26/09; [2009] VSCA 227

SUPREME COURT OF VICTORIA — COURT OF APPEAL

METROLINK VICTORIA PTY LTD v INGLIS

Neave and Redlich JJA and Williams AJA

3 February, 2 October 2009

(2009) 25 VR 633; (2009) 54 MVR 145; [2009] Aust Torts Reports 82-032

CIVIL PROCEEDINGS – NEGLIGENCE – COLLISION BETWEEN MOTOR VEHICLE AND TRAM – ECONOMIC LOSS SUSTAINED BY TRAMWAY OPERATOR – OPERATIONAL PERFORMANCE PENALTIES PAYABLE BY TRAMWAY OPERATOR TO THIRD PARTY – CATEGORISATION OF THE LOSS – FEATURES OF 'KIND OR GENUS' – FINDING BY MAGISTRATE THAT LOSS WAS A REDUCTION OF A FINANCIAL BENEFIT PAYABLE BY A THIRD PARTY OR THE IMPOSITION OF A FINANCIAL PENALTY BY A THIRD PARTY – WHETHER MAGISTRATE APPLIED THE WRONG TEST – REMOTENESS OF DAMAGES – FINDING BY MAGISTRATE THAT LOSS WAS NOT REASONABLY FORESEEABLE – WHETHER MAGISTRATE IN ERROR.

Pursuant to a Franchise Agreement with a third party, M. operated tramway passenger services. The Agreement provided for the payment by M. to the third party of certain penalties when its services were delayed. One of M.'s trams collided with a motor vehicle negligently driven by I. When M. subsequently commenced proceedings against I., the particulars of damage included an amount by way of operational penalties said to have been imposed on M. by the third party. In dismissing the claim, the Magistrate identified the kind or genus of loss as a reduction of a financial benefit payable by a third party or the imposition of a financial penalty upon M. by a third party. The Magistrate also found that the loss as identified was not reasonably foreseeable. Smith J dismissed the appeal [MC12/08]. Upon appeal to the Court of Appeal—

HELD: Per Redlich J and Williams AJA, Neave JA dissenting, appeal allowed. [2008] VSC 10; (2008) 49 MVR 331; MC12/2008 overruled.
1. Per the Court: The characterisation of the kind or genus of loss or damage suffered by M. was a question of law and not of fact.

2. The test for remoteness of damage is that established in *The Wagon Mound* [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; [1961] 1All ER 404 and applied in *National Australia Bank Ltd v Nemur Varity Pty Ltd* [2002] VSCA 18; (2002) 4 VR 252; [2002] Aust Torts Reports 81-645 namely, whether the damage claimed by the appellant is 'of such a kind or genus that a reasonable person should have foreseen'. This involves a two stage process. First, it is necessary to identify the particular kind or genus, to which the loss belongs ('the categorisation question'). Second, once the particular kind or genus has been identified, it is necessary to determine whether a reasonable person in the position of the defendant ought to have foreseen loss of that particular kind or genus.

3. The categorisation applied by the Court should not be so narrow as to require foreseeability of the precise manner in which the particular injury came about or of its extent. The precise damage need not have been foreseen, and it is sufficient if damage of the same kind as occurred could have been foreseen in a general way.
***Hughes v Lord Advocate* [1963] UKHL 1; [1963] AC 837; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31; and**
***March v Stramare Pty Ltd* [1991] HCA 12; (1990-91) 171 CLR 506; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095, applied.**

Per Redlich JA and Williams AJA, Neave JA dissenting:
4. In the present case, the narrow category chosen by the Magistrate was not appropriate as the loss alleged to have been suffered by Metrolink was not that which was of an unusual kind. There was nothing unusual about the expectation that Metrolink would receive remuneration for the operation of its part of the tram network or that it would lose revenue in the event that it could not operate a part of its service. There is no reason of policy that compels a different approach to the recovery of losses calculated by reference to targeted performance obligations which have not been met because of the inability to conduct the service, and losses arising from the same cause

which are to be calculated under a different remuneration structure. That this remuneration might be reduced or increased depending upon the operator's ability to provide the service is unremarkable. That the mechanism by which remuneration for this service is determined might be complex, and be calculated according to a number of key performance indicators, is similarly neither unusual, nor is its complexity a reason to treat it differently from a more simple form of remuneration. For this very reason, I. was compelled to concede that it was reasonably foreseeable that fares would be lost as a consequence of interruption to the operation.

5. Accordingly, the Magistrate erred in defining too narrowly the kind or genus of the loss suffered by Metrolink. The appropriate categorisation was simply one which required foreseeability of 'revenue lost as a result of the inability to operate the tram service'.

6. It was in no way 'far-fetched' that the collision of a car with a tram, causing an inability to operate trams on the network, might result in a loss of revenue. It was in fact highly likely, or at least a real risk, that the disruption of the provision of any service might result in a loss of revenue to the person who is responsible for the provision of that service. Accordingly, I. was liable for the loss incurred by M. arising by operation of the Franchise Agreement.

NEAVE JA:

1. I have had the advantage of reading the draft reasons for judgment of Redlich JA. I agree with his Honour, for the reasons given by him, that the characterisation of the kind or genus of loss suffered by the appellant was a question of law and not of fact.

2. However contrary to Redlich JA's view I consider that the learned Magistrate did not err in characterising the kind or genus of loss suffered by Metrolink as:

> the reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party.

My reasons follow.

3. In *Mount Isa Mines Pty Ltd v Pusey*,[1] Windeyer J commented that the test of reasonable foreseeability of harm applies both in determining whether a person owes a duty of care to avoid negligently causing loss to others (the 'liability question'), and, if a defendant is held to have breached a duty of care owed to the plaintiff, in determining whether the kind of injury suffered by the plaintiff was too 'remote' to be compensable (the 'remoteness question').[2]

4. If Metrolink's loss arising from the terms of the Franchise Agreement had been characterised as 'pure economic loss' the first question for decision would have been the liability question, that is whether the appellant owed it a duty of care to avoid causing such economic loss. If no such duty of care arose, the remoteness question, that is whether the loss was too remote, would never have arisen.

5. If, on the other hand, Metrolink's loss was characterised as an economic loss resulting from damage to property (the tram) there is no doubt that the appellant breached its duty of care by negligently driving into the tram. The remoteness question would then have to be determined.

6. In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*,[3] ('*Esso*') three groups of plaintiffs (business users of gas, domestic users and stood-down employees) sought damages for losses caused by the shut down of the gas supply as a result of the negligence of Esso, which supplied 98 per cent of the natural gas used in Victoria.

7. Before deciding whether Esso owed a duty of care to the various groups of plaintiffs, Gillard J considered whether the particular types of loss suffered by these plaintiffs should be classified as 'purely economic loss' or as economic loss consequent on property damage. One of the plaintiffs, Barrett Burston, was a malt producer. It suffered financial losses because barley, which was being processed when the gas supply was shut down, had to be discarded, there was a loss of profit on the sale of the damaged batch of barley and the company lost profits on the sale of malt that would otherwise have been produced during the period the plant was shut down because there was no gas. Gillard J held that the loss of barley amounted to property damage. The expenses incurred in respect of that lost production and the loss of the profit on the sale of the discarded malt were held to be economic losses consequential on property damage. However

the profit that the malt producer lost on the sale of malt that would otherwise have been produced during the period that the gas supply was shut down was classified as 'purely economic loss.'[4] Esso was held not to owe Barrett Burston a duty of care to avoid causing it pure economic loss.

