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# Causation, remoteness, scope of duty and the Rubenstein decision

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The Rubenstein case involves the typical scenario where an investor is introduced to an investment said to be equivalent to a bank deposit when it is not. The English Court of Appeal decision is an important one as it deals with intriguing related issues of causation, remoteness and scope of duty, and across the areas of breach of statutory duty, negligence and contract.

# Causation, Remoteness, Scope of Duty and the *Rubenstein* Decision

## Introduction

Oftentimes, based on the facts of a case, what justice requires is reasonably clear; yet, when the clever arguments of the defendant's lawyers have to be dealt with, the Judge faces difficult, even insurmountable obstacles as he seeks the legal justification for the result which he knows (or feels) is the correct one. *Rubenstein v HSBC*[1] is such a case.

The *Rubenstein* judgment is not easy to digest, for several reasons. First, the claims traversed statutory duty, tort of negligence and contract and, along with that, the perennial vexed question of whether different paths should lead to the same result. Second, the core of the decision involves related arguments and issues of causation, remoteness, foreseeability and scope of duty. Third, the reader would have been much assisted if the appeal Judge had been more systematic by segregating the discussion of the law from its application to the facts.

## Facts

The facts of the case are quite straightforward. Rubenstein ("R") and his wife had sold their home and were waiting to buy another and, in the meantime, wanted to put the money (£1.25m) into a safe investment with a better yield than a fixed deposit. The time frame for the investment was a year.[2]

R dealt with HSBC's officer Marsden ("M"), a qualified independent financial adviser employed by the bank. R's behest was crystal clear: "We can't afford to accept any risk in the investment in the principal sum". M recommended an AIG EVRF (enhanced variable rate fund) and assured R that the product was "the same as cash deposited in one of our accounts" and that the only risk was the risk of default by the financial institution. He omitted to explain that the essential risk of the EVRF was that it was an investment in the market,[3] and, therefore, subject to market fluctuations. In September 2005, R invested his money in the EVRF.

It should be noted that in relation to R's query on fees, M had replied that the minimum fee (and no more) would be payable "[a]s once the account open [sic] it is effectively an instant access account so it is unlikely that you will need further advice".

R was still invested in the fund in September 2008 when the run on AIG, triggered by the collapse of Lehman Brothers, occurred. He was eventually able to withdraw his money in November 2008 but received £180,000 less than he had invested. He sued for this loss under breach of statutory duty,[4] negligence and contract.

## Defendants' Arguments

Many issues were raised by the defendants. This case comment focuses on the issues of causation, foreseeability and remoteness. The defendant argued that even if the bank (through M) had been in breach of its statutory duty, duty of care or contractual duty (in not recommending an appropriate investment), the loss was caused not by the breach but by the collapse of the markets in the assets held by the EVRF. The bank also argued the loss was not reasonably foreseeable and was too remote.

## Trial Judge's Decision

At first instance, the trial Judge, Judge Havelock-Allan QC, found that HSBC was negligent in breach of statutory duty and in breach of contract. The bank could have and should have recommended alternatives such as the SVRF (standard variable rate fund). However, he awarded only nominal damages. This was because the loss was unforeseeable and too remote, and was caused not by the bank's breach but by the "extraordinary and unprecedented" financial turmoil following the collapse of Lehman Brothers.

## Arguments on Appeal

The plaintiff appealed as regards causation and remoteness while the defendant cross-appealed on the finding that the bank had breached its duties. HSBC, in resisting the appeal, argued that it had no duty beyond the investment horizon of one year projected by R (the loss occurred more than three years after the investment was made). It argued that whether viewed in terms of "scope of duty" (under the law of negligence) or "reasonable contemplation of the parties" (under contract law) or in terms of causation, foreseeability or remoteness, the bank should not be liable for the client's loss.

The Court of Appeal had to deal with many questions, the foremost of which were:

1. Was the bank negligent?
2. Was the loss caused by the bank's negligence?
3. Was the loss unforeseeable and too remote? and
4. Was the loss within the bank's "scope of duty"?

