay drainage pipes. (The Auckland City Corporation is referred to in the judgment and here as "the Corporation"). During these operations the contractor drove a tunnel between two streets, going underneath the plaintiff's factory. As a result, the factory floor subsided two inches and cracked.

These facts illustrate the background to the plaintiff's claims of $8,738.66 for remedial work and $1,305.00 for consulting engineers' fees.

LOCATION OF THE ACTIVITY

An important factor in the Clearlite case was the location of the activity. Although the contractor's tunnelling began in the street, the act which gave rise to the damage clearly took place on the plaintiff's land, or more precisely, under its factory. This fact gave rise to the first issue, which was discussed at great length by Mahon J. : Can the plaintiff bring an action for nuisance if the activity complained of occurred on his land?

Mahon J. quotes the following statement from Salmond on Torts[2]:

> As nuisance is a tort arising out of the duties owed by neighbouring occupiers, the plaintiff cannot succeed if the act or omission complained of is on premises in his occupation. The nuisance must have arisen elsewhere than in or on the plaintiff's premises.

A large portion of his judgment involves his reasons for disagreeing with that statement.

Firstly Mahon J. says that the probable origin of the rule expressed by Salmond is the historical distinction between trespass and case. An action for damages occurring on the plaintiff's land was an action for trespass. It was clearly distinguished from situations where the damage was caused by an act occurring outside the plaintiff's land, where the appropriate remedy was action on the case. For this reason nuisance came to be limited to acts committed elsewhere than on the plaintiff's land.

However, if the argument is centred on the basic principle of nuisance then perhaps a different rule is reached. Mahon J. says[3]:

> ... in essence [nuisance] consists in unlawful damage either to the land of another or to the proper use and enjoyment of that land.

This is similar to a statement at the end of his discussion of the location of the activity[4]:

> The gist of a claim for private nuisance lies in the damage which has been caused. The nature of the conduct causing that damage is subsidiary to the major concept.

If this is taken as the basic principle of nuisance, it justifies Mahon J.'s finding that the location of the activity

is unimportant. Winfield and Jolowicz on Tort[5] formulates the same principle :

> Private nuisance may be described as unlawful interference with a person's use or enjoyment of land, or some right over it, or in connection with it.

This expression of the principle is also supported by the distinction drawn in St. Helen's Smelting Co. v Tipping[6] between damage to land and indirect interference by intangibles. It is well accepted that the reasonableness of the defendant's conduct and the location of the activity are relevant where it is the enjoyment of rights in land that is interfered with, but not where there is actual damage to the land.

It can, however, be argued that the activity which caused the damage is relevant to any discussion of the essence of nuisance. A nuisance problem is seen as a conflict between two landowners, which must be resolved by "weighing up" their respective interests. One case illustrating this approach is Sedleigh-Denfield v O'Callaghan[7], which will be discussed later. But Mahon J. is saying that there will be cases, like Clearlite, where there is unintentional indirect damage to land but where the parties involved are not adjoining landowners; such cases should come under the heading of "nuisance". Instead of labelling these cases as "certain anomalous exceptions"[8], Mahon J. says that they come under the basic principle of interference with rights in land.

The rule Mahon J. had to consider said that a plaintiff would not be given a remedy for nuisance committed on his own land. The one modern case which clearly supports this rule

is Titus v Duke.[9] In that case the defendants were the plaintiff's landlords. The branch of an ant-infested tree growing on the property (about which the plaintiff had previously complained) fell on the garage and damaged the plaintiff's car. The tortious conduct had not, therefore, emanated from outside the plaintiff's land. In the Court of Appeal of Trinidad and Tobago, Wooding C.J., with whom Phillips J.A. agrees, says[10]:

> The essence of a private nuisance ... is that there has been some wrongful interference with the use or enjoyment of land or premises by the continuance of a state of things ... upon other premises in the occupation or, it may be in some cases, in the ownership of the person to whom it is sought to attach liability.

(The minority judge, McShine J.A., was in agreement with the majority on this issue.)

The court stated that support for this principle is to be found in Sedleigh-Denfield v O'Callaghan.[11] There are two passages in Sedleigh-Denfield v O'Callaghan to which the court was referring.

