Liability to a hirer for damage to property: *Armstead v Royal & Sun Alliance Insurance Company Ltd* [2024] UKSC 6

A. INTRODUCTION

The Supreme Court decision in *Armstead v Royal & Sun Alliance Insurance Company Ltd*[1] considers certain important issues in the law regarding liability for negligently damaging property belonging to a third party. Although it is an English case, it is nonetheless of considerable interest north of the border as well.

The facts of the case are reasonably straightforward. After her own car was damaged in a road traffic accident, the claimant hired a car from a company called Helphire Ltd, to drive while her own vehicle was being repaired. Unfortunately, less than a fortnight later, the claimant was involved in another accident, when this hire car was struck by a vehicle driven by the defendants' insured. It was not disputed that the defendants' insured was at fault.

In terms of the hire contract, the claimant was obliged to indemnify Helphire for any damage to the car. In terms of clause 16 of the hire contract, she was also obliged to pay a daily hire charge for any period the car was unavailable as a result of damage (referred to by the Supreme Court as "the clause 16 sum".) The claimant sought recovery of these sums from the defendants, who denied liability.

B. THE ISSUES

The Supreme Court was concerned with two issues. First, in principle, can a wrongdoer be liable to another person for loss suffered as a result of damage to property belonging to a third party? Second, in the circumstances, and assuming an affirmative answer to the first question, was the clause 16 sum too remote a loss to be recoverable?

Both of these questions were answered in the claimant's favour. This note is primarily concerned with the first of these issues, but it is as well to give a brief account of the court's reasoning on the second. There was, the court said, "no reason in principle why recoverable loss should not include a contractual liability to a third party provided that the liability is

[1] [2024] UKSC 6, [2024] 2 WLR 632. The lead judgment was a joint one by Lord Leggatt and Lord Burrows. The other judges concurred, though Lord Briggs (paras 76-79) expressed certain reservations on a point with which this note is not concerned. For earlier stages of the case, see [2022] Lloyd's Rep IR 574 and [2022] EWCA Civ 497; [2022] RTR 23.

consequential on physical damage to the claimant's property".[2] It was foreseeable that damage to property might give rise to contractual liabilities. Contractual liabilities that the hirer claimed to have incurred would, however, be too remote to be recovered from the wrongdoer if they were void as penalties[3] or as unfair terms in a consumer contract.[4] The reason for this is that a contractual liability "is only reasonably foreseeable if it really is a contractual liability",[5] and apparent liability under a void contractual term is no liability at all. Whether clause 16 was void did not have to be decided, however: the onus was on the defendants to demonstrate that and, no such case having been pled,[6] it was not open to the court to make findings on the point.[7]

Let us turn now to the more general point. In what circumstances will a wrongdoer be liable to a pursuer for damage to property not belonging to the pursuer?

This is a question that has arisen in a number of cases.[8] Why the difficulty? After all, the pursuer has suffered loss, and this loss would not have been suffered but for the fault of the defender. The problem is that, in general terms, the law denies delictual liability for damage to property to anyone except the owner of that property.[9] Such loss is said to be "pure economic loss", and is irrecoverable except in very limited cases. How do we understand the basis for this rule?

One approach would begin by observing that, where I have a remedy against you for harms caused by your conduct, that necessarily implies that your conduct breached a right I held. This must be so: if something is legally recognised as a wrong against me, I must have had a legally recognised right to expect that that thing did not happen. The two things are, in effect, different ways of saying the same thing. The point is sometimes expressed using the maxim *ubi ius, ibi remedium*: where there is a right, there is a remedy. We might equally put it the other way round: *ubi remedium, ibi ius*. Where there is a remedy, there is a right. Rights are defined by their remedies. If we recognise a new remedy, we are either recognising a new

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[2] Para 31.
[3] Para 49, following *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172.
[4] Para 50. The relevant law is contained in the Consumer Rights Act 2015, s. 62(4), read with s. 62(1).
[5] Para 52.
[6] Paras 58-65.
[7] Para 71.
[8] See *e.g. Nacap v Moffat* 1987 SLT 221 and *North Scottish Helicopters Ltd v United Technologies Inc* 1988 SLT 77, discussed below.
[9] E C Reid, *The Law of Delict in Scotland* (2021), para 5.01.

right or clarifying the scope of an existing one. If I damage your property, my liability arises from the fact that you have a real right of ownership in the property, which (being a real right) is enforceable against me and which I have infringed by damaging the property. Likewise, if I injure your person, I have infringed one of your personality rights, namely your right to bodily integrity.