The *Rubenstein* case is intriguing also because it raises two captious issues:

1. What is the relationship between causation, remoteness and the emergent concept of scope of duty?
2. Should the analysis of a claim from the different approaches of breach of statutory duty, negligence and contract lead to the same result (ie in favour of the plaintiff or defendant)?

## Decision of Court of Appeal

The Court of Appeal allowed the appeal and held that there was causation and that the damage was foreseeable and not too remote. The Court dismissed the cross-appeal as the bank was clearly in breach of its obligations under statute, tort of negligence and contract.

For clarity of understanding, we shall consider the Court's treatment of the causation issue and the remoteness (and scope of duty) issue separately even though they were intertwined in Rix LJ's judgment.

## Causation

Many factors, some sequential, led to the losses incurred by the investors in the EVRF, namely:

1. the collapse of Lehman Brothers;
2. financial turmoil;
3. collapse in the market value of the securities in which the EVRF was invested;
4. run on AIG;
5. loss of confidence by investors in the EVRF; and
6. excessive encashment by EVRF investors.

The Judge at first instance found[5] that R's loss was caused not by the bank's breach but by the collapse of the markets, the run on AIG and the financial turmoil surrounding the collapse of Lehman Brothers. However, such a finding was a legal assessment and not a factual assessment; and the Court of Appeal was entitled to act upon its own understanding and analysis of the factual findings of the trial Court.6

Compared with the remoteness issue (which is discussed below), there was minimal discussion of the law on causation and instead the judgment focused on the application of causation principles to the facts. In Rix LJ's assessment of the causation issue,7the trial Judge had wrongly selected the run on AIG as the "essential cause" of the loss. In his view:8

> … what connected the erroneous advice and the loss was the combination of putting [R] into a fund which was subject to market losses while at the same time misleading him by telling him that the investment was the same as a cash deposit, when it is not. Therefore, the correct selection of the cause of [R's] loss was the loss in value of the assets which the EVRF… was invested.

In short, in Rix LJ's opinion, the essential cause of R's loss was not any of the connecting factors identified by the trial Judge but rather the loss of value of the underlying assets of the EVRF or, as better rephrased later in his judgment, the exposure to market risk.9

The correct sequential causal factors appear to be:

1. Wrong advice by M;

2. Investment in the EVRF;

3. Exposure to market risk;

4. Loss in value of the EVRF; and

5. R's loss.

The selection of the earlier set of factors, in Rix LJ's view, was wrong. The reason why the selection was wrong, the writer suggests, is that the factors were irrelevant. The exposure to market risk, which R did not want and had expressly intimated to M, caused the loss; the details of factors and events which actually unfolded as a result of this unwanted market risk were irrelevant to R and his claim for the loss.10These causes and events would not have affected R if M had introduced him to an investment which, as M had purported in relation to the EVRF, was the same as cash deposited with HSBC.

In contrast, R was prepared to bear institutional risk (Rix LJ used the term default risk – the risk of the failure of the bank with whom the money is deposited or, in this case, AIG Life, the issuer of the EVRF). If events had turned out differently and AIG and AIG Life had collapsed (which indeed they would have if the US government had not intervened and saved AIG), then the causation argument would have availed the bank because even if M had arranged for what was in effect a cash deposit with AIG Life, loss would still have occurred.11

He continued:12

> If such an investment goes wrong, there will nearly always be other causes (bad management, bad markets, fraud, political change etc): but it will be an exercise in legal judgment to decide whether some change in markets is so **extraneous** to the validity of the investment advice as to absolve the adviser for failing to carry out his duty or duties on the basis that the result was not within the scope of those duties. (Emphasis added).

Although his Honour was speaking in the context of the "scope of duty" issue, the essence of the discussion was on causation – that even if an adviser was in breach of his duty, he may not be held liable if the loss was caused by an extraneous event or, to use the familiar causation terminology, a *novus actus interveniens*. It is implicit in Rix LJ's judgment that he thought none of the factors of financial turmoil, run on AIG or collapse of secondary markets can be said to be extraneous to the bank's wrong advice in recommending the EVRF. On the contrary, they flowed from it.