Lord Wright[12]:

> The ground of responsibility is the possession and control of the land from which the nuisance proceeds. The principle had been expressed in the maxim 'Sic utere tuo ut alienum non laedas'.

Lord Atkin[13]:

> For the purpose of ascertaining whether as here the plaintiff can establish a private nuisance I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or

> premises by the use of land or premises either occupied or in some cases owned by oneself.

According to Mahon J., Lords Wright and Atkin could not have been stating an exclusive definition. He says the dicta relate only to the adjoining occupier situation.

In Sedleigh-Denfield v O'Callaghan drainage pipes were installed in the defendants' property without their knowledge. When the defendants discovered the drainage system, they adopted it. However, a defect in the system resulted in the flooding of the plaintiff's land. The defendants were not successful in arguing that the nuisance had been created by a trespasser. The House of Lords held that the defendants' adoption of the nuisance made them liable.

The question of who owned the ditch in which the drainage system was installed was not, in fact, fully argued. But all the courts proceeded on the basis that it was the defendants' property.

It is easy to say that what their Lordships state in Sedleigh-Denfield v O'Callaghan should have limited application, but this is not the way other cases have interpreted those statements. It is suggested that a statement of Denning L.J. in the Court of Appeal in Southport Corporation v Esso Petroleum Co. Ltd.[14] should be considered.

> Private Nuisance. In order to support an action on the case for a private nuisance the defendant must have used his own land or some other land in such a way as injuriously to affect the enjoyment of the plaintiff's land.

Lord Radcliffe in the House of Lords was in agreement with Lord Denning on this point.[15] Mahon J.'s reasons for

rejecting the dicta from Sedleigh-Denfield v O'Callaghan as support for the decision in Titus v Duke do not, it is submitted, apply to this statement of Lord Denning's. Lords Wright and Atkin may have been confining their discussion to cases which concern adjoining landowners, but Lord Denning expressly puts Lord Wright's statement in a wider context, and is clearly discussing general principles of nuisance. It should be noted, however, that Lord Denning's statement does refer to the defendant using his own land or some other land. Possibly it is not too wide an interpretation to include the plaintiff's land in that latter phrase.

On what basis do Lords Wright and Atkin make the statements referred to above? Lord Wright says that "with possibly certain anomalous exceptions" (a phrase mentioned in various judgments but never expanded or explained) possession or occupation is the test.[16] He refers to Cunard v Antifyre[17] but it is submitted that Talbot J. in that case was concerned only with the principle that the plaintiff must be an owner or occupier. The passage Lord Wright refers to is[18]:

> Private nuisances, at least in the vast majority of cases /exceptions once again are not spelt out/, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property;

but Talbot J. immediately goes on to say:

> and it would be manifestly inconvenient and unreasonable if the right to complain of such interference extended beyond the occupier, or (in case of injury to the reversion) the owner, of such neighbouring property.

Talbot J. is not really addressing himself to the question of who the defendant is; he is concerned with the identity of the plaintiff. The action was dismissed because the plaintiff was not an occupier or owner - thus there was no need to go any further.

Whatever way the judgments in Sedleigh-Denfield v O'Callaghan are interpreted, there remains the fact that their Lordships were concerned to emphasise that the occupier was responsible for the nuisance merely by being the occupier. Occupation was important in this case precisely because the defendants were liable as adoptors rather than creators. It seems that a person who is deemed to have adopted a nuisance must be an occupier. Therefore in any case where the creator of the nuisance is not involved, discussion can relate only to occupiers. Thus one can agree with Mahon J. that the application of Sedleigh-Denfield v O'Callaghan should be limited.

During his discussion of the location of the activity, Mahon J. refers to Hooper v Rogers,[19] a case which is of interest because Scarman L.J. considered the passage from Salmond[20] which was quoted above.

In Hooper v Rogers both the possible nuisance criteria were fulfilled : the defendant was acting as a landowner in committing the tortious conduct, and he was damaging the land of the plaintiff. The plaintiff and defendant jointly owned the land, but the defendant's activity was threatening a house owned solely by the plaintiff.

