THE IMPECUNIOUS PLAINTIFF: LIESBOSCH RECONSIDERED

S.M. Wexler*
Vancouver

Owners of Dredger Liesbosh v. Owners of Steamship Edison, a well known House of Lords decision, is taken to stand for the proposition that a tort plaintiff may not recover damages which result from his own impecuniosity. Such damages are said to be too remote. Liesbosch has been misunderstood, however; the case does not stand for the proposition for which it is generally said to stand. Because their business was failing, the plaintiffs in Liesbosch divested themselves of their insurance. They thus created the risk of large injuries which they then sought to shift to the defendants through a tort action. Liesbosch is not about remoteness; it is about causation and stands for the proposition that the defendants in a tort action will not be required to pay for injuries caused by the plaintiffs.

On considère généralement que Owners of Dredger Liesbosch c. Owners of Steamship Edison, décision bien connue de la chambre des Lords, appuie la proposition selon laquelle, en droit délictuel, la partie plaignante ne peut recevoir les dommages et intérêts dont la cause serait sa propre inpécuniosité, ceux-ci étant alors qualifiés de trop indirects. Cette décision a été mal comprise car elle n'appuie pas cette proposition. Leurs affaires ne marchant pas, les plaignants de Liesbosch se défirent de leur assurance. Ayant ainsi pris le risque de dommages graves, ils essayèrent d'en faire porter la responsibilité aux demandeurs en les poursuivant en justice pour délit. Il ne s'agit pas du tout dans Liesbosch de dommages indirects mais bien de causalité et cette affaire appuie la proposition selon laquelle, en droit délictuel, le demandeur n'est pas requis de payer de dommages et intérets pour les dommages causés par le plaignant.

Introduction

The well-known House of Lords decision, *Owners of Dredger Liesbosch* v. *Owners of Steamship Edison*,[1] is generally taken to establish the proposition that:

> The plaintiff cannot recover damages—real though they may be—which arose out of his own impecuniosity.[2]

The rule in *Liesbosch*, as I shall call this proposition, is an exception to the ordinary rules on which damages are awarded in negligence. In gen-

* S.M. Wexler, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.

[1] [1933] A.C. 449 (H.L.).

[2] *Stilling* v. *Clarke Simpkins Limited* (1951), 2 W.W.R. (N.S.) 302, at p. 303 (B.C.S.C.).

eral, the defendant who is found to be responsible for injuring a plaintiff must restore him, in so far as money can do so, to the position he occupied prior to the injury. This principle of full monetary compensation is limited by the principle of remoteness; a defendant is not required to pay for *all* the damages which flow from his negligence, but only for such damage as was forseeable.

Whether or not a particular injury was forseeable is a question of mixed law and fact, but a number of legal rules have been developed to structure the factual issue. One is the so called "thin-skull" rule, which requires the defendant to accept the plaintiff as he finds him. This rule was first suggested in *Dulieu* v. *White & Sons*:[3]

> If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.

Liesbosch is taken to have established an exception to the thin-skull rule, an exception which may be characterized as the "thin-pocket rule". *Liesbosch* is said to hold that it is an answer to the plaintiff's claim for damages that he would have suffered no injury or less injury, if he had not been impecunious. In this article it is submitted that *Liesbosch* does not establish the proposition for which the case is always said to stand. *Liesbosch* should be taken to stand for the narrower proposition that a plaintiff may not recover for damages he caused by unreasonably making himself impecunious in circumstances where he knows that to be impecunious is to run the risk of very large losses. This narrower proposition has two virtues; it accords better with the general principles of tort law, and it avoids an obvious injustice implicit in the usual statement of the rule in *Liesbosch*.

As it is generally stated, the rule in *Liesbosch* fails to distinguish between two very different impecunious plaintiffs. One, characteristically injured in his business, is impecunious but not poor. He may actually be quite wealthy but, because he has been careless or reckless in conducting his business, he cannot cover a particular contingency. Such a plaintiff is to blame for his impecuniosity and, when it is applied to him, the rule in *Liesbosch* makes good sense.

Because it has been stated too broadly, the rule in *Liesbosch* can be, and has been applied to a different kind of impecunious plaintiff. This plaintiff, typically, is injured, not in his business but in his personal affairs, and he is impecunious, not because he had done anything wrong, but simply because he is poor. An example of the application of the rule in *Liesbosch* to such a plaintiff is *Chiasson et al.* v. *Tremblay*.[4]

---

[3] [1901] 2 K.B. 669, at p. 679 (K.B.D.).

[4] (1976), 12 N.B.R. (2d) 590 (N.B. App. Div.).