8. *Esso* shows that not all losses which result from negligently caused property damage are treated as consequential on that damage and that some may be characterised as purely economic loss. Thus in this case it may have been open to the respondent to argue that the penalties incurred by Metrolink under the Franchise Agreement were 'pure economic loss', similar to Barrett Burston's lost profits. If that argument had succeeded, the Magistrate would then have had to decide whether the respondent owed Metrolink a duty of care to avoid causing it such loss. However that is not how the case was argued.[5]

9. Thus the sole issue for determination in this case is whether the loss incurred by Metrolink, as a result of the operation of certain provisions of the Franchise Agreement, was too remote. To decide that issue it was necessary for his Honour to first categorise the kind or genus of loss suffered by Metrolink and then to decide, as a question of fact, whether a reasonable person in the position of the defendant could have foreseen that the plaintiff would suffer that kind of loss, if the defendant behaved negligently.

10. There are no settled legal criteria for categorising the kind or genus of a loss suffered by a plaintiff.[6] The breadth or narrowness of the categorisation may determine whether the damages suffered by the plaintiff are held to be reasonably foreseeable. As Redlich JA acknowledges in his reasons,[7] the categorisation of the type of harm suffered by the plaintiff, is ultimately a question of policy. This is because the concept of remoteness of damage (like the anterior duty of care question) is used to define the outer limits of the liability of a negligent defendant.[8]

11. The relevance of policy in categorising the type of harm suffered does not mean that determination of the question whether a particular kind of loss is too remote depends simply on the discretion of individual judges. In cases which have considered whether the scope of the duty of care should be expanded to cover a new type of harm, courts have proceeded incrementally and cautiously, reasoning by analogy from decided cases.[9] The same approach must necessarily apply in deciding the kind or genus of loss suffered by the plaintiff and consequently whether a particular kind of loss is not compensable because it is too remote.

12. It is axiomatic that a loss may not be too remote simply because a reasonable person could not foresee the precise manner in which it occurred.[10] However there is no clear distinction between foreseeing a particular kind of loss and foreseeing the precise events causing that loss. This is implicit in McHugh JA's statement in *Alexander v Cambridge Credit Corporation*[11] that:

> The most difficult question in determining the relevant kind of damage concerns the level of classification of the damage which the parties must have contemplated. Clearly the level must not be so high that the parties are required to contemplate the very loss in question or the precise manner of its occurrence. Nor must it be so low that any loss or damage, **no matter how unusual in nature or occurrence** would fall within the classification.[12] (Emphasis added)

13. *Rowe v McCartney*[13] illustrates the difficulty of distinguishing between foreseeing the manner in which the injury occurs and foreseeing the kind or genus of loss suffered. The plaintiff in that case suffered a depressive illness following a car accident. If her psychiatric condition had been the result of physical injuries caused by the negligence of the driver of the car, her loss would have been regarded as reasonably foreseeable and she would have been entitled to recover damages for that injury.[14]

14. However the majority of the court considered that it was not reasonably foreseeable that she would suffer from depression caused by her persisting sense of guilt, which arose because she had allowed her friend to drive her car, as a result of which he became quadriplegic. In other words, they focussed on the manner in which her injuries occurred and held that it was not reasonably foreseeable. Accordingly they held that her loss was too remote.[15]

15. The dissentient, Glass JA, focussed on the genus or kind of loss suffered and considered that the relevant question was whether a reasonable driver could have foreseen that if he drove negligently a passenger might suffer a mental illness. Accordingly he held the plaintiff was entitled to recover damages for her psychiatric illness.[16]

16. The approach in *Rowe* can be contrasted with the more expansive approach of the House of Lords in *Hughes v Lord Advocate*.[17] In that case an eight year old boy was severely burned when a paraffin lamp was knocked into a manhole, an explosion occurred and he fell into the hole. The manhole had been covered by a tent and lighted paraffin lamps had been placed around it. It was submitted that because the damage suffered by the plaintiff was caused by an explosion which was not reasonably foreseeable, the defendant was not liable for the plaintiff's injuries. Although there are some differences in the reasoning of the Law Lords, it was held that because injury by burning was reasonably foreseeable and the child was severely burned, the fact that the 'precise concatenation of circumstances' which led to the child's injury was not reasonably foreseeable did not prevent recovery of damages.[18]

17. Claims for damages consequent on physical harm to the plaintiff or a third party are categorised as involving either physical or psychiatric injury. By contrast, in cases involving claims for pure economic loss, the delineation of recoverable loss has been more precise and restrictive.[19] In pure economic loss cases, limits on recoverability have generally been imposed by limiting the scope of the duty of care to avoid causing economic harm to others, rather than by relying on the concept of remoteness.

18. The *Esso* case[20] exemplifies this approach. Gillard J held that although it was reasonably foreseeable that if *Esso* stopped its gas supply its customers would suffer 'pure economic loss', it did not owe a duty to avoid negligently causing such loss to business users, domestic consumers or employees of gas customers who were stood down from work because of the interruption to the gas supply. His conclusion that there was no such duty of care was based on a number of factors, one of which was the concern that a duty of this kind would make a supplier of gas or electricity liable to an indeterminate class of people for an indeterminate amount and period of time.[21]

19. There is some doubt as to whether the financial loss suffered by Metrolink as the result of the provisions of the Franchise Agreement should be characterised as purely economic loss, or as a financial loss consequent upon the property damage to the tram. The respondent might well be held not to owe the appellant a duty of care if the loss were characterised in the former manner, rather than as a financial loss consequent upon property damage.[22]

20. However, even assuming that the loss should be regarded as a financial loss consequent upon property damage and that a duty of care was owed by the respondent to avoid causing such loss, in answering the remoteness question I consider that the magistrate correctly described the kind or genus of loss as 'the reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party'.

21. The policy considerations which are taken into account in considering whether there is a duty of care to avoid causing purely economic loss also have some relevance in determining the remoteness question. Therefore, in categorising the kind or genus of financial loss consequential on property damage it is appropriate to take a view which is narrower than the broad categorisation of loss adopted in the area of personal injury. In this case, a broad categorisation of the kind or genus of loss suffered by Metrolink would expose a person who negligently damages a tram to an unacceptably broad range of potential liability.

22. In my opinion the categorisation of the genus of loss suffered by Metrolink as a loss of business income or a loss of revenue is too broad because it would mean that any loss arising as the result of disruption of a contract made with a third party was potentially compensable. A loss suffered as the result of failure to meet performance targets under a contract with the State government is a loss of a different character to the loss of fares caused by a tram becoming inoperative because it is damaged.

23. This approach does not wrongly require a defendant to have foreseen the 'precise concatenation of circumstances which brought about the loss'. Nor is it based on the complexity of the contractual terms in the Franchise Agreement. Rather it recognises that a loss caused by the operation of a contract with a third party which covers the operation of the whole tram network is a loss of quite a different kind from loss of fares or the cost of repairing the tram.

24. I have held that the Magistrate did not err in characterising the kind or genus of loss. It follows that it was open to the Magistrate to decide, as a matter of fact, that the loss suffered by Metrolink as the result of the operation of terms of Metrolink's Franchise Agreement with the Director of Public Transport, was not reasonably foreseeable and that therefore Mr Inglis was not liable to compensate Metrolink for the losses suffered as a result of the provisions of the Franchise Agreement. Nevertheless, the learned judge below incorrectly held that the characterisation of the kind or genus of loss as a question of fact, rather than a question of law.