Although the plaintiff succeeded, there is no doubt that Scarman L.J. supported Salmond's rule. He says[21]:

> He [the plaintiff] has only to show that land of which he is the occupier is damaged, or threatened, by a wrongful act done on land of which the defendant is an occupier, and either created,

> continued or adopted by the defendant, to establish his cause of action.
>
> [Emphasis added]

This clarifies the rule as expressed by Salmond. The rule is not so much a prohibition relating to the plaintiff's land as a description relating to the defendant's conduct.

The judicial statement which is most supportive of the approach taken by Mahon J. is a statement made by Devlin J. in the court of first instance in Southport Corporation v Esso Petroleum Co. Ltd.[22]

> It is clear ... that the nuisance must affect the property of the plaintiff, and it is true that in the vast majority of cases it is likely to emanate from the neighbouring land of the defendant. But no statement of principle has been cited to me to show that the latter is a prerequisite to a cause of action ...

Mahon J. refers to two Australian cases which support this statement - the Full Court of the Supreme Court of Tasmania in Kraemars v Attorney-General[23] and Windyer J. in the High Court of Australia in Hargrave v Goldman.[24]

Another part of Mahon J.'s argument on the location of the activity relates to an early line of cases involving land over which shooting rights had been given. Generally in these cases, the plaintiff occupier was alleging that the defendant with shooting rights was responsible for damage caused to the land (namely, his crops) by animals. Thus Mahon J. sees these plaintiffs and defendants as two people with rights over the same piece of land, rather than as adjoining occupiers. Although the cases obviously involve

a special relationship, they can be classed as nuisance cases because the essential feature is indirect damage to land.

Two of the cases are Farrer v Nelson[25] and Seligman v Docker.[26] Mahon J. says[27]:

> It is instructive to notice the way in which Farrer v Nelson and Seligman v Docker are treated in Clerk & Lindsell on Torts (13th ed) para 1403. It seems to have been assumed by the learned editors that in each case the cause of complaint was the conduct of the defendant in overstocking his own land, with the result that the pheasants went on to the plaintiff's land and thereby caused damage. But as I read the two cases the cause of action involved the introduction of pheasants on to the land of the plaintiff by a positive act on the part of the defendant, not that the defendants allowed the game to trespass.

With respect, it is submitted that a different interpretation could be placed on the facts. In Farrer v Nelson, although the pheasants were introduced on to the land of the plaintiff by "a positive act on the part of the defendant", that was not the basis of the cause of action. In that case, the pheasants were placed on the plaintiff's farm in an area reserved to the landlord. If nothing more had happened, there would have been no action. It was the damage caused when some of these pheasants strayed out of the reserved area which was the subject of the claim.

In Seligman v Docker the cause of complaint was[28]:

> that an inordinate number of pheasants were congregated in the defendant's coverts ..., that the defendant did not shoot them fast enough,

> and that they seriously damaged his crops in their quest for food.

That cause of action seems to be more concerned with overstocking than with a positive act on the part of the defendant.

Despite the possible variations in interpretation of the facts in these cases, it is clear that all the land involved did belong to the plaintiffs, even though someone else had been granted rights over the whole of it.

Control, although not often referred to in the cases under discussion, is an important element in the reasoning. An owner or occupier is liable for nuisance emanating from his land precisely because "an owner of private property can prevent people from coming on to his land and committing a nuisance there." [29] If the tortious act is emanating from land, the owner presumably has some control over it. This may be one reason why the rule that nuisance cannot emanate from the plaintiff's land has lingered on so long. If a nuisance is emanating from the plaintiff's land, should he not have used the control he has as owner or occupier to prevent its creation or continuance?

Because of the importance of control as a factor to be taken into account in nuisance cases, it is submitted that the decision in Titus v Duke is reconcilable with that of Mahon J. in Clearlite. It is interesting to note that Mahon J. concludes his discussion of Titus v Duke by simply saying[30]:

> The result is, in my opinion, that if there is any support for the basis of the finding against nuisance in Titus v Duke it is not to be found in Sedleigh-Denfield v O'Callaghan.

A question which relates very much to control is : What could the plaintiff have done to avoid the damage or interference suffered?

In Titus v Duke the plaintiff's complaints were met with the reply that if he didn't like the tree, he could move somewhere else. An important fact in that case was that the plaintiff did not have to go to that absurd length in order to prevent the nuisance from affecting him : he was at liberty to make the tree safe in some way. Wooding C.J. discusses this under the negligence head[31]:

> Throughout the subsistence of the tenancy the respondent /tenant/ was in full possession and control of the premises and the appellants /landlords/ could not effectively prevent him from doing whatever may have been necessary or proper to make the tree safe.