Due to the negligence of the defendants (and the driver of another vehicle), the defendants' gasoline truck turned over on the road adjacent to the homes of the three plaintiffs. The gasoline spilled and fouled the plaintiffs' wells. At trial, the plaintiffs were awarded approximately $3,000 each, to cover the cost of drilling new wells. In addition, they were each awarded damages to reflect the inconvenience they had suffered in not having water for drinking or washing. For twenty months, from a few days after the accident until the date of the trial, the plaintiffs were obliged to take their clothes to a laundromat and to haul water to drink. For this injury, one plaintiff was awarded $1200 and the other two were awarded $800 each.

The plaintiffs appealed these last awards on the grounds that they were inordinately low. The Appeal Division of the New Brunswick Supreme Court refused to vary the award. Speaking for the court, Bugjold J.A. cited *Liesbosch* for the proposition that "a plaintiff cannot recover damages which arose out of his own impecuniosity".[5] Applying that principle to the facts of the case, he stated:[6]

> . . .the plaintiffs did not have the financial capacity to remedy their problems promptly. . . . In my view, the inability of the plaintiffs, for financial reasons, to restore their domestic water supply would not be traceable to the defendants' fault. It seems to me the proper measure of general damages for the inconvenience of hauling water to their homes and travelling to the laundromat would be for the period of time that would reasonably be required to restore the domestic water to its condition prior to the accident. In the circumstances, I think a period of three months would be reasonable. In my view the award of general damages to the plaintiffs is on the high side and not inordinately low.

Without venturing any opinion on the adequacy of the actual amounts awarded in *Chiasson*, it is respectfully submitted that the case is wrong in principle. The plaintiffs were impecunious, but not because they had done anything wrong. They simply did not have the money to pay for the drilling of new wells. Why should they have been penalized for this? They can hardly have been expected to foresee the injury the defendants caused them, or to be prepared to undo it. The loss they suffered is not covered under either general homeowners or farmowners insurance, so without taking extraordinary steps, they could not even have insured themselves against it.

The defendants, on the other hand, could and should have foreseen the possibility that they might injure someone if their gas truck turned over. Not only could they have insured themselves against the injury they caused, they had undoubtedly done so. More importantly, the defendants, who could have remedied the situation immediately, chose not to. They drilled test wells after the accident, but refused to complete the drilling.

---

[5] *Ibid.*, at p. 595.

[6] *Ibid.*, at pp. 594-595.

The application of the rule in *Liesbosch* to plaintiffs such as those in *Chiasson* is unfair. The law is not supposed to draw any formal distinction between people who are rich and people who are poor.

> The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.[7]

Anatole France's comment is, of course, ironic. He was not praising the law for its "majestic equality", but criticising it for failing to recognize the special needs of the poor. The rule in *Liesbosch* goes further; it actually penalizes the poor for being poor. It acknowledges that a poor man may sometimes suffer extra damages because of his impecuniosity—("The plaintiff may not recover damages— *real though they may be*—which arose out of his own impecuniosity.")—but denies him the right to recover for them. This is manifestly unfair and runs against the whole theory of tort law.

Tort law is not revolutionary; it does not seek to change the lot of either the rich or the poor. Tort law is conservative; it contents itself with putting a person back in *whatever* economic position he was in before he was injured. This is a neutral principle. It allows the rich the advantages of being rich, and requires the poor to accept the disadvantages of being poor, but it does not actively discriminate against the poor.

The rule in *Liesbosch* actively discriminates against the poor. In the face of this fact, it is interesting to note that the rule in *Liesbosch* has been defended on the ground that it is non-discriminatory, that it prevents the poor man from gaining an unfair advantage.

> . . . the rule to be derived from the *Liesbosch* case as I understand it is one of non-discrimination and provides that an impecunious person, because of his impecuniosity, cannot recover in the circumstances more than a person of reasonable means.[8]

The mistake here is in failing to notice how the neutral principles of tort work themselves out in practice. The economic position of a *defendant* is totally ignored in tort, at least in theory; in its "majestic equality", tort law generally imposes the same standard of care on a man with great resources as it does on a man with limited resources[9] and it requires a poor man to pay as much as a rich man for the same accident.

The goal of returning a person to whatever economic position he was in before he was injured precludes tort law from ignoring the economic position of a *plaintiff*. Tort law must take account of a plaintiff's economic position and thus, while the rules of tort are neutral, in prac-

---

[7] Anatole France, Le Lys Rouge (1894).

[8] *Trans-Canada Forest Products* v. *Heaps*, [1952] 1 D.L.R. 827, at p. 843 (B.C.S.C.).