25. This is an appeal from orders made by a Supreme Court judge hearing an appeal under s109(6) of the *Magistrates' Court Act* 1989. That section provides that:

> After hearing and determining the appeal, the Supreme Court may make such order as it thinks appropriate, including an order remitting the case for re-hearing to the Court with or without any direction in law.

26. In *Equuscorp Pty Ltd v Rigeri*[23] Osborn J held that where the court is of the view that the Magistrate's order is correct, for different reasons than he or she stated, a trial division judge may uphold the order of the Magistrate.[24] His Honour said that view was supported by three matters:

> First it is appropriate that the Supreme Court exercise its supervisory role in a manner which recognises that proceedings in the Magistrates' Court may well be more summary in nature than those in better resourced jurisdictions. In [*George Hudson Australia Ltd v Australian Timber Workers Union*] [25]... Isaacs J stated as follows in words which reflect a continuing reality although the Magistrates' Court jurisdiction has been expanded:
>
> > 'I should like to add another observation before parting with this point. The Court of Petty Sessions is par excellence the poor man's court, and is intended rather for a broad and speedy decision on facts than for any ruling on a difficult point of law. Section 101 is perhaps, as to parties in civil cases at all events, the most extensive and least expensive method of appeal so as to obtain a Supreme Court decision on the legal obligations of the parties. Whether represented by counsel or not or, being represented by counsel, whether or not he is habitually accustomed to the recondite intricacies of scientific jurisprudence, if a litigant, merely because some decisive but unusual point escapes attention, were to be debarred from the benefit of a Supreme Court's ruling on the point, Parliament would have failed to meet an obvious necessity.'[26]
>
> Secondly the power of the Court to make an order under s109(6) of the *Magistrates' Court Act* is discretionary and it must be relevant to the exercise of the Court's discretion to consider whether the order which it is asked to set aside was in fact correct in law albeit not for the reasons stated by the Magistrate. As Hedigan J said in *Urban No 1 Corporation Society v Kilavas*[27]:
>
> > 'It is sometimes said that the appellant must show that it will suffer a substantial injustice if the order appealed against is allowed to stand.'[28]
>
> Thirdly in cases such as the present where an appellant seeks the remission of proceedings for rehearing in accordance with law, it would be pointless to make such an order if the claim was doomed to fail in any event.
>
> In *Mond v Lipshut*[29]Ashley J stated that it must be accepted that on an appeal under s109 of the *Magistrates' Court Act* a party may support an order appealed from by resort to a point raised for the first time on appeal.[30] I agree. I would only add as Brooking J observed in *Coutts* the point will not be regarded as open if the proceedings below took a course which makes it unjust to allow the matter to be relied on now or if the defect could have been cured before the Magistrate.[31]

27. In my opinion the same principle must apply when this Court is asked to set aside the orders of the judge below, dismissing an appeal from the Magistrate's decision. If the Magistrate's decision was, as held by the judge below, correct, it should not be set aside, because the judge incorrectly held that the characterisation of the kind or genus of loss as a question of fact, rather than a question of law. It would not be unjust to take that approach having regard to the way the proceedings were argued below or in this Court.[32]

28. For these reasons, I would dismiss this appeal.

REDLICH JA:

29. This is an appeal under s17(3)(A)(b) of the *Supreme Court Act* 1986 (Vic), from the decision

of a judge of the Trial Division of the Supreme Court who dismissed an appeal, on a question of law, from the decision of a Magistrate.[33]

Background

30. By complaint filed on 21 March 2006, Metrolink Victoria Pty Ltd ('Metrolink') commenced proceedings in the Magistrates' Court to recover damages from the respondent Ryan Inglis ('Inglis') arising from a collision between a tram owned by Metrolink and a motor vehicle driven by Inglis. By his defence Inglis admitted the accident and negligence, and has since paid for the cost of repairs to the tram.

31. As a result of this collision the passage of the damaged tram was blocked until the motor vehicle was removed. In consequence of this the operation of a number of trams also operated by Metrolink was delayed. The only issue before the Magistrate related to damages claimed to arise from the loss which Metrolink alleges they have suffered pursuant to a franchise agreement with the State of Victoria.

32. The particulars of damage pleaded by Metrolink were in these terms:

> (i) The collision caused the plaintiff's train services to be significantly delayed.
>
> (ii) Pursuant to its Franchise Agreement with the Director of Public Transport, the plaintiff is require to pay Operational Performance Penalties when its services are delayed. A copy of the Franchise Agreement can be inspected at the office of the plaintiff's solicitors by appointment.
>
> (iii) As a result of the collision the plaintiff paid the Director of Public Transport $7,000.77 in Operational Performance Penalties as evidenced in the attached document titled 'Indicative Unplanned OPR Costs/PWM'.[34]

33. Inglis denied liability as to the damages claim and pleaded the following defence:

> 1. The Defendant alleges that the operational performance penalties claimed by the plaintiff are not reasonably foreseeable as damages arising as a consequence of the collision on the ground that, *inter alia*, they are based upon a contractual obligation between the plaintiff and the Victorian State Government, its servants/agents/instrumentalities.
>
> 2. The Defendant alleges that the operational performance penalties payment is too remote a loss arising as a consequence of the collision.
>
> 3. The Defendant alleges that the operational performance penalties payment is a penalty and is not reasonably foreseeable.

The learned Magistrate's decision

34. The issue raised by the pleadings was one of remoteness. It was held by the learned Magistrate that to determine the extent of the liability pursuant to the test for remoteness the Court must ask 'is this damage of the kind or genus which would occur to the mind of a reasonable person in the position of the defendant'?[35]

35. After reviewing a number of authorities, the learned Magistrate characterised the kind or genus of the loss suffered as:the reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party.

36. His Honour observed that although it would occur to a reasonable person that a collision between a tram and a car would result in damage to the tram, personal injury, and perhaps replacement of the damaged tram with another, this was of a different kind or genus to the loss suffered by Metrolink under the Franchise Agreement. That loss, it was said:

> would not be reasonably foreseeable because it is not only unlikely but also far-fetched. It is a kind of damage that would not occur to the reasonable person in the position of the defendant.

37. The learned Magistrate therefore dismissed Metrolink's claim for damages.

The decision below

38. Metrolink appealed that decision to the Supreme Court under s109 of the *Magistrates' Court Act* 1989 (Vic). Metrolink relied upon four grounds of appeal:

> 2. That the learned Magistrate erred in that he unnecessarily restricted the application of the 'foreseeability' test by considering only whether the particular contractual arrangement pursuant to which the Appellant operated was foreseeable.
>
> 4. That the learned Magistrate erred in law in finding that the economic loss suffered by the Appellant and which formed the subject of the Appellant's claim was not foreseeable.
>
> 5. That the learned Magistrate did not properly formulate the test to be applied in determining whether the damage claimed was properly claimable.
>
> 6. That the learned Magistrate failed to apply the appropriate test of foreseeability of damages, that is, whether the damage is within a kind or genus of damage which is foreseeable.

39. The learned judge dismissed each ground of appeal, upholding the decision of the learned Magistrate.

40. In his reasons, his Honour characterised grounds 2, 5 and 6 as raising, in essence, the same question, namely, whether the Magistrate erred in law in failing to apply the correct test to determine the foreseeability of damages, in relation to the question of remoteness. This was put on the alternative basis that the learned Magistrate applied the incorrect test or that he applied the right test incorrectly. His Honour characterised ground 4 as raising a separate ground, namely, whether the learned Magistrate erred in law on the basis that it was not open to him to conclude that the damages claimed were not reasonably foreseeable.