This also explains the general exclusion of liability for pure economic loss. Suppose that my negligence causes the shoreline to be covered with oil, with disastrous consequences for the profits of your beachside café. This is pure economic loss, and is as clearly irrecoverable as can be. If we consider the propositions stated above, we can see why: no right of yours has been infringed in any way. The affected area of shoreline does not belong to you, and the hypothetical customers were under no obligation to patronise your café.

No doubt objections major and minor could be made to this. Space allows only a sketch, not a full discussion. In broad terms, though, it or something like it must logically be true. It is quite common to point to "policy" reasons to justify allowing or rejecting a claim,[10] but this is only a partial explanation. Any remedy given by the law must be justified by the presence of a pre-existing right that can be said to have been infringed, because the recognition of the remedy necessarily implies the recognition of that right. While policy reasons may justify the courts in disallowing an otherwise valid claim, they cannot directly justify the acceptance of a claim. At most, they can only do so indirectly, by clarifying or extending an existing right, or by recognising the existence of a new one.

Essentially, the approach outlined here was the one taken by the Supreme Court, albeit naturally couched in terms of English rather than Scots law. The court put forward three "well-established principles".[11] The first two are respectively that there is a duty of care not to damage another's property, and no duty of care to someone who suffers loss as a result of damage to another person's property.[12] The third principle addresses the question of when something counts as a person's property. It is enough that the person seeking compensation "has a right to possession of the property". As possessor of the car, the claimant in *Armstead* had such a right, because "a person in possession of property has a right to possession of it as against a stranger."[13]

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[10] E C Reid, *The Law of Delict in Scotland* (2021) paras 4.37 and 4.39-4.42.
[11] *Armstead,* para 18.
[12] Paras 19-20.
[13] Para 21.

This is as clear a judicial statement of the principle as has ever been made, and is precisely the argument made above: if person A is delictually liable to person B, that implies that B has a right that has been infringed, and that is enforceable against A at least to the extent of allowing that liability. This should not be controversial, but it has been obscured in previous case law, which has rarely attempted to give a principled justification for the rule excluding liability for pure economic loss, or for the exceptions to that rule. The decision in *Armstead* indeed implies that the term "pure economic loss" itself should not apply to cases of this kind: they are not exceptions to the rule on pure economic loss. Rather, where a right has been infringed, we are arguably not dealing with a case of pure economic loss at all.

C. *ARMSTEAD* IN SCOTLAND

Armstead is a principled decision on an important point, and is to be welcomed. There is, though, room for concern about how it will be received in Scotland. The claimant in *Armstead* had a right to possession because she was a "bailee"[14] and, as a result, had a "possessory title" to the car.[15] "Bailee", however, is a term with no meaning in Scots law. "Possessory title" is a term that is used in older case law to refer to a possessor of land with a possessory judgment,[16] but otherwise did not appear in Scots law[17] until it was taken from Lord Brandon of Oakbrook's opinion in *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd*[18] to refer to situations of the kind we see in *Armstead*. In *Nacap Ltd v Moffat Plant Ltd*,[19] the pursuers were unsuccessful in recovering damages where pipes they were laying on behalf of British Gas were damaged by the defenders' fault, in circumstances where the pursuers were responsible to British Gas for making good any damage to the pipes. In *Nacap*, the term "possessory title" is used, and is explained as meaning "a right of possession similar to that of an owner". In its way, this is quite as reckless of legal coherence as the decision of the House