[9] An exception which proves the rule is *Goldman* v. *Hargrave*, [1967] 1 A.C. 645 (P.C.).

tice, a rich man will often get a higher award for the same physical injury than a poor man. A defendant who negligently kills a man in a car accident, must pay his family what the man would have earned for them over the rest of his life. If the man who was killed happened to be earning a high salary, the defendant will have to pay his family a great deal of money; if the man who was killed happened to be earning little or nothing, the defendant will have to pay his family little or nothing. This will be so, even though a rich man, at his death, is likely to leave his family well provided, with insurance, a home, savings and investments, while a poor man is likely to leave his family in need.

No one ever suggests that a rich man "cannot recover. . . more than a person of reasonable means". He can recover his actual losses. This is the general principle of tort. The rule in *Liesbosch* says the poor man cannot recover his actual losses. This is not a rule of non-discrimination. It is a blatantly unfair rule, and the unfairness of it is not lessened by the fact that there are very few reported cases in which the rule in *Liesbosch* has actually been applied against poor people. The existence of the rule means that poor people will be advised that they cannot recover for damages which are the result of their own impecuniosity.

The rule in *Liesbosch* is not just unfair; it is also bad law. A careful study of the facts and judgments in *Liesbosch* shows that the case does not establish the unfair rule for which it is usually cited.

On November 26, 1928, a collision occurred in the harbour of Patras, Greece. A steamship, the Edison, ran into a dredger, the Liesbosch. As a result of the collision, the Liesbosch sank and was totally lost. A year and a half later, the owners of the Edison admitted liability for the accident and the question of damages was put before the Admiralty Registrar in England.

The Liesbosch belonged to a syndicate which was conducting extensive dredging and improvements to Patras harbour under contract to the Harbour Commissioners. The contract was a big one and the syndicate had strained its resources to the limit. When the Liesbosch went down, the syndicate did not have the funds to replace her. Work on the contract stopped. It was not resumed until six months later, when the syndicate was finally able to rent another dredger, the Adria. The syndicate used the Adria for a year and then, with the aid of the Patras Harbour Commissioners, finally purchased her.

The Liesbosch had been purchased at a cost of £4,000. She had been refitted at a further cost of £2,000. As a result of her being lost, her owners claimed damages of £23,514! The great discrepancy between the cost of the item destroyed and the claim for damages is a central fact in the decision. We will return to it later.

The owners of the Liesbosch claimed damages under five heads:

(1) the value of the Liesbosch;

(2) their expenses during the period when they had no dredger but had to maintain their staff;

(3) the rental of the Adria;

(4) the extra cost of operating the Adria as compared with the Liesbosch; and

(5) the loss of profit owing to the cessation of work.

The Registrar allowed item 1 in full, assessing the value of the Liesbosch at £9,000. In addition, he allowed the larger portion of items 2, 3 and 4 and about one third of item 5. In total, the Registrar allowed £19,820 out of the claim of £23,514.

The defendants appealed. They did not challenge the £9,000 awarded under item 1 as the value of the Liesbosch, but sought review of the remainder of the award. Their appeal was heard by Langton J., who summarized the argument of the defendant/appellants as follows:[10]

> . . . a defendant, either in contract or tort, is by law obliged to make good the normal and only the normal consequences of his misdeeds. It is not. . . a normal consequence of a tort that a plaintiff should be so poor as to be unable to carry on his business by reason of the tort, more especially when the business happens to be a very expensive one, involving the expenditure of comparatively large sums even while the work thereof is being held in abeyance. . .. In the present case the defendants are being called upon to pay twice as much, or more than twice as much as the value of the article destroyed merely because the plaintiffs happened to be poor. . .. the damages consequent upon the mere poverty of the plaintiffs are too remote and cannot be recovered in law.

Langton J. rejected this argument. He said:[11]

> To my mind the proper method of approach to this case is not to commence by straining one's imagination after the notional phantom which will be recognized when intellectually captured as "the normal dredger-owner," and having first determined what he would have suffered by the loss of his dredger, to proceed to rule out all other items of damage as too remote.

Instead, Langton J. said, the proper course was:[12]

> . . . to examine what these plaintiffs actually claim to have lost, and to test each item by the plain criterion whether it was properly and necessarily incurred. . . "having regard to all the existing circumstances, such as . . . their want of liquid resources."

Langton J. admitted that he was sympathetic to the defendants:[13]

> I can imagine few things more maddeningly provoking than to be called upon, as a consequence of sinking a somewhat elderly dredger, to pay a sum amounting to more than twice her value when generously computed.

But he sustained the award of the Admiralty Registrar.

---

[10] *The Edison*, [1931] P. 230, at pp. 236-237 (P.D.A.).

[11] *Ibid.*, at p. 238.

[12] *Ibid.*

[13] *Ibid.*, at p. 239.