41. In relation to grounds 2, 5 and 6 his Honour held that the learned Magistrate had correctly stated the test of remoteness.

42. In doing so his Honour observed that the test of remoteness requires a characterisation of the 'kind or genus' of the loss suffered. His Honour proceeded on the basis that this categorisation was a question of fact, and that the categorisation adopted by the learned Magistrate was valid, provided that it was 'open' upon the facts. His Honour found that no error of law could be established as the characterisation adopted by the Magistrate was reasonably open to him.

43. In relation to ground 4, his Honour, having accepted the categorisation put forward by the learned Magistrate, concluded that it was open upon the facts for the Magistrate to have concluded that the damages claimed by Metrolink were not reasonably foreseeable to a reasonable person in the position of Inglis.

The proposed notice of appeal and summary of submissions

44. By its amended notice of appeal, the appellant relies upon the following four grounds of appeal:

> (i) The learned trial judge was wrong in holding that the learned Magistrate had identified and correctly stated, or had purported to apply, or had correctly applied, the test required by law to be applied in determining whether the appellant was entitled to recover damages for the loss sought to be recovered in the proceeding.
>
> (ii) That the learned trial Judge was wrong in holding that the question of what was the relevant 'kind or genus' of the damage suffered by the appellant was not one of law.
>
> (iii) If the question of what was the 'kind or genus' of the damage suffered by the appellant was one of fact, then the learned trial Judge was wrong in holding that the categorisation adopted by the learned Magistrate was open to him.
>
> (iv) On the basis that the learned trial judge was correct in holding that the learned Magistrate had identified the relevant features of the relevant 'kind or genus' of damage which was reasonably foreseeable as 'a reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party', it was not open to the learned Magistrate to find that such a kind or genus of loss was not foreseeable.

45. In support of grounds 1, 2 and 3 the appellant submitted that the learned judge below had made an error of law by adopting too narrow a categorisation of the 'kind or genus' of the loss. The Magistrate erred, it was said, as he should have characterised the damage as a loss of revenue or income in Metrolink's commercial operations. It was reasonably foreseeable that the tram involved in the accident would be delayed for some time, that other trams would be delayed, and that the appellant would suffer a loss of revenue. Since the actual loss suffered by the appellant came within this kind or genus of loss, it was therefore not too remote.

46. Against this, counsel for the respondent contended that his Honour had correctly treated the characterisation of the 'kind or genus' of loss as a question of fact so that the question to be resolved on this appeal was whether the learned Magistrate's characterisation of the loss was one which was reasonably open to him. In any event, it was said, the learned Magistrate adopted the correct characterisation of the loss and that a broader category such as 'loss or revenue' or a 'loss of profit' did not sufficiently describe the unusual losses incurred by Metrolink.

47. In relation to ground 4, the appellant submitted that even if the Magistrate had correctly characterised the loss, it was not open on the facts to find that such a loss was not reasonably foreseeable. It was submitted that however remuneration or revenue is earned in a particular case, it must be reasonably foreseeable that the operator of a commercial service might suffer a loss of revenue or remuneration in the event that the service cannot be provided. Against this, counsel for the respondent submitted that the loss in the present case flows from a private arrangement between the operator of a public transport service and the entity on whose behalf those services are provided. The loss which arises, it was said, is unforeseeable, as it was incurred as a result of 'peculiar provisions' which are 'complex and unique'.

The categorisation of the loss

48. It was common ground between the parties that the test for remoteness of damage is that established in *The Wagon Mound*[36] and applied by this Court in *National Australia Bank Ltd v Nemur Varity Pty Ltd*,[37] namely, whether the damage claimed by the appellant is 'of such a kind or genus that a reasonable person should have foreseen'.

49. As identified by his Honour on the appeal, this involves a two stage process. First, it is necessary to identify the particular kind or genus, to which the loss belongs ('the categorisation question'). Second, once the particular kind or genus has been identified, it is necessary to determine whether a reasonable person in the position of the defendant ought to have foreseen loss of that particular kind or genus.

50. It is necessary to determine whether the categorisation of loss raises a question of law.

51. The respondent contended that the categorisation is a question of fact, so that the relevant question of law on appeal is whether the categorisation adopted by the learned Magistrate was one which was open to him. The decision would be valid, in this case, provided the facts were 'capable of' being categorised as the 'kind or genus' chosen by the learned Magistrate.

52. The appellant submitted that although it is a question of fact whether an injury of a particular kind or genus is foreseeable, the question needs to be considered within the framework of legal principle, which requires the correct legal categorisation of the kind or genus of the loss. On this view, the question on appeal is whether the learned Magistrate asked himself 'the right question' when considering the foreseeability of the loss. In support of its submission the respondent relied upon *Richards v State of Victoria*.[38]

53. The respondent additionally submitted that there are a number of factors which suggest that the appropriate categorisation of loss is a question of fact. These were said to include the fact that reasonable minds may differ as to the appropriate categorisation, the potential for overlap between categories, that the criterion for classification of kinds or types of harm are undefined and at large and that there is no list of recognised kinds or genuses into which claimed losses must fall.

54. The appellant referred to *H Parsons (Livestock) Ltd v Uttley Ingham and Co Ltd*[39] and *Cripps v G and M Dawson Pty Ltd*,[40] where, in each case, it was said that the question of remoteness

is one of law. The appellant further submitted that the question of categorisation raises matters which are not suited to the tribunal of fact, as the same facts should not be categorised differently so as to produce different answers to the question of remoteness depending on the individual views of different tribunals.

55. The categorisation of damage within a kind or genus of loss is a necessary precondition to the question of fact which is determinative of remoteness of damage, namely:

> whether the loss or damage was of a kind or genus so as to be reasonably foreseeable.[41]

56. As Lord Reid said in delivering the judgment of the Privy Council in *Overseas Tank Ship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2)*:[42]

> it has now been established by the *Wagon Mound (No. 1)* and by *Hughes v Lord Advocate* that in such cases damages can only be recovered if the injury complained of was not only caused by the alleged negligence but was also an injury of a class or character foreseeable as a possible result of it.

57. The decision in *Richards v State of Victoria*[43] does not assist the respondent. The case concerned a schoolboy who received serious injuries in a fight with another schoolboy. The fight occurred in the presence of the defendant teacher, who took no steps to prevent or stop the fight. On the question of remoteness, the appellant argued that the injury sustained did not fall within a class of injury that could reasonably have been foreseen, and therefore the trial judge should have ruled that it was not open to the jury to find that the teacher should have reasonably foreseen that the plaintiff might suffer a physical injury or, alternatively, a physical injury other than an injury of a minor character, not giving rise to any liability.[44]

58. In support of its submissions, counsel for the respondent referred to part of the judgement where it was said:

> In the argument before us it was not contended by either counsel that the question whether an injury was of the same class or kind as that which was foreseeable was one of law. We have, however, since the argument seen the decision of Dean J in *Siwek v Lambourn* [1964] VicRp 47; [1964] VR 337 in which the learned judge appears to have taken such a view. We find his Honour's reasoning in that a case at pp341, 342 somewhat difficult to follow, *and in so far as he held the question to be one of law we would, with respect, disagree. It would, of course, be a question of law whether in a given case there was any evidence on which a jury could find that the injury suffered was of the same class or kind as that which was foreseeable.*[45]

59. It was submitted by counsel for the respondent that this constitutes a clear statement that the question of remoteness is one of fact. As a decision of the Full Court of this Court, it was said that we should follow this approach.