## Comment

In the writer's view, the Court of Appeal was correct in reversing the lower Court's decision on the point of causation. If one were to apply the established causative principle, it is clear that "but-for" M's exposing R to market risk, the loss would not have taken place. As R did not want market risk, it is irrelevant how the market risk actualised.

Whilst on causation, it is observed that Rix LJ employed the expression "material contribution" – a concept originating from medical indeterminacy scenarios – in discussing causation:

> An investment adviser… who as adviser recommends a particular investment … may well be responsible if some flaw in the investment turns out materially to contribute to some investment loss.13

However, "material contribution" is a controversial concept and it is highly debateable whether it should be applied outside of medical indeterminacy cases.14

## Remoteness and Scope of Duty: The Law

On appeal, the bank argued that the loss was not foreseeable and, therefore, too remote. It also argued that the loss was not within the bank's scope of duty. A significant portion of the Court of Appeal's judgment deals with the issue of remoteness.

Rix LJ perceived the law, as it applied to the current scenario, as having three perspectives:

1. The traditional or classic principle that only the type of loss needs to be foreseeable:

2. The need for balancing the expectations of the defendant with those of the plaintiff; and

3. The concept of scope of duty.

As regards the traditional principle, Rix LJ referred15to the House of Lords decision of *Hughes v Lord Advocate*16for the established tort principle that while the type of loss needs to be foreseeable, the extent of loss or the manner of harm need not be. On the latter point, Rix LJ noted, approvingly, Lord Reid's words17in *Hughes*that "an unforeseeable mechanism of injury" does not make the injury too remote.

Rix LJ then referred to contract law authorities, in particular *The Achilleas*,18where Lord Hoffmann spoke of the generally accepted principle that "if losses of that type are foreseeable, damages will include compensation for those losses, however large, if the loss of that type or kind fell within one or other of the rules in *Hadley v Baxendale"*. This principle, Lord Hoffmann opined,19 was generally an "inclusive principle" – "if losses are of that type are foreseeable, damages will include compensation for the losses, however large". This is similar to the tort position mentioned above.

But, as Lord Hoffmann continued to explain in *The Achilleas*,20 the general principle may also be exclusive – a party "may not be liable for foreseeable losses because they are not of a type or kind for which he can be treated as having assumed responsibility". He then remarked that while the question of whether the damage was foreseeable is a question of fact, the question of whether a given type of loss was one which a party "assumed contractual responsibility" is a question of law.

Rix LJ next referred21to the scope of duty concept or approach laid down by Lord Hoffmann in *SAAMCO v York Montague*:22

> The scope of the duty, in the sense of the consequences for which the [defendant] is responsible, is that which the law regards as best giving effect to the express obligations assumed by the [defendant]: neither cutting them down so that the [plaintiff] obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the [defendant] a liability greater than he could reasonably have thought he was undertaking.

Let us pause for a moment to examine the above passage, for it says much. First, a defendant is liable only for losses which the law regards as being within his scope of duty. Second, this scope of duty is arrived at through delicate balancing of the expectations and perspectives of the defendant against those of the plaintiff. Third, it is the reasonable expectations of the parties that are to be considered.

Rix LJ then considered Lord Hoffmann's illustration of the mountaineer's knee. The scenario is that a mountaineer consults a doctor and is negligently advised that his knee is fit for a climb. The mountaineer goes for the climb and is injured in an accident which has nothing to do with his knee. As a matter of causation, even though the mountaineer would not have gone climbing and thus would have avoided the injury, the doctor's negligence cannot be held responsible for the injury as it would have occurred even if the advice had been correct. The injury, which would have happened even if the doctor had not been negligent, is outside the doctor's scope of duty.

What appears to be implied but not articulated here is that there must be a logical and not just sequential connection between the defendant's breach and the plaintiff's loss. Sequentially, the doctor's negligent advice caused, or rather resulted in, the mountaineer's injury. As a matter of logic and legal responsibility, the advice is not connected to injury.