The owners of the Edison appealed again, and this time their appeal was successful. The Court of Appeal cut the award back to £9,000, the amount the Registrar had assessed as the value of the Liesbosch itself.[14] Scrutton L.J. began his analysis by noting how high the award was:[15]

> The actual figures awarded seem to me to suggest strongly that something has gone wrong in the working out of the principles. Langton J. says in his judgment: "I can imagine few things more maddeningly provoking than to be called upon, as a consequence of sinking a somewhat elderly dredger, to pay a sum amounting to more than twice her value when generously computed." But it does not seem to have occurred to him that to pay twice the value generously computed of the ship you have sunk suggests that something has gone wrong with the assessment.

Scrutton L.J. then analyzed the proper techniques for valuing a lost ship and concluded:[16]

> The value of the ship is an estimate, or rough capitalization, of the earning power of the ship for its life. You cannot give both the value of the ship and the profits it would probably earn.

Scrutton L.J. thought the £9,000, assessed as the value of the Liesbosch, was high, but he was prepared to allow it as a factual conclusion which should not be overturned on appeal. He would not, however, allow anything further. He likened the loss of the Liesbosch to the loss of the shaft in *Hadley* v. *Baxendale*.[17]

In a concurring judgment Greer L.J. took the *Hadley* v. *Baxendale* tack more explicitly. Allowing that "the second portion of the test has. . . no bearing on damages for tort",[18] Greer L.J. quoted Baron Alderson's famous rule from *Hadley* v. *Baxendale*:[19]

> 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 a breach of contract should be either such as may fairly and reasonably be considered 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 in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Applying this test to the facts before him, Greer L.J. concluded:[20]

> . . . it would exclude from consideration all the special damages claimed in respect of the loss to the plaintiffs by their inability to proceed with their contract, those being damages such as would not arise naturally according to the usual course of things from their being deprived of their dredger.

Greer L.J. did not address the issue of the plaintiffs' poverty. Scrutton L.J. did. "I am not aware," he said, "that the poverty of the injured

[14] *The Edison*, [1932] P. 52 (C.A.).

[15] *Ibid.*, at p. 58.

[16] *Ibid.*, at p. 65.

[17] (1854), 9 Ex. 341, 156 E.R. 145 (Exch. Ch).

[18] *The Edison*, *supra*, footnote 14, at p. 71.

[19] *Supra*, footnote 17, at pp. 354 (Ex.), 151 (E.R.).

[20] *Supra*, footnote 14, at p. 71.

person has ever been allowed to increase damages for loss of property before''.[21] He continued:[22]

> . . . what the owners have lost is their dredger. If the Court gives them the value of their dredger at the time and place of the loss as a profit-earning dredger, and gives them interest on that value from the time of the loss till judgment, I do not see any room for a further award of profits they have lost because they cannot effectively replace the dredger by reason of their poverty. . .

''[E]xtra expenditure due to the owners' poverty'', he concluded, are not ''direct and natural consequences of the collision''.[23]

The owners of the Liesbosch appealed from the decision of the Court of Appeal. They were not successful. The House of Lords sustained the decision of the Court of Appeal.[24] Lord Wright delivered the judgment of the House of Lords, and it is his opinion which is cited whenever *Liesbosch* is used as authority. Unfortunately, Lord Wright's decision in *Liesbosch* has not been read carefully enough. *Liesbosch* has been, indeed it is generally treated as a case on remoteness. Even Lord Wright himself later said that *Liesbosch* ''held that loss due to the party's impecuniosity was too remote and therefore to be neglected in the calculation of damages''.[25]

This is not correct. *Liesbosch* is *not* a case on remoteness. It is a case on *causation*. It was treated as a case on remoteness in both the lower courts, and in the House of Lords decision Lord Wright did address the issue of remoteness, but he did not decide *Liesbosch* on that ground. He was quite clear on this point:[26]

> The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to money. But the appellants' actual loss so far as it was due to their impecuniosity arose from that impecuniosity *as a separate and concurrent cause*, extraneous to and distinct in character from the tort. . . .
>
> In the present case if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but *I prefer to regard it as an independent cause*. . . .

The distinction between causation and remoteness is made difficult by the fact that we use the words ''proximate cause'' as the test for remoteness. Proximate cause has nothing to do with cause. To understand this, it is necessary to compare proximate cause with two other concepts: cause-in-fact and intervening cause.

Cause-in-fact is an element in the plaintiff's case. The plaintiff must prove that the defendant's negligence was *a cause* of his damages,

[21] *Ibid.*, at p. 66.

[22] *Ibid.*, at p. 67.

[23] *Ibid.*

[24] *Supra*, footnote 1.

[25] *Monarch Steamship Co., Ltd.* v. *Karlshamns Oljefabricker (A/B)*, [1949] A.C. 196, at p. 224 (H.L.).