60. Against this, counsel for the appellant pointed out that the Full Court did not, in *Richards*, direct themselves to the categorisation of the loss adopted by the trial judge in that case. It was submitted that the relevant ground of appeal in *Richards* was concerned with the second stage of inquiry, as to whether there was any evidence upon which the jury could find that the loss suffered by the plaintiff was reasonably foreseeable. The question considered by the Court was simply whether:

> the trial judge should have ruled that it was not open to the jury to find that [the defendant] should have reasonably foreseen that the plaintiff might suffer a physical injury or, alternatively, a physical injury other than an injury of a minor character, not giving rise to any liability.[46]

61. The correctness of the genus of damage formulated was not in issue. Hence the Court said:

> We think there was in this case evidence on which the jury could find that the injury suffered was of the same 'class' or 'type' or 'character' as could reasonably have been foreseen, and accordingly we reject the argument that this prerequisite to liability could not be satisfied.[47]

62. The decision in *Richards* does not support the view that the categorisation question is one of fact. The Court was not concerned with whether the class or kind of injury had been correctly

categorised but with whether it was open to the jury to find that the injury fell within that class of injury that could have been reasonably foreseen.[48]

63. A defendant can only escape liability if the loss or damage sustained can be regarded as 'differing in kind' from what was foreseeable.[49] The loss which actually materialises may not be identical to that foreseen as responsibility does not depend upon the capacity of 'the reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of.'[50] Thus in *Richards* it was found that even though the grave injuries sustained were radically different to the minor injuries that might reasonably have been anticipated, it was open to the jury to conclude that they were of the same class or kind as was foreseeable. In reaching that conclusion the court recognised that the injury could be viewed as of much greater gravity than any injury reasonably foreseeable or that the precise chain of events causing injury was not foreseeable.[51]

64. The decision in *Richards*, properly understood, supports the appellant's position. Though the precise means by which the appellant's loss was to be calculated may not have been known to the defendant, the loss fell within a class of damage which, if categorised correctly, was foreseeable.

65. Both the appellant and the respondent sought to gain support from the decision of the Court of Appeal of the Supreme Court of New South Wales in *Rowe v McCartney*.[52] The question in that case was whether damage in the form of depressive neurosis was too remote. This injury resulted from severe guilt, triggered by allowing the defendant (a friend) to drive, resulting in a consequent accident with severe injuries. It was held by the trial judge that the injured driver could not be liable for the damage suffered by the plaintiff, because that damage could not reasonably have been foreseen by a reasonable person in the position of the driver.

66. In affirming the decision of the trial judge (with Glass JA dissenting as to the conclusion), the approach taken by all members of the Court was to treat the appropriate categorisation of the loss as a question of law. Each member undertook a review of the decision below, by asking whether the classification adopted by the trial judge was correct. This is evident in the approach of Samuels JA (with whom Moffitt P was generally in agreement) who directed his reasons towards the issue of whether the trial judge asked himself 'the right question'.[53] Glass JA similarly approached his review of the decision of the trial judge in this manner observing:

> It is true that a finding of remoteness is not a finding of law, but a finding of fact which cannot be disturbed unless shown to be clearly wrong: *Richards v State of Victoria* and the cases there cited. But it is necessary to examine the manner in which his Honour arrived at his finding in order to determine whether he applied the appropriate principle of law.[54]

67. After setting out the categorisation adopted by the trial judge Glass JA concluded by observing:

> It is clear from a later passage that he answered this exact question in the negative, and found against the plaintiff on that account. *In my opinion, his finding is liable to be set aside, because his Honour posed to himself the wrong question*. It is established law that the foreseeability of a given occurrence or a medical condition is not to be judged in terms of that particular event or situation, but as an instance of a class of occurrence or kind of damage foreseeable in a general way.[55]

68. In *March v Stramare* McHugh J expressed the view that:

> that a policy choice is involved in the use of some rules which limit liability for wrongful acts and omissions is obvious. Thus the rule that a defendant is only legally liable for damage 'of such a kind as the reasonable man could have foreseen' (*The Wagon Mound*) is clearly a rule of policy.[56]

69. The reasoning in *Rowe v McCartney* shows that the formulation of a category of genus involves considerations incompatible with the role of a tribunal of fact as it involves questions of policy and precedent and reasoning by analogy. The following passage from the judgment of Windeyer J in *Mt Isa Mines v Pusey*[57] was referred to by Samuels JA:

> ... it is not for an individual judge to determine the policy of the law according to his own view of what social interests dictate. ... Courts must therefore act in company and not alone. Analogies in other courts and persuasive precedents as well as authoritative pronouncements, must be regarded.[58]

70. The process of reasoning by analogy as to questions of policy as to whether the particular damage in issue was of a kind foreseeable, requires a line to be drawn between the broadest of categories, on the one hand, which would reintroduce liability for direct consequences, and the narrowest on the other, which would promote uncertainty and provide distinctions of disreputable nicety. As was observed by McHugh JA in *Alexander v Cambridge Credit Corporation*,[59] a case of contract:

> the most difficult question in determining the relevant kind of damage concerns the level of classification of the damage which the parties must have contemplated. Clearly the level must not be so high that the parties are required to contemplate the very loss in question or the precise manner of its occurrence. Nor must it be so low that any loss or damage, no matter how unusual in nature or occurrence would fall within the classification.[60]

71. Consideration of policy and precedent and reasoning by analogy are inconsistent with a fact-finding function and in particular the role of a jury. The decision in *Rowe v McCartney* in my respectful opinion is plainly correct in principle and accords with authority. Whether the learned Magistrate asked 'the right question' in his categorisation of the kind or genus of the loss is a question of law.

72. Brief mention should be made of the two further authorities relied upon by the appellant. The first was *Parsons Ltd v Uttley Ingham & Co.*[61] The appellant referred to the statement of Denning LJ that 'remoteness of damage is beyond doubt a question of law'.[62] That case concerned the question of damages for breach of contract, arising out of the death of pigs infected as a result of a faulty bulk food hopper. The House of Lords was not asked to address the question of characterisation. The statement of Lord Denning is, therefore, of limited utility in resolving the classification of the categorisation question. It is, furthermore, potentially inconsistent with the proposition confirmed in *State of Victoria v Richards*, that the second stage which involves the broader question of remoteness is ultimately one of fact.

73. The second case referred to by the appellant was *Cripps v G and M Dawson Pty Ltd.*[63] In that case, it was necessary to determine the correctness of a decision by the Administrative Decision Tribunal relating to the remoteness of damages under a contract. The issue of whether remoteness constitutes a question of fact or law arose in the context of determining whether the case for review fell within the jurisdiction of s113(2) of the *Administrative Decisions Tribunal Act* 1997 (NSW).

74. This Court was directed by the appellant to the finding by the New South Wales Court of Appeal that:

> it is a question of whether or not a particular item of loss or damage about which there was no relevant factual dispute, was capable of coming within the concept of remoteness. That question is in my judgement a question of law.[64]

75. That passage was not, however, concerned with the classification question but with the broader issue of whether the facts before the Tribunal were 'capable' of falling within the concept of remoteness. That this is a question of law is accepted by both sides.

76. In my view the categorisation of the genus of loss or damage forms part of the framework of legal principle of remoteness. A review of the validity of a particular categorisation constitutes a review of a question of law.

Did the Magistrate correctly categorise the genus or kind of the loss?