(This statement is made despite the complication of the fact that the landlords told the tenant that the tree should be left as it was.)

In a sense, therefore, there was fault on the part of the plaintiff : damage was caused because he had not made the tree safe. Looking at the entire factual situation in Titus v Duke, the plaintiff is in a very different position from that of the plaintiff in Clearlite. The tenant plaintiff doesn't appear as simply a passive victim of damage. He himself had put up the shed under the tree for use as a garage. Under his contractual relationship with the defendant, he was the one who had the power, and presumably the means, to prevent the damage occurring. This is in contrast to the facts in Clearlite. The Corporation has statutory power to construct drains.[32] The only power the factory had was to make an objection.[33]

Although the decision in Titus v Duke appears to be based on the rule that nuisance cannot emanate from the plaintiff's

land, the policy reason for that decision may be the fact that the plaintiff had sufficient control over the land to allow him to prevent any damage.

There are three different situations where the defendant could be creating a nuisance to the plaintiff on the plaintiff's own land : the defendant and plaintiff could be joint owners (as in Hooper v Rogers[34]), or their relationship could be that of landlord and tenant (Titus v Duke[35]), or licensee and licensor (Clearlite).

The Clearlite case has at least said that where the relationship is that of licensee and licensor, it doesn't matter where the action took place. Should Mahon J.'s decision be extended to the other categories above? Possibly all that can be said is that generally a tenant will not get a remedy as against his landlord because that relationship implies some degree of control, as illustrated in Titus v Duke.

Variations in facts may warrant different results even within one of the categories. If, for example, the plaintiff tenant in Titus v Duke had been powerless to remove the offending branch because the tree was planted for ornamental purposes, the case may well have been decided differently.

The importance of control in the cases already discussed is evident.

In Hooper v Rogers Scarman L.J. says[36]:

> Whatever may be the rights and duties inter se of co-occupiers of land, neither can prevent the other from coming on to the land; and the plaintiff would have needed instant and extraordinary legal skill ... to have prevented the excavations complained of by the exercise of his authority as co-occupier.

Control was absent, so the plaintiff succeeded.

In Kraemars v Attorney-General Burbury C.J. emphasises the element of control[37]:

> I am content to say that ... the extent of control over the land which the respondent was authorised to exercise and did exercise as a licensee constituted sufficient management and control of the land to found liability for nuisance emanating from it.

The Chief Justice is not, of course, contemplating a situation like Clearlite, but the element of control is at least one basis on which a defendant can be found liable for nuisance.

Another type of situation where the defendant could be creating a nuisance on the plaintiff's land is illustrated by the cases involving shooting rights. In those cases, the damage was caused by straying animals which were supposed to be under the control of the defendant, not the plaintiff. Although the plaintiff, as occupier, had control over the land, he did not have control over the thing which was causing the nuisance.

Perhaps the solution to the problems found in these cases is to say that there is no hard-and-fast rule about the location of the activity; if the nuisance took place on the plaintiff's land it is presumed that he could have abated it or controlled it in some way, and accordingly he will be denied a remedy, but if the element of control is justifiably absent, he will have a remedy.

Up to this point the main consideration has been the extent of the plaintiff's control of the land. If control is viewed from the defendant's standpoint, then it can be seen that in Clearlite it was the defendant who had control. This is what R.S. Chambers says on the Clearlite case in 'Nuisance - Judicial

Attack on Orthodoxy" [38]:

> ... the defendant in this case did have control over the area of soil occupies by the pipes; that area was outside the control of the plaintiff. If the plaintiff had dug up the pipes, he would have been liable in trespass.

He concludes :

> Thus, the Auckland City Corporation could have been found liable on the ground that its actions in that part of the sub-soil under its control caused harm to the plaintiff's land. In the final analysis, this is not a case where "the nuisance was committed on the plaintiff's land" because the part of the land from which the harm emanated had ceased to be within the plaintiff's control.