[26] *Supra*, footnote 1, at p. 460. (Emphasis added).

a cause but for which his damages would not have occurred. It the plaintiff fails to do this, he loses his action. Thus, if it had apeared on trial in *Liesbosch* that the dredger would have sunk whether or not she had been hit by the Edison, the plaintiffs would have lost.

Unlike cause-in-fact, proximate cause and intervening cause are raised by the defence. If the plaintiff succeeds in showing that the defendant's negligence was a cause-in-fact of his damages, the defendant may respond by saying either that his negligence was not the proximate cause or that there was an intervening cause. It is the distinction between proximate cause and intervening cause which is the key to understanding *Liesbosch*.

When a defendant says there was an *intervening* cause of the plaintiff's damages, he is alleging that someone else is responsible for those damages. He is saying: "I was not the cause, someone else was." When a defendant says his negligence was not the *proximate* cause of the plaintiff's damages, he is not alleging that someone else is responsible for them. The defendant who denies that his negligence was the proximate cause of the plaintiff's damages does not say that there was another, more proximate cause. He admits he was the only cause, but says that on policy grounds the plaintiff should be left to shoulder the loss himself. In *Liesbosch*, Lord Wright explained the point this way:[27]

> The law cannot take account of everything that follows a wrongful act. . .. Thus the loss of a ship by collision due to the other vessel's sole fault, may force the shipowner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.

The difference between intervening cause and remoteness is that *someone other than the defendant* is responsible for damages which are held to be the result of an intervening cause, and *no one* is responsible for damages which are held to be too remote. If, in *Liesbosch*, Lord Wright had decided against the plaintiffs on the grounds of remoteness, he would have been saying: the defendants caused the plaintiffs' damages, but on policy grounds they should not be made to pay for them. By deciding against the plaintiffs in *Liesbosch* on the grounds of causation, Lord Wright said not just that the plaintiffs would be left to pay for their losses, but that they were responsible for them. Since responsibility in tort is generally tied to fault, this amounts to saying that the plaintiffs were somehow at fault.

It is morally wrong to say that the plaintiffs were at fault simply by virtue of being poor. This is the mistake in *Chiasson*, and if there were no more to *Liesbosch*, one would have to regard the case as wrongly decided. But there is an added factor in *Liesbosch*, a factor which has gone unnoticed since the case was decided. In the summary of the argu-

---

[27] *Ibid.*

ments in the first appeal from the Admiralty Registrar, Langton J. put the following question to the counsel for the owners of the Liesbosch:[28]

> Were not the plaintiffs insured? Could they not have bought a new dredger with the insurance money?

The question is almost too obvious. The practice of insuring boats is nearly universal. The Liesbosch was a boat. Why did her owners not recover for her? How could they have been impecunious?

Counsel for the owners of the Liesbosch had either not been instructed on this point or, as seems more likely, he was unhappy about the answer he was forced to give. He is reported as having said: "The question was not gone into at all, but very possibly the policies were pledged."[29]

The owners of the Liesbosch made a business decision. They were in desperate need of funds to carry on their contract, so they stripped themselves of the protection afforded by their insurance, accepting whatever sum they got for pledging that insurance in exchange for the risk that if anything happened to the Liesbosch they would not be able to replace her. In a literal sense, they assumed the risk of not being able to replace the Liesbosch if she went down.

To understand *Liesbosch*, it is only necessary to picture the plaintiffs at the moment when they learned that their dredger had been sunk. No one yet knows how the accident happened but, at first, that does not matter.

"Thank God we were insured," they think. "We will buy a new dredger and get back to work as quickly as possible."

Then, suddenly, they remember. "Oh no! We pledged the insurance! We're ruined!"

Sometime later, perhaps, the owners of the Liesbosch learn that the Edison was at fault for the accident. There is jubilation all around. "We are saved!" they exclaim. "We can sue and *they* will have to pay." The owners of the Liesbosch thought a tort had bailed them out of the mess they had made.

The owners of the Liesbosch assumed the risk that if anything happened to the Liesbosch they would suffer very large damages. When the risk materialized, they sought to shift it onto the owners of the Edison. *Liesbosch* held that they could not do this. *Liesbosch* held that the owners of the Edison were responsible for sinking the Liesbosch, but not for the consequences of the decision to pledge the insurance on her. *Liesbosch* need not be taken to stand for the unfair principle that a plaintiff cannot recover for damages caused by his own impecuniosity. Rather, *Liesbosch* can be understood as standing for the eminently fair principle that a

---

[28] *Supra*, footnote 10, at p. 232.

[29] *Ibid.*

plaintiff may not recover for damages he has caused by choosing to make himself inpecunious in circumstances where he knows that to be impecunious is to run the risk of very large losses. A plaintiff may not use a tort action to bail himself out of a bad business decision.