77. It is said on behalf of the appellant that in identifying the 'kind or genus' of the loss, the Magistrate misdirected himself, in that he defined, otherwise than in accordance with law, the question of law which he had to answer.[65]

78. It is first necessary to identify the loss suffered by the appellant. The losses particularised in the pleadings refer to Operational Performance Penalties arising under the Franchise Agreement. These penalties were caused by the collision of the motor vehicle with the tram, which had the effect that Metrolink could not meet its obligations relating to the operation of trams in its part of the tram network.

79. The method of calculation of these penalties was explained before the learned Magistrate and before the appeal judge. The summary of the Franchise Agreement which appears in the judgment below and which is not challenged was that it:

> ... involves the Director paying to the Appellant at the end of a reporting period a sum of money depending on the Appellant's compliance with timetabling. The closer the timetabling requirements the greater the amount payable and the greater the departure the smaller the amount payable by way of incentive. If the departure was great enough, it could result in a negative figure and, so, result in a penalty to be paid by the Appellant to the Director.

80. The Performance Payment Penalty can therefore be seen as a part of the system of remuneration payable to Metrolink for the operation of the tram system. The Performance Payment Penalty provides a mechanism whereby this overall level of remuneration might be increased or reduced, by measuring the services provided under the Franchise Agreement against a number of performance indicators. Both the learned Magistrate and appeal judge regarded the complexity of the Franchise Agreement and the precise manner in which any loss was to be calculated as of particular importance.

81. On appeal his Honour set out the claim made under the Franchise Agreement as follows:

> **[4]** The Franchise Agreement between Metrolink and the Director of Public Transport (the Director) was tendered in evidence. It is an extraordinarily complex document and contains 433 pages of terms and schedules.
>
> **[5]** It commences by identifying the parties and setting out a number of recitals. So far as relevant, the recitals include the proposition that the Franchisee (Metrolink) had agreed to operate tramway passenger services on tram infrastructure subject to a lease and had agreed to use rolling stock under the terms of the Agreement. It also stated that the Director and the Franchisee had agreed to the payment of Franchise Payments and other payments on the terms of the Agreement.
>
> **[6]** Under cl 4.1, the Franchisee agreed
>
> to provide Passenger Services and operate the Franchise Business in accordance with, and subject to, the terms and conditions of the Agreement for the Franchise Period.
> **[7]** The Agreement contained provisions designed to address Metrolink's performance of the obligation to provide the passenger services. In particular, cl 7.1 provided as follows:
>
> **7.1**
> **Adherence to Master Timetable.**
> The Franchisee must use reasonable endeavours to provide the Passenger Services in accordance with the Master Timetable.
> It went on in cl 7.2(b) to impose a similar obligation in respect of the Daily Timetable. It then dealt with an incentive regime in the following provision:
>
> **7.3**
> **Incentives for Adherence to Master Timetable and Daily Timetable**
> Schedule 7 contains an incentive regime for adherence to the Master Timetable and the Daily Timetable. The Director and the Franchisee agreed to make the OPR incentive payments in accordance with schedule 7.
>
> **[8]** Schedule 7 is to be found in and between pp 216 and 290 of the Franchise Agreement. It contains what is called the 'OPR Incentive Regime'. A key element appears to be the concept of 'Passenger Weighted Minutes' ('PWMs'). They reflect the effect of any deviation from the timetables calculated with reference to the route, the time of day, the stop at which the deviation is measured and the anticipated passenger usage of the service. Schedule 7 also provides a mechanism by which a financial value is put on each passenger weighted minute. The value varies under the agreement from time to time. By multiplying the values with the PWMs an incentive payment is arrived at, described in the Agreement as 'OPR Incentive Payment'.
>
> **[9]** The Agreement allows for minor deviations from the timetables at any monitoring point. The schedule also provides for Daily Performance Targets. The incentive programme operated on the basis that if the PWMs when totalled for the relevant period amounted to a figure less than the specified performance target, Metrolink received a bonus payment from the Director. If, however, the PWMs exceeded the target for the relevant period, Metrolink would pay an amount to the Director calculated by reference to the PWMs in excess of the target multiplied by the financial value of each minute.

[10] There are further complications. The formula for calculating the OPR incentive payment in fact involved eight defined categories of PWMs each with their own formula. They comprised

- planned cancellations, delays, early arrivals and short shuntings and
- unplanned cancellations, delays, early arrivals and short shuntings.
-

[11] It should be noted that under cl 3.7 of schedule 7 it is provided that:
the parties acknowledge that an OPR incentive payment is payable irrespective of whether or not the cause of the OPR incentive payment is a breach of this Agreement.
It should also be noted that what was envisaged under the Franchise Agreement was that there could be a setting off of payments under the incentive scheme.

[12] The monitoring of the performance was done by electronic means with the result that information was provided automatically about daily timetable deviations and provided at the same time to both Metrolink and the Director.

[13] In this case, the system produced a report relating to the collision on Wednesday 8 February 2006. That report included the following table which set out the number of PWMs involved in respect of each of four categories and the cost of those categories using a value of 16.9552 cents per PWM. It was in the following form:

	Number of Services	**Passenger Weighted Minutes**	**Cost**
Cancellations	1	1,5600.00	$264.50
Shorts	62	22,452.50	$3,806.87
Earlys	7	940.00	$159.38
Lates	115	42,022.50	$7,125.00
Totals	**122**	**66,975.00**	**$11,355.75**
Target PWM		**25,685.20**	**$4,354.98**
Totals Less Target		**41,289.80**	**$7,000.77**

[14] Before the learned Magistrate, Metrolink alleged, and Inglis accepted, that the collision resulted in deviations of various kinds which in turn resulted in Metrolink becoming obliged to pay to the Director under the OPR Incentive Payments Scheme, a sum totalling $10,760.75.[66]

82. On this appeal leave was sought by counsel for the respondent to argue that on the correct construction of the Franchise Agreement, the appellant had not in fact established that it had suffered any loss. Leave was refused on the basis that this point was not argued below, and that before both the learned Magistrate and his Honour, it was accepted that the figure of $10,760.75 reflected the amount which Metrolink was required to pay to the Director under the scheme. The task for this Court is therefore, simply to determine whether the learned Magistrate adopted the correct characterisation of the loss of $10,760.75.

83. As described above, the Magistrate categorised this loss as:

> the reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party.

84. The categorisation applied by the Court should not be so narrow as to require foreseeability of the precise manner in which the particular injury came about or of its extent.[67] The precise damage need not have been foreseen, and it is sufficient if damage of the same kind as occurred could have been foreseen in a general way.[68]

85. As was observed in *Chapman v Hearse*:

> it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of.[69]

86. The appropriate categorisation may, however, make reference to the events which form part of the loss. In such a case, the task for the Court is to reconcile the detail necessary to identify

the precise genus or category of the loss, without requiring foresight of the 'precise concatenation of the events'. It is, after all, equally clear from the authorities that it will not be sufficient for the appellant to say merely that since the respondent foresaw some damage to the appellant he is responsible for those damages which were in fact sustained.[70]

87. The method to be used to determine the appropriate categorisation has not been the subject of much judicial comment. McHugh JA in *Alexander v Cambridge Credit Corporation*[71] in the passage I have already quoted, emphasised that the level of classification of the loss or damage must not be placed so high as to require 'the very loss' or 'the precise manner of its occurrence'. To that one may add 'or the method by which the loss is to be calculated'. McHugh JA also said:

> helpful guidance as to the proper level of characterisation is to be found in some of the decided cases. Thus in tort, injury by shock is a different kind of damage from injury by a blow.
>
> In *Rowe v McCartney* this Court held that mental illness as the result of irrational guilt feelings and with only a 'tenuous connection' with the negligence of the defendant driver was damage different in kind from mental illness arising from an ordinary car accident.
>
> In *Doughty v Turner Manufacturing Co Ltd,* the English Court of Appeal held that injury resulting from an eruption after an unexpected chemical reaction of a molten liquid was damage different in kind from injury due to splashing of the liquid.[72]

88. The decision in *Doughty* might be seen as an example of a narrow approach to the question of categorisation. A slightly broader approach was undertaken by Gillard J in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*.[73] That case required consideration of the remoteness of damage claimed to have resulted from the disruption to the Victorian gas supply caused by the negligent actions of the defendant *Esso*. There, Gillard J said it was unnecessary for any of the plaintiffs to show that the precise manner in which the damage was sustained was foreseeable so long as damage to a class of persons including the plaintiffs might reasonably have been foreseen as a consequence of Esso's negligence.[74]

89. In *Esso*, there was before the Court no evidence that Esso knew anything of the businesses or the nature of any damage or expense that any of the plaintiffs or the class to which they belonged may incur as a result of the stoppage of gas supply, but Gillard J was satisfied that the economic loss suffered by the plaintiffs was reasonably foreseeable by the reasonable corporation in the position of Esso. In reaching that conclusion his Honour applied the formula of Lord Atkin that one must 'take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' It was applied by the High Court in *Tame v New South Wales*[75] as relevant to the question whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated. Applying *Tame*, Gillard J concluded that it was reasonably foreseeable by *Esso* that the cessation of the gas supply could cause specific economic damage such as 'lost profits due to lost production, loss of custom at hotels and restaurants because of curtailment of services, costs and expenses incurred to acquire and use plant and equipment to overcome the lack of gas'.[76]

90. A broader approach was undertaken in the decision of the House of Lords in *Hughes v Lord Advocate*.[77] The facts of that case concerned injuries sustained by a young boy, after an explosion occurred when a paraffin lamp was lowered into a man-hole. It was argued that the damage suffered by the boy was too remote on the basis that it was not reasonably foreseeable. While an injury from an ordinary fire might be foreseeable, it was said, injuries resulting from an explosion were not. This argument was rejected by the House of Lords who held that the damage suffered by the boy was indeed of a kind which was reasonably foreseeable. The reasoning of the Lords is captured in the observation of Lord Morris who said:

> ... the defenders are not absolved from liability because they did not envisage the 'precise concatenation of circumstances which led up to the incident'.[78]

91. Lord Morris further observed:

> I consider that the defenders do not avoid liability because they could not have foretold the exact way in which the pursuer would play with the alluring objects that had been left to attract him or the exact way in which in so doing he might get hurt.[79]

92. Ultimately the kind or genus of damage identified was simply that which is caused by 'burning'.[80] As was said by Lord Guest:

> an explosion is only one way in which burning can be caused. Burning can also be caused by the contact between liquid paraffin and a naked flame. In the one case paraffin vapour and in the other case liquid paraffin is ignited by fire. I cannot see that these are two different types of accident. They are both burning accidents and in both cases the burning injuries would be burning injuries. Upon this view the explosion was an immaterial event in the chain of causation. It was simply one way in which the burning which might be caused by the potentially dangerous paraffin lamp.[81]

93. I refer, finally, to *National Australia Bank Limited v Nemur Varity Pty Ltd,*[82] where this Court considered a claim for damages for consequential loss from the alleged negligence of the National Australia Bank. Although that was a case of contract it was submitted, correctly, that the same principles are relevant to the question of remoteness in negligence. Batt JA with whom Phillips JA agreed stated:

> During argument there was quite some discussion as to the genus of loss or head of damage which was in question, principally, it is true, in connection with reasonable foreseeability. Several possibilities were suggested such as the loss of opportunity of discovering the fraud, loss by fraud, difficulties between the broker and its customers or the loss of customers. In my opinion the loss or harm must be such as sounds in money, so that the first and third suggestions are inadmissible. Loss by fraud is too wide. With the exception of the ANI cheque, I consider the relevant genus to be the loss of business income. Business interruption (espoused by Mr Williams) and injury to the business might also be acceptable although they are wider. In the case of the ANI cheque the genus is far less clear unless it is simply the loss of the face value of the cheque, for continuing to do business with ANI does not of itself sound in money …[83]

94. Seeking to draw support from this decision, counsel for the appellant suggested that the category of 'loss of business income', is analogous to the kind of loss in this case, namely 'loss of revenue' relating to the Franchise Agreement.

95. It is not always easy to discern the basis upon which the breadth of the relevant category is determined in the individual case. It does appear, however, that in the ordinary case a broad categorisation of the kind or genus of the loss will be appropriate. So it has been said that the liability of a defendant for shock is foreseeability of injury from the shock,[84] the right to recover for injury by a fire is foreseeability of injury by fire (burning)[85] and the right to recover for loss of business income is foreseeability of loss of business income.[86] The adoption of a broad categorisation is consistent with the principle that it should not be necessary that the exact course of events which produced the injury was predictable or likely so long as the injury was foreseeable.[87] It is furthermore supported by a number of cases referred to by the authors of Causation and Remoteness of Damage,[88] which illustrate a general refusal of the courts to sub-divide bodily injury into harms of different kinds. It seems that those cases which descend to a further level of detail, such as *Doughty* and *Rowe v McCartney*, are those which involve an unusual injury or an injury which arises from a particularly unusual sequence of events.

96. It is important to bear in mind that the appropriate categorisation of the loss in a given case will be, in essence, a question of policy. In a case which involves an uncommon kind of damage, it may be useful to narrow the category of damage beyond simply 'economic loss' or 'physical injury', so as to require that the tribunal of fact be given the opportunity to consider its reasonable foreseeability.

97. In the present case, the narrow category chosen by the learned Magistrate is not appropriate as the loss alleged to have been suffered by Metrolink is not that which is of an unusual kind. I observe that much has been made by the respondent before this Court, and before the judge below, of the complexity of the Franchise Agreement. In the modern world, however, complexity of contracts, and the provision of items such as key performance indicators and other performance targets, could hardly be said to be unusual.

98. There is nothing unusual about the expectation that Metrolink would receive remuneration for the operation of its part of the tram network or that it would lose revenue in the event that it could not operate a part of its service. There is no reason of policy that compels a different approach to the recovery of losses calculated by reference to targeted performance obligations

which have not been met because of the inability to conduct the service, and losses arising from the same cause which are to be calculated under a different remuneration structure. That this remuneration might be reduced or increased depending upon the operator's ability to provide the service is unremarkable. That the mechanism by which remuneration for this service is determined might be complex, and be calculated according to a number of key performance indicators, is similarly neither unusual, nor is its complexity a reason to treat it differently from a more simple form of remuneration. For this very reason, the respondent was compelled to concede that it was reasonably foreseeable that fares would be lost as a consequence of interruption to the operation. For liability to be dependent upon foreseeability of 'a reduction in benefit' or the 'imposition of a penalty', is to lose sight of the fact that these are contractual mechanisms which are part of the manner in which the overall remuneration for the provision of the service is calculated. To require foresight of this is to require what was described in Hughes as foresight of 'the concatenation of the circumstances which caused the loss' or as in Cambridge Credits, as 'the precise manner of its occurrence'.