It is submitted that Mahon J.'s approach, abolishing a rule which was difficult to justify, was more satisfactory than that suggested in this article. The Chambers approach demands very fine distinctions, even subdivisions of ownership of the sub-soil. The tortious activity may have been taking place in the sub-soil, but it was the plaintiff's factory, not the pipes, that was damaged.

The final reason Mahon J. gives for refusing to follow the rule about the location of the activity is a policy one. Anomalies result from the application of a rule which is no longer necessary and cannot be justified. Therefore the rule should be abandoned.

The rule seems to be based on the assumption that the boundary is always relevant in tort cases involving land. Historically this was so, as Mahon J.'s discussion of the

distinction between trespass and case indicates. The first step was to decide where the boundary lay - the answer would determine which writ was appropriate. But now negligence is a separate tort, with no limitations relating to where the negligent conduct took place. Thus the boundary is not relevant where there is negligence. Is it now possible to say that the boundary is only relevant in some nuisance cases?

The boundary of the property was highly important in Titus v Duke.[39] If the branch had fallen from outside the plaintiff's property, the whole picture would have been changed. Any control that the plaintiff might have had has disappeared. There is in this case, therefore, a good reason for maintaining the distinction between the plaintiff's land and other land. But in the Clearlite situation, the boundary is really just an artificial irrelevancy. If it is regarded as a vital factor, anomalies result. For example, if the contractor in Clearlite had driven the tunnel parallel to the plaintiff's boundary, causing subsidence and damage, the plaintiff would be able to recover damages for private nuisance. It seems absurd that the plaintiff should be denied a remedy because of a fact which is otherwise irrelevant.

What should be done when a rule causes anomalies? Modification of the rule is one possibility. Chambers suggests that the rule, in referring to the plaintiff's land, really relates to land within the plaintiff's control.[40] As suggested above, such a refinement would render the rule imprecise and unwieldy. Perhaps this is one of the policy reasons why Mahon J. chose to abolish the rule. The weight given to facts relating to boundaries and control now remains with the judge.

STRICT LIABILITY

Mahon J. says that liability in nuisance is strict.[41] Because there is some doubt on the matter, he discusses the reason for applying strict liability in nuisance cases. The real reason, he says, is the fact that a nuisance dispute is settled by balancing the interests of the parties. He refers to J.P.S. McLaren, "Nuisance in Canada".[42] This is part of the passage quoted :

> The real key lies in an appreciation of the fundamental problem in most nuisance suits, a problem which by its very nature depends for its resolution not on the application of a priori criteria but on an honest evaluation of the conflicting interests at stake in each case.

Even if a person is not at fault, a court may decide that his neighbour's interest outweighs his own. This is illustrated in Mahon J.'s main statement on strict liability[43]:

> In litigation involving private nuisance the test of liability is not whether the tortious interference reflects negligent conduct, but whether it is unreasonable having regard to the legitimate interests of the plaintiff, and where direct physical damage to property results then, in my opinion, the invasion of the plaintiff's rights is actionable without fault so long as the damage represents the consummation of a risk, no matter how remote, factually inherent in the conduct of the defendant.

REMOTENESS OF DAMAGE

Once liability was established, it was clear that the plaintiff would be awarded its claims for loss due to the cost of remedial work and the payment of consulting engineers' fees.

The plaintiff did not seek damages for loss of production, but claimed instead $9,780.25 for rental payments. The following facts form a background to this claim.

Before the tunnelling operation took place, the plaintiff had made a contract for the construction of a new factory on another site. A condition of the contract was that the construction company was to find a purchaser for the existing factory, or itself purchase the factory. Before the damage occurred, the construction company had found a purchaser for the factory, and a price and a date on which the purchaser would take possession had been agreed on. Construction on the new factory had begun.

These circumstances enabled the plaintiff to mitigate its losses by continuing production at the existing factory until it was able to transfer its operations to the new factory. Remedial work was then carried out on the damaged factory. The plaintiff made rental payments to the new owner while the repairs were undertaken. These rental payments were substantially less than the loss of profits which would have resulted if the plaintiff had immediately closed the factory for repairs.

Thus the latter type of damages was foreseeable but was not claimed; damages claimed may not have been foreseeable, but they were related to, and were in fact a mitigated form of, those which were foreseeable.