In the course of his judgment, Rix LJ also considered authorities on the subject of responsibility and foreseeability, citing with approval, the rhetorical words of Hobhouse LJ in *Brown v KMR Services*:23

> If it was the duty of the defendants to protect the plaintiff from the losses of the kind which he subsequently suffers, how can it be just or appropriate to say that, because those losses are larger than either party anticipated, the plaintiff must bear those losses not the defendant?

and, in similar vein, Toulson LJ's comment in *Supershield v Siemens Building Technologies*:24

> If those responsible [for multiple protection systems] fail to do [as they ought] and the unlikely happens, it should be no answer for one of them to say that the occurrence was unlikely, when it was that party's responsibility to see that it did not occur.

Herein is a principle that if it is the defendant's duty to protect the plaintiff from a kind of loss, the defendant will be liable even if the amount is larger than anticipated or the occurrence of harm is unlikely. This closely resembles the established tort principle mentioned earlier that the type of loss must be foreseeable but the extent or manner of injury need not be.

## Remoteness and Scope of Duty: Application to the Facts

Applying the principles to the facts of the case, Rix LJ first remarked25that the clear statutory purpose of the COB (Conduct of Business) regime pursuant to the Financial Services & Markets Act was to give carefully balanced protection to the consumer. The regime was designed to ensure that "the investment adviser understands his client and his client understands risk". Noting how M understood neither the client nor the product and how through omission and commission he misled him into thinking that he was investing in something that was the same as cash, Rix LJ commented26that this situation was not a "promising context in which to find that a loss suffered as a result… was too remote" and that it was "wholly unlike" the case of the mountaineer's knee. (The reason the case at hand was different from Lord Hoffmann's mountaineer's knee illustration was given earlier in Rix LJ's judgment – far from being unconnected to the loss suffered, the bank's breach caused the loss.)

The learned Judge then dealt with the bank's three arguments in support of the trial Judge's conclusion that the loss was too remote.

First, on the argument that the loss was caused by unforeseeable events and, therefore, too remote, Rix LJ was of the view that the loss was caused by the collapse of the market securities in which the EVRF was invested and that the resulting loss was both foreseeable and foreseen.27Further, as it was the bank's duty to protect R from market risk, the losses cannot be considered as remote even if the incidence was unexpected. Any loss which is within the defendant's scope of duty cannot be said to be remote.

Second, on the argument that the trial Judge had found that at the time of the investment the EVRF would have been regarded as without risk, Rix LJ responded28with the interesting allegory that "nearly all the greatest losses come out of a cloudless sky". The implication appears to be that so long as loss is theoretically possible, it matters not that the likelihood of its occurrence is extremely low.

Third, the Judge considered the timescale argument,29which he acknowledged was a "powerful submission",30and came to the conclusion, on the facts, that the timescale was not a year but an "indefinite period of about a year" and that a period of three years was not significantly different from the indefinite period. The Judge was particularly influenced by the fact that M had told R that no further advice was needed since once the account was opened R would have "instant access to a cash deposit account". Thus, the loss occurring more than a year after the account was opened was within the bank's scope of duty.

(Observe that there were really two applications of the concept of scope of duty in the *Rubenstein* case – the bank's duty to protect R from market risk and the duration of the bank's duty.)

Applying the various principles to the case at hand, Rix LJ concluded:

> Where the obligation of a defendant is not merely to avoid injuring the claimant but to protect him from the very kind of misfortune which has come about, it is not helpful to make fine distinctions between foreseeable events which are unusual, most unusual, or of negligible account.

In other words, in such a scenario, the foreseeability of the actual events is irrelevant.

He continued:

> Whether the test of remoteness is expressed in the classic terms… or has to reflect the sense of balance… to which Lord Hoffmann referred to in SAAMCO… or has to take account of the manner in which the scope of duty may extend responsibility for even unusual events (see Supershield…), it should not be said that the loss which [R] suffered… is to be regarded as too remote.

In simple terms, R's loss was not too remote as it was:

1. a foreseeable type of loss;
2. in accordance with the parties' expectations; and
3. within the bank's scope of duty, especially since it was the bank's duty to protect R from that very risk of loss.