Several leading Canadian cases applying *Liesbosch* take precisely this approach. They say the plaintiff's damages arose as a result of his impecuniosity, but they blame the plaintiff for that impecuniosity. They say his business was not properly run and refuse to allow him to use a tort action to bail himself out. Thus, for instance in *Alberta Caterers Ltd.* v. *R. Vollan (Alta.) Ltd.*,[30] the court said:

> . . . the plaintiff was, and is, impecunious. . .. That condition was created by the plaintiff itself. It risked its all on this venture. It did not have a reserve fund for contingencies. It gambled that nothing would happen before it could earn some money to meet contingencies. It lost that gamble.

Similarly, in *Abbeyview Enterprises Ltd.* v. *Matsqui*,[31] the defendant negligently and wrongfully blockaded access to the plaintiff's land development. The plaintiff was unable to remove the blockade because it was impecunious and when the development collapsed, it sought to recover very large damages. It claimed that its position as "a financial disaster was brought about through the negligence and unlawful acts of the officials of the municipality".[32] The court disagreed. It found that the plaintiffs' financial disaster was brought about by the plaintiffs not having properly planned, financed or managed their development; ". . . this, very regretfully, was a venture that was doomed almost from the outset."[33]

Abbeyview points to a further issue. MacKinnon J. said:[34]

> . . . I have concluded that their loss [would] not have occurred had the plaintiff taken the proper steps to remedy the situation. . .. The evidence indicated it was a simple matter of requiring the expenditure of $1,000. Surely any sound business person with an asset in excess of $1,000,000 on the brink of producing income would take the required steps to remedy the situation. . ..

In other words, the plaintiffs should have mitigated their damages.

The issue of mitigation was raised in *Liesbosch*. Interestingly enough, it was not raised, as it usually is, by the defendants, but rather by the plaintiffs, who sought to rely upon a dictum of Lord Collins in *Clippens Oil Company, Ltd.* v. *Edinburgh and District Water Trustees*:[35]

> . . . in my opinion the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer. . ..

---

[30] (1977), 81 D.L.R. (3d) 672, at p. 683 (Alta. T.D.)

[31] (1980), 22 B.C.L.R. 113 (B.C.S.C.).

[32] *Ibid.*, at p. 135.

[33] *Ibid.*

[34] *Ibid.*, at p. 139.

[35] [1907] A.C. 291, at p. 303 (H.L.).

Lord Wright refused to accept the plaintiffs' submission on mitigation. He said mitigation was not in issue in *Liesbosch*:[36]

> . . . it is clear that Lord Collins is here dealing not with the measure of damage, but with the victim's duty to minimize damage, which is quite a different matter. . ..

With respect, mitigation is not a "different matter" from measure of damage. One aspect of measure of damage is causation and the failure to mitigate is merely one sort of intervening cause. It is such a common sort of intervening cause that it has been lifted out of the category of intervening causes and given a name of its own. Mitigation is actually the best legal concept for dealing with the issue in *Liesbosch*, and it is submitted, with respect, that Lord Wright refused to analyze *Liesbosch* in terms of mitigation, not because mitigation was not in issue, but because Lord Collins' dictum in *Clippens* would have forced him to come to a conclusion he did not wish to reach.

Clippens and *Liesbosch* seem to be squarely opposed, but they are not. In fact, the two cases run in the same direction and an analysis of *Clippens* makes *Liesbosch* clearer. *Clippens* involved the claim of a mining company that it had been wrongfully restrained from digging under the pipes which carried water into the city of Edinburgh. The company claimed £137,000 in damages, the total value of its business, on the basis that it had gone bankrupt as a result of the wrongful restraint on its operations. It alleged that there had been a rising market for its product during the time when it was wrongfully restrained from mining, and that had it been able to mine during that period, it would have remained solvent.

At trial, the company was awarded only £15,000. On appeal, this figure was raised, but only to £27,000. The company appealed to the House of Lords seeking the full amount it had claimed. It argued that, though the award had been raised on appeal, the appeal court had applied a wrong principle in denying it the full amount of its losses. In support of this proposition, the appellant pointed to the following comment by Lord Dunedin:[37]

---

[36] *Supra*, footnote 1, at p. 461.

Despite Lord Wright's assertion that mitigation was not at issue in *Liesbosch*, many cases have treated *Liesbosch* as a case on mitigation. Thus, in *Martindale* v. *Duncan*, [1973] 2 All E.R. 355, at p. 358 (C.A.), *Liesbosch* is said to be "authority for the proposition that impecuniosity is no excuse for not mitigating damage", and in *Dawson* v. *Helicopter Exploration Co.* (1958), 12 D.L.R. (2d) 1, at p. 11 (S.C.C.), Rand J. said:

> Dawson could have purchased the number of shares promised and had he done so his damages would have been made certain. From the point of view of a purchaser, this is really in the nature of mitigation, and it would be no answer that at the time he was not financially able to buy: "*Liesbosch Dredger*" v. *SS. "Edison"*, [1933] A.C. 449.