Mahon J. awarded the full amount of damages claimed.

On the issue of remoteness of damage, Mahon J. discussed two submissions which had been made by counsel for the contractor and the Corporation.

The first was that the plaintiff could not recover the rental payments because that loss was not foreseeable and was economic loss unconnected with the physical damage. Mahon J. said that loss of profits was foreseeable, and the fact that the plaintiff chose to mitigate this loss could not absolve the defendants from liability.

In this case it is submitted that a qualification to the general principle on remoteness has been made. The general principle is that, in the words of the Wagon Mound (No. 1) decision,[44] each claim "rests on its own bottom and will fail if it can be established that the damage could not reasonably have been foreseen."

But mitigation introduces a different slant : if the damages claimed represent the plaintiff's way of mitigating its losses, the defendant is not exhonerated by the fact that they may not have been reasonably foreseeable. This sort of claim is not "resting on its own bottom"; the plaintiff is being allowed to submit the alternative lesser claim because it is so closely related to the claim for reasonably foreseeable damage.

Directness and foreseeability are both tests which the courts have used in establishing a cut-off point beyond which the defendant will not be liable. Since the Wagon Mound (No. 1),[45] the test which has generally been applied is foreseeability, but the directness test has not been completely forgotten, as is illustrated by the fact that defendants are held liable for all damage suffered in "eggshell skull" cases. In those

cases, policy considerations outweigh the advantages of the strict application of a remoteness test. Perhaps there is a similar situation where mitigation is involved - Mahon J. could be saying that for policy reasons the remoteness tests simply can't be applied here.

What are these policy reasons? It is submitted that in this case the court did not have to concern itself with finding a cut-off point for liability. This is because mitigation essentially involves alternatives. The plaintiff has two possible claims : a claim for the damage that he would have suffered; or, a claim for his loss as mitigated. By allowing the plaintiff to recover for this particular loss which happened not to be foreseeable, Mahon J. isn't in danger of letting in a flood of claims, nor of unjustly burdening the defendant. The defendant cannot complain that the net of liability is being cast too wide - he is, after all, benefitting from the plaintiff's act of mitigation.

The same point applies to the argument based on economic loss cases. The reason why the courts have distinguished between economic and other types of loss is that a great number of people far removed from the physical damage could suffer economic loss. To allow all such claims would be to put an unfair burden on the tortfeasor. The fact that the claims would be for economic loss also means that they could be "inflated or even false .... It would be well-nigh impossible to check the claims".[46] But on the facts in Clearlite, the situation is not one where claims could be limitless, fictitious, or hard to prove. In this case the policy argument that the defendant must not be exposed "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class" [47]

is not very strong. The factor of mitigation has changed the situation.

The remoteness of damage issue raises the question : What was the cause of the loss in the form of rental payments? Was it the physical damage, the tortious act, or the plaintiff's financial inability to pay for its new premises without selling its old premises? The third possible cause will be discussed later.

The loss of rental payments can be regarded as flowing from the tortious act rather than the physical damage. Such pure economic loss would not be recoverable under the rule in Spartan Steel & Alloys Ltd. v Martin & Co..[48] But this approach, which would apply a hard-and-fast rule to all economic loss, has been modified in Caltex Oil v 'Willemstad'.[49] All five judges in the High Court of Australia allowed the plaintiff to recover for economic loss, but for differing reasons. According to the approach taken by Gibbs J., the question to consider in this case is whether Clearlite and the contractor were in such a relationship that the latter could have foreseen that his tortious act could cause pure economic loss to the former as a specific individual. As the contractor would have known nothing of the plaintiff's contract with the construction company, the answer under Gibbs J.'s test would be negative. It is submitted that the contractor could not have foreseen economic loss to the factory owners unconnected with the physical damage. According to Stephen J., the question is : Are there factors which demonstrate a close degree of proximity between the defendant's conduct and the economic loss suffered? Possibly under this test the claim by the factory owners would be allowable.

Thus the tests for remoteness leave a vagueness and uncertainty which contrast with the obvious justice of the result reached by Mahon J. The mitigation factor is sufficient to connect the unforeseen loss with the foreseeable damage, so it is allowed. It could be argued that the unforeseen loss is "parasitic", to which Lord Denning so strongly objected.[50] But the most logical way of viewing the unforeseen loss is to say that it is an alternative to the foreseeable loss, and for that reason is recoverable.