## Comments

The somewhat complicated legal framework which emerges from Rix LJ's analysis appears to be that whether in tort (of breach of statutory duty or negligence) or in contract, a claim for losses will not be too remote if the type of loss was foreseeable **and either** the defendant had assumed responsibility for the loss **or**the loss was within the defendant's scope of duty. Where these requirements are satisfied, it matters not whether the actual loss is larger than expected, or the manner of occurrence is not anticipated or the event causing the loss is unforeseeable.

In ascertaining assumption of responsibility, the Court carefully balances the reasonable expectations of the defendant against the reasonable expectations of the plaintiff. As for scope, a particular type of loss is within the scope of a defendant's duty if it was his responsibility to protect the plaintiff against the very harm or danger.

This framework appears to be a sensible one. The upshot of it is that foreseeability of the type of loss alone is insufficient to satisfy the remoteness requirement. The type of loss must either be one for which the defendant had **assumed responsibility** or be within the defendant's **scope of duty**. This is a significant development. Whilst it gives Judges additional tools to justify a desired outcome, it is also a source of greater confusion in the law.

And there is another thought – are assumption of responsibility and scope of the duty the same thing? In essence, it would appear that they are.

## Scope of Duty in the Tort of Negligence

The increasing importance of the concept of scope of duty raises the intriguing question of whether the concept is relevant only to the fourth element of the tort of negligence (ie damage which is not too remote).

Arguably, scope of duty relates as well to the first element of duty of care. If the loss is outside the scope of duty, one can say (as with, for example, claims for grief and sorrow being not claimable as they are not "recognised psychiatric illnesses") that the defendant did not owe the plaintiff any duty as regards the type of loss being claimed.

Scope is also relevant for the second element – breach of duty. Indeed, if the loss is outside the scope of duty of care, surely there cannot be any actionable breach.

Likewise, scope is also relevant to causation because if there is no breach then there cannot be causation.

Finally, it seems that scope of duty is the complement to consent. On the facts of *Rubenstein*, we can say that market risk was within the bank's scope of duty while default/institutional risk was within the client's ambit of consent. If the events in *Rubenstein* were changed and that AIG Life had collapsed, then the bank would probably not have been liable since institutional risk was not within the bank's scope of duty but rather within the client's ambit of consent.

It remains to be seen whether future Courts and Judges will adopt such lines of reasoning and whether this will add to or reduce the existing complexities in the law of negligence. The former seems more likely.

## Different Paths to Same Result?

As mentioned at the start, the case raises the difficult question of whether the legal enquiry from different branches of law (statutory duty, negligence and contract) should lead to the same result. Rix LJ does not engage in the substantive or doctrinal arguments on this issue but he regards the same general principles as being applicable to the contexts of contract, tort and statutory duty.31

He also cites32with approval Lord Hoffmann's position stated in *SAAMCO* that:

> … in a case of statutory duty, the question as to scope of duty is to be answered by reference to the statute itself, and in such a context the position in negligence and in contract will fall in behind the statutorily discerned purpose.

Rix LJ, however, did entertain33the possibility that, absent the statutory duty context, the tort and contract approaches "might" lead to separate (or different) results.

These tentative pointers aside, the interface of different major areas of law remains largely unexplored territory and awaits further judicial exposition.

## Other Issues

The *Rubenstein* case, in particular the lower Court decision, also touches on a number of issues which may interest readers in the field of financial advisers law, including:

1. The distinction between information and advice;

2. The categorisation of the bank's COB contraventions into procedural and substantive breaches;34

3. The adviser's duty (under UK law) to give advice on a "more suitable" and the "most suitable" investment; and

4. The fact that R was a retail investor and not a sophisticated investor.

## Concluding Remarks

The *Rubenstein* decision is surprisingly complex and complicated. The actual result, in the writer's view, is just. The reasoning of Rix LJ is fairly persuasive, even though greater clarity would have been achieved by better organisation and clearer and more succinct statements and restatements of law. But the task of arriving at the correct decision and for the right reasons was far from easy. In the circumstances, a commendable job was done.

So what do we take away from the *Rubenstein* decision? Several thoughts (amongst others) come to mind.

First, although issues of causation and remoteness are closely intertwined, it is important, for the purpose of clear understanding, to analyse them separately, for indeed they are distinct.