[37] *Supra*, footnote 35, at p. 303.

> The defenders are not to be prejudiced by the fact that times were bad and the company was not rich. Accordingly, a claim upon total loss is, I think, inadmissible.

It was in response to this comment that Lord Collins said the wrongdoer had to take his victim as he found him; if the victim's ability to mitigate was impaired by his being impecunious, so much the worse for the wrongdoer.

It would seem, having said this, that Lord Collins would have been obliged to give the company the full amount of its claim. But the House of Lords did not raise the award. Lord Collins said that if Lord Dunedin had meant to say that the defendant could use the plaintiff's inability to mitigate as a defence, he would have been wrong, but in Lord Collins' view, Lord Dunedin's comment was limited to this:[38]

> A company whose financial position was such that it could not have availed itself of the opportunity of. . . a rising market cannot claim damages on that footing that might have done so.

Lord Collins went on to quote a factual finding below:[39]

> The evidence leaves in considerable doubt whether they would have been able, if all had gone on uninterruptedly, to take advantage of the rise in prices, and to hold their own with other companies.

In other words, the company would have gone bankrupt whether or not they had been wrongfully restrained from mining during the period in question.

Two things stand out about *Clippens*. First, though Lord Collins' dictum would seem to put *Liesbosch* and *Clippens* at odds, *Clippens* actually stands for the same principle as *Liesbosch*. Both cases refused to allow a business which was on the verge of insolvency to bail itself out through a tort action. Second, in *Clippens*, as in *Liesbosch*, the plaintiffs recovered very high damages and were only refused still higher damages.

Attention was drawn earlier to the fact that the damages claimed in *Liesbosch* were very high compared to the value of the item destroyed by the defendant's negligence.[40] Both Langton J. and Scrutton L.J. remarked on this fact. Tort is supposed to provide full monetary compensation to anyone who is injured by someone else's negligence, but there is a countervailing value in tort. Defendants should not be made to pay *too* much. No one knows exactly how much is too much, but there are a variety of techniques for limiting awards in tort.[41] The primary one is remoteness. As Lord Wright said:[42]

---

[38] *Ibid.*, at pp. 303-304.

[39] *Ibid.*, at p. 304.

[40] *Supra*, p..

[41] One is the rule about economic loss, *Ultramares Corporation* v. *Touche*, 174 N.E. 441 (N.Y.C.A., 1931); another is the limit the Supreme Court of Canada imposed on non-pecuniary damages in the "trilogy", *Andrews* v. *Grand & Toy Alberta Ltd.*,

> The law cannot take account of everything that follows a wrongful act. . .. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.

The unfortunate thing about the doctrine of remoteness is its name. By talking in terms of "remoteness", we deny that the doctrine is a necessary, but essentially arbitrary limit on damages. We make it seem to be a logical rule that grows out of the same policies as general tort theory. To compound the problem, we explain the doctrine in terms of directness, proximity and forseeability. All these concepts imply that remoteness is an outgrowth of tort theory, rather than a device to mitigate its rigour.

Liesbosch has been mistakenly treated as a case on remoteness because it accomplishes the same result as the doctrine of remoteness. Both prevent the defendant from having to pay damages which seem too high in light of the physical harm he did. But remoteness is an arbitrary limit on damages and stands *against* general tort theory, while *Liesbosch* is neither. *Liesbosch* has a foundation in the general theory of tort. It is part of the notion of causation and fault. If it is treated as an arbitrary rule of remoteness, it stands for the unfair policy judgment that poor people should be penalized simply for being poor.

One final point needs to be discussed. Saying that the owners of the *Liesbosch* were at fault for pledging their insurance raises a very difficult issue. There is a great reluctance to allow the fact of insurance to have any play at all in the law of tort. It may even seem that Langton J.'s question about the plaintiffs' insurance was improper. Certainly any question about the defendants' insurance would have been improper.

The rigid division between tort and insurance is not intellectually defensible. *Liesbosch* straddles the boundary between insurance and tort. Questions about the insurance of defendants are improper because whether a defendant is or is not insured has nothing to do with either his negligence or how much damage his negligence caused, but the fact that a defendant is insured is likely to influence both the decision on negligence and the decision on damages.