Although it is difficult to apply remoteness tests to these particular damages, the result reached by Mahon J. is within the principles of mitigation of damages.

In British Westinghouse v Underground Electric, Viscount Haldane L.C. (with whom the other Law Lords agreed) said[51]:

> ... provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage.

Counsel's second submission on the remoteness issue was that the rental payments were made as a result of the impecuniosity of the plaintiff, and were therefore not recoverable, on the basis of the decision in Liesbosch Dredger v S.S. Edison.[52]

Mahon J. says simply that[53]:

> the Liesbosch case may require reconsideration in the light of The Wagon Mound (No 1) and Dorset Yacht

Co Ltd v Home Office [1907] AC 1004; [1907] 2 All ER 294 in so far as the Liesbosch decision proceeded upon the application of the rule in Re Polemis and Furness, Withy & Co [1921] 3 KB 560 with its restriction to direct physical consequences.

It is submitted that Clearlite can be distinguished from Liesbosch on the basis that in Liesbosch the plaintiff's financial position really was a cause of their loss. In the Clearlite case the plaintiff's financial position would not have been relevant had it not decided to close the factory at a later stage. The financial position was simply a vehicle by which the plaintiff mitigated its loss.

In the Liesbosch case there is some condition (impecuniosity) of the plaintiff which means that he suffers greater loss than could be expected. It is therefore similar to the "eggshell skull" cases although, because the extra loss is economic, the plaintiff cannot recover it. Thus in a limited area the courts will apply the rule that a tortfeasor takes his victim as he finds him. Limits are imposed on the application of this rule because it is unfair to the defendant. But in Clearlite, this rule, strangely enough, works to the defendant's advantage. The defendant has "found" a plaintiff which has been able to substantially mitigate its losses. Therefore there is no reason why the plaintiff cannot recover those mitigated losses.

Footnotes

1 [1967] 2 N.Z.L.R. 729

2 16th ed. London, 1973.

3 See n.1 at 732.

4 See n.1 at 739.

5 10th ed. London, 1975 at 318.

6 (1865) 11 H.L. Cas. 642; 11 E.R. 1483

7 [1940] A.C. 880

8 Lord Wright in Sedleigh-Denfield v O'Callaghan, n.7 at 903.

9 (1963) 6 W.I.R. 135 (T)

10 Ibid., 136.

11 See n.7.

12 Ibid., 903.

13 Ibid., 896-897.

14 [1954] 2 Q.B. 182 at 196

15 Esso Petroleum Co. Ltd. v Southport Corporation
[1956] A.C. 218 at 242

16 See n.7, at 902-903.

17 [1933] 1 K.B. 551

18 Ibid., 557.

19 [1975] Ch. 43

20 See n.2.

21 See n.19 at 51.

22 [1953] 2 All E.R. 1204 at 1207-1208

23 [1966] Tas. S.R. 113

24 (1963) 110 C.L.R. 40

25 (1885) 15 Q.B.D. 258

26 [1949] Ch. 53

27 See n.1, at 738.

28 See n.26, at 55.

29 Finnemore J. in Hall v Beckenham Corporation [1949] 1 K.B. 716 at 724

30 See n.1, at 735.

31 See n.9, at 137.

32 Municipal Corporations Act 1954, s 218.

33 Ibid., Sch. 10.

34 See n.19.

35 See n.9.

36 See n.19, at 51.

37 See n.23, at 118.

38 [1978] N.Z.L.J. 172 at 177

39 See n.9.

40 See n.38.

41 See n.1, at 740.

42 Studies in Canadian Tort Law (1968) edited by Professor Linden.

43 See n.1, at 740-741.

44 [1961] A.C. 388 at 425

45 Ibid.

46 Lord Denning in Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd. [1973] Q.B. 27 at 38.

47 Cardozo C.J. in Ultramares Corporation v Touche, Niven & Co. 255 N.Y. 170; 174 N.E. 441 (1931).

48 See n.46.

49 (1976) 11 A.L.R. 227

50 See n.46.

51 [1912] A.C. 673 at 690

52 [1933] A.C. 449

53 See n.1, at 743.