Second, in deciding remoteness of damage, the traditional principle of foreseeable type of loss is now bolstered by concepts of assumption of responsibility (involving the balancing of the reasonable expectations of the defendant and the plaintiff) and of scope of duty. As regards scope of duty, where it is the defendant's very duty to protect the plaintiff from a certain harm or type of harm, the loss cannot be said to be too remote even if it was unforeseeable.

Third, it would appear that in substance, assumption of responsibility and scope of duty are similar if not the same.

Finally, the principles of causation and remoteness apply whether the context is breach of statutory duty, negligence or contract. In general, the different paths should lead to the same result.

All in all, the Court of Appeal's decision in *Rubenstein* makes significant contributions to the legal analysis of a challenging context where closely related issues and concepts occur in a confluence of different branches of law.

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* In writing this case comment, I benefitted from discussions with Professor George Wei and Nicholas Liu, for which I am grateful. Deficiencies and errors are mine alone.

**Notes**
1 [2012] EWCA Civ 1184.
2 The precise words were: "… we are very unlikely to need this account for more than a year; probably less".
3 He did not explain that what the account holder was entitled to was not a return of his capital but only the current value of the underlying assets invested by the fund.
4 Section 150(1) of the Financial Securities and Markets Act provides that a contravention of a Conduct of Business (COB) rule is actionable by a person who "suffers loss as a result of the contravention". The alleged substantive contraventions included the following:
(a) Making a recommendation without taking reasonable steps to ensure that the customer understood the nature of the risks (COB 5.4.3):
(b) Communicating advice and information in a misleading way (COB 2.1.3); and
(c) Making a recommendation which was not the most suitable from its range of packaged products (COB 5.3.5).
There were also various procedural or process contraventions, namely failure to:
(a) conduct KYC (Know Your Client) due diligence (COB 5.2.5);
(b) retain proper records (COB 5.2.9);
(c) provide the customer with a statement of his demands and needs (COB 5.2.12); and
(d) provide the customer with a suitability letter about its recommendation (COB 5.3.14).
5 [2011] EWHC 2304, QB at [113], [115] and [117] respectively.
6 At [118].
7 The learned Judge's analysis of the causation issue is found mainly in paras [75], [103], [117] and [118] and is intertwined with his analyses of remoteness and of scope of duty.
8 At [118].
9 He said at [121]: "That risk, of market movement in the value of an investment… was exactly the risk which caused his loss".
10 This reasoning parallels the remoteness principle that the type of loss (loss resulting from market risk) needs to be foreseeable but the extent of loss and the manner of occurrence need not.
11 Assuming it was made clear to R that the deposit was with AIG Life.
12 At [103].
13 At [103].

14 See eg *Markesinis & Deakin's Tort Law* (7th edition OUP) pp 225-233 and Lunney & Oliphant,*Tort Law: Text & Materials* OUP (4th edition, OUP), pp 225-248.
15 At [97].
16 [1963] AC 837.
17 *Ibid*at 847.
18 [2009] 1 AC 61 at [21].
19 *Ibid*at [21].
20 *Ibid*at [21].
21 At [98]-[99].
22 [1997] AC 191 at 212E. The issue for the House of Lords in *SAAMCO* was whether a negligent valuer was liable to the bank for loss flowing from the difference between correct valuation and the wrong valuation, or whether it should extend to the actual greater loss suffered by the bank on account of the collapse of the property market. The court decided that the valuer was liable for the former.
23 [1995] 2 Lloyd's Rep 513 at 557.
24 [2010] EWCA 7 at [40].
25 At [115].
26 At [115].
27 Earlier in his judgment (at [112]), Rix LJ distinguished the instant case from *Camerata Properties Ltd v Credit Suisse Securities Europe Ltd (No 2)* EWHC 7.
28 At [119].
29 The bank's argument was that since R's loss occurred outside of the investment timescale of a year, it was outside of the bank's scope of duty and was too remote, just as the doctor's scope of duty does not extend to next season's climb.
30 At [119].
31 At [101].
32 At [114].
33 At [114].
34 See note 4 above.