Langton J.'s question about the plaintiffs' insurance was relevant in *Liesbosch*. The owners of the Liesbosch alleged that they had suffered damages because they could not afford to replace what the defendants had destroyed. If they had been adequately insured to cover the physical loss caused by the defendant, the plaintiffs would not have been impecunious. Their claim would have been, quite simply, false.

[1978] 2 S.C.R. 229; *Thornton* v. *School District No. 57*, [1978] 2 S.C.R. 267; *Arnold* v. *Teno*, [1978] 2 S.C.R. 287; a third very common but less acknowledged technique for restricting damages to what is deemed to be appropriate in the circumstances is the making of factual findings such as those in *Clippens*.

[42] *Supra*, footnote 1, at p. 460.

But if the issue of the plaintiffs' insurance was relevant to the truth of their claim, it is not clear on current theory how the fact of their having pledged their insurance amounts to fault. Did the plaintiffs' have a duty to insure themselves? Is this duty like the duty to wear a seat belt? Does *Liesbosch* stand for the proposition that a plaintiff may not recover for losses which result from his unreasonable failure to insure himself? The collateral benefits rule allows the plaintiff to recover from the defendant even though he was insured for the loss he suffered.[43] The justification for this rule is that the defendant should not benefit from the plaintiff's prudent decision to insure himself. Does *Liesbosch* stand for the related proposition that the defendant should not suffer from the plaintiff's imprudent decision not to insure himself.

Given the rigid intellectual barrier the law has erected between tort and insurance, it is impossible to say that *Liesbosch* establishes a duty to insure oneself. But the division between tort and insurance is becoming harder and harder to maintain. The decision of the Supreme Court of Canada in *Janiak* v. *Ippolito*[44] illustrates one way in which this distinction is being eroded.

In that case, the Supreme Court held that the plaintiff in a motor-vehicle negligence action who unreasonably refuses to undergo an operation which has a seventy per cent chance of alleviating the back pains from which he suffers as a result of the accident has failed to mitigate and that seventy per cent of his damages are cut off from the date at which he would have recovered from the back pains had the surgery been successful.[45] Suppose that the plaintiff undergoes the operation required to mitigate, but, instead of being cured by it, he is more seriously injured. If this extra injury is caused by the negligence of the surgeon performing the operation, there is some question as to whether the defendant in the automobile negligence action would be liable for it,[46] but it is clear in law that if the plaintiff undergoes an operation to relieve injuries for which the defendant is liable, and through no negligence of his doctors, he suffers further injury as a result of the operation, the defendant is liable for that extra injury as well.[47]

The barrier between tort and insurance may be eroded in a jurisdiction where there is a minimum of liability insurance for automobile neg-

---

[43] *Canadian Pacific Ltd.* v. *Gill* (1973), 37 D.L.R. (3d) 229 (S.C.C.).

[44] *Janiak* v. *Ippolito*, [1985] 1 S.C.R. 146, (1985), 16 D.L.R. (4th) 1.

[45] If one were to criticize this decision, one would point out that on this logic the same rule should apply to an operation which only had a 10% chance of curing the plaintiff's pains.

[46] See K.D. Cooper-Stephenson and I.B. Saunders, Personal Injury Damages in Canada (1981), pp. 600-614.

[47] *Thompson* v. *Toorenburgh* (1973), 50 D.L.R. (3d) 717 (B.C.C.A.), aff'd without written reasons (1973), 50 D.L.R. (3d) 717n (S.C.C.).

ligence. In British Columbia, for example, every defendant is covered for at least $200,000.[48] Suppose that a plaintiff's damages before he undergoes the operation are $190,000. The plaintiff, therefore, knows he will recover all his damages, unless he undergoes the operation and incurs extra damages as a result of it. If he does incur these extra damages, they would only be covered by the defendant's insurance if the defendant had voluntarily paid for a higher level of coverage. Can the plaintiff compel the defendant to disclose the limits of coverage under his autobmobile negligence insurance? The standard rules of tort say the defendant cannot be compelled to reveal even the fact that he has insurance coverage, let alone the limits of his coverage.[49] But surely the limits of the defendant's coverage are relevant to the reasonableness of the plaintiff's refusal to undergo the operation. If the defendant will not reveal the limits of his coverage, he must at least be estopped from pleading failure to mitigate.

The idea that the plaintiff must do everything reasonable to mitigate imports questions of insurance into the law of torts. Small inroads like this tend to broaden, especially when they reflect reality. Insurance is part of the reality behind tort. If the rigid distinction between tort and insurance breaks down, then narrowing *Liesbosch* from a case on remoteness to a case on causation gives the case a very broad *ratio* indeed.

---

[48] Insurance (Motor Vehicle) Act Regulations, B.C. Reg. 447/83, s. 67.

[49] Indeed, if the defendant were to reveal the limits of his coverage, he might very well be in breach of his contract of insurance.