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[14] Para 22.
[15] Para 26.
[16] A possessory judgment allows a good faith possessor of land for seven years to have their title treated as valid unless and until it is reduced at the instance of the owner. See C Anderson, "The Protection of Possession in Scots Law" in E Descheemaeker (ed), *The Consequences of Possession* (2014) at 111 for an overview. For examples of this use of "possessory title", see *Hally v Lang* (1867) 5 M 951, 955 (Lord Deas); and *McKerron v Gordon* (1876) 3 R 429.
[17] The term is used in argument by counsel in *Morrison v Robertson* 1908 SC 332, but appears there to be taken from English sources.
[18] [1986] 2 WLR 902, 908.
[19] 1987 SLT 221.

of Lords in *Sharp v Thomson*,[20] for all that it has not attracted the same criticism. The court took a phrase which is, to quote another Scottish judge speaking in another context, "in a Scottish lawyer's mouth…a perfectly unmeaning phrase",[21] and has defined it in a way that could hardly be less vague. When is a possessor's right "similar to" that of an owner? Worse, the court in *Nacap* gave no indication of what it is that justifies the holder of such a "possessory title" in having a remedy.

Even more problematic is the reasoning in *North Scottish Helicopters Ltd v United Technologies Inc*.[22] Here the "possessory title" idea is again approved, but the Lord Ordinary also states that the pursuers (who were hirers of a helicopter damaged through the defenders' negligence) "had a possessory right by reason of a contract attaching to the chattel itself".[23] It is profoundly unclear what the quoted words are intended to mean, quite apart from the fact that "chattel" is not a term of Scots law.

All of this makes it much harder than it ought to be to understand how to apply the law to novel situations. For example, Douglas Brodie, in a recent comment on *Armstead*, described *Nacap* as a case in which "physical possession did not suffice".[24] This, though, overlooks the fact that possession is a term with an established, technical meaning within Scots law. It requires not just physical holding but also the intention to hold on one's own behalf,[25] and is protected against interference by third parties.[26] It has been argued in the past that, in Scots law, the justification for allowing a remedy in situations of the *Armstead* type lies in the fact of possession being a protected state.[27] If followed, *Armstead* appears to confirm that this is the correct approach. The pursuers in *Nacap* did not have possession, because they held the property on another's behalf and not their own. Viewed through the

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[20] 1997 SC (HL) 66. See Scottish Law Commission, Report on *Sharp v Thomson* (Scot Law Comm No 208, 2007).
[21] *Leitch & Co v Leydon* 1931 SC (HL) 1 at 8 per Viscount Dunedin. The phrase in question here was "trespass as to a chattel".
[22] 1988 SLT 77.
[23] 1988 SLT 77, 81. The Lord Ordinary is here paraphrasing Lord Penzance in *Simpson & Co v Thomson* (1877) 5 R (HL) 40, 46.
[24] D Brodie, "Editorial" (2024) 177 Rep B 1, 2.
[25] Stair, *Inst.* 2.1.17; K G C Reid, *The Law of Property in Scotland* (1996) para 125.
[26] Stair, *Inst.* 2.1.22; Reid, *ibid,* paras 161-166. Interestingly, in *Gemmell v Bank of Scotland* 1998 SCLR 144, 146, the sheriff uses the term "possessory title" to mean possession in this sense.
[27] Reid, *ibid,* para. 116; C Anderson, "Spuilzie today" 2008 SLT (News) 257; "The alleged case of the spuilzied helicopter: a reply" 2009 SLT (News) 31; "McGarrigle v UK Insurance Ltd [2023] SAC (Civ) 7: Case Comment" 2023 SLT (News) 104.

prism of *Armstead*, the pursuers in *Nacap* lost, not despite having possession, but because they did not have possession at all.

D. CONCLUSION

Armstead is an important case, with a welcome analytical rigour, and has the potential to bring clarity to the law. For Scots law, though, it can only have that effect if understood in Scots law terms, and not simply parroted in half-understood English law terms. It is appropriate to close with a quote from the same Scots judge as was quoted earlier:

> "Although I think it is quite true that the general considerations on which this case falls to be determined are the same in Scots and English law, it is quite a different thing to say that Scots and English law are so much the same that you can quote cases as quoted by my noble and learned friend…and make them Scottish authorities…"[28]

These words are as apt here as they were in their original context.

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[28] *Leitch & Co v Leydon* 1931 SC (HL) 1 at 8 per Viscount Dunedin.