99. For these reasons I conclude that the learned Magistrate erred in defining too narrowly the kind or genus of the loss suffered by Metrolink. The appropriate categorisation was simply one which required foreseeability of 'revenue lost as a result of the inability to operate the tram service'.

Was the loss reasonably foreseeable?

100. Once the appropriate category of loss has been determined, it is necessary undertake the second step of the test laid down in *The Wagon Mound*.[89] In the present case that requires one to ask whether the loss of revenue as a result of inability to operate the tram service should have been foreseeable to a reasonable person in the position of Inglis.

101. The authorities provide some guidance as to the principles which apply to the question of reasonable foreseeability. The question is whether there was 'a real risk, one which would occur to the mind of a reasonable man in the defendant's position and which he would not brush aside as far-fetched'.[90] A risk of injury is foreseeable if it is real and not far-fetched or fanciful, even if extremely unlikely to occur.[91]

102. It was conceded by the respondent in the Supreme Court that if a claim was made by Metrolink in respect of fares lost, then that sort of loss was reasonably foreseeable as a loss suffered in the operation of business. A loss of fares is, I observe, of precisely the same kind or genus as loss arising by operation of the Franchise Agreement. They are both 'revenue lost as a result of the inability to operate the tram service'. It should not be otherwise, as there is no sound policy reason to treat direct remuneration from fares differently from that part of remuneration calculated under the Franchise Agreement. They are both part of the overall payment for the operation of the tram service.

103. I consider in the present case, that it is in no way 'far-fetched' that the collision of a car with a tram, causing an inability to operate trams on the network, might result in a loss of revenue. It is in fact highly likely, or at least a real risk, that the disruption of the provision of any service might result in a loss of revenue to the person who is responsible for the provision of that service.

104. I would allow the appeal.

WILLIAMS AJA:

105. I have had the benefit of reading the judgments of Redlich JA and Neave JA in draft and I agree with Redlich JA that the appeal should be allowed for the reasons his Honour gives.

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[1] [1970] HCA 60; (1970) 125 CLR 383, 397; [1971] ALR 253, Barwick CJ at CLR 389 appears to have treated the case as raising the question of liability, whilst Menzies J at CLR 392, Windeyer J at CLR 401 and Walsh J at CLR 413, treated the question whether the plaintiff could recover damages for a mental illness caused by seeing a fellow employee seriously burned as raising an issue of remoteness of damage.

[2] See also *Rowe v McCartney* (1976) 2 NSWLR 72, 83; (1983) 14 A Crim R 118 (Samuels JA).

[3] [2003] VSC 27; [2003] Aust Torts Reports 81-.

[4] Ibid [621]-[627].

[5] Mr Inglis pleaded that the penalties were too remote but did not specifically allege that this was because they were in the nature of 'pure economic loss'.

[6] *Rowe v McCartney* [1976] 2 NSWLR 72, 86; (1983) 14 A Crim R 118 (Samuels JA).
[7] At paragraphs [68]-[71] below.
[8] Compare *Rowe v McCartney* [1976] 2 NSWLR 72, 88; (1983) 14 A Crim R 118 (Samuels JA).
[9] Compare the remarks made by Callinan J in *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180; (1999) 164 ALR 606; (1999) 73 ALJR 1190; [1999] Aust Torts Reports 81-516; (1999) 15 Leg Rep 2, concerning the duty to avoid negligently causing pure economic loss.
[10] *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112, 121; [1962] ALR 379; 35 ALJR 170 (although that view was expressed in relation to the issue of duty of care it was also implicitly applied to determine whether the damages suffered as a result of that breach were too remote).
[11] (1987) 9 NSWLR 310; (1987) 12 ACLR 202; [1987] Aust Torts Reports 80-106; (1987) 5 ACLC 587.
[12] Ibid 366.
[13] [1976] 2 NSWLR 72; (1983) 14 A Crim R 118.
[14] See also *Tremaine v Pike* [1969] 3 All ER 1303. In that case it was held that even if the defendants ought reasonably have foreseen that the plaintiff would be exposed to hazards as a result of exposure to an infestation of rats on their farm, they could not have foreseen that the plaintiff was at risk of contracting a rare disease as the result of exposure to rats' urine and hence the injury suffered was too remote. Payne J characterised the kind or genus of loss as 'disease contracted by contact with rats' urine.
[15] See [1976] 2 NSWLR 72, 76 (Moffit P), 87 (Samuels JA); (1983) 14 A Crim R 118.
[16] See ibid 78-79 (Glass JA).
[17] [1963] UKHL 1; [1963] AC 837; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31.
[18] See for example ibid AC 853 (Lord Morris of Borth-y-Gest), AC 855-856 (Lord Guest), AC 857 (Lord Pearce).
[19] See for example *Esso* [2003] VSC 27; [2003] Aust Torts Reports 81-692.
[20] For discussion of the authorities see *Esso* [2003] VSC 27, [113]-[226]; [2003] Aust Torts Reports 81-692.
[21] For other relevant factors see *Esso* [2003] VSC 27, [840]-[1220]; [2003] Aust Torts Reports 81-692.
[22] In the *Esso* case Gillard J held that loss of barley being processed in a plant which was turned off as a result of interruption to the gas supply caused by *Esso*'s negligence was property damage, but that profit lost on the sale of malt which would have been produced over the period of stoppage was a purely economic loss.
[23] [2003] VSC 343; [2003] ASC 155-061.
[24] *Preston Ice and Cool Stores Ltd v Hawkins* [1955] VicLawRp 17; [1955] VLR 89; [1955] ALR 371; *Mond v Lipshut* [1999] VSC 103; [1999] 2 VR 342, 350-1.
[25] [1923] HCA 38; (1923) 32 CLR 413, 426; 30 ALR 13.
[26] Ibid 427.
[27] [1993] VicRp 69; [1993] 2 VR 201; [1993] ANZ Conv R 397; [1992] V Conv R 54-452 .
[28] Ibid 211.
[29] [1999] VSC 103; [1999] 2 VR 342.
[30] Ibid 351.
[31] [2003] VSC 343, [58]-[61]; [2003] ASC 155-061.
[32] Note however that in *Derring Lane Pty Ltd v Fitzgibbon* [2007] VSC 563 it was held that on an appeal from a trial judge hearing an appeal on a question of law from the Victorian Civil and Administrative Tribunal, the Court of Appeal did not have power to make a decision in favour of the appellant based on a decision of law not raised on appeal, and had to remit the matter to VCAT. Ashley JA took the same view in relation to an appeal on a question of law from the Magistrates' Court in *Mond v Lipshut* [1999] VSC 103; [1999] 2 VR 342, 349.
[33] Leave to appeal was granted on 31 March 2008.
34] The amount claimed in (iii) was later amended to $11,355.75. The appellant now claims an amount, referred to in the judgment below, of $10,760.75.
[35] Referring to *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound*) [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; [1961] 1 All ER 404; *Overseas Tank Ship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1966] UKPC 1; [1967] 1 AC 617; [1966] 2 All ER 709 and *The National Australia Bank Limited v Nemur Varity Pty Ltd* [2002] VSCA 18; [2002] 4 VR 252; [1966] 2 All ER 709.
[36] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound*) [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; [1961] 1 All ER 404.
[37] [2002] VSCA 18; (2002) 4 VR 252; [2002] Aust Torts Reports 81-645.
[38] [1969] VicRp 16; [1969] VR 136.
[39] [1977] EWCA Civ 13; [1978] QB 791.
[40] [2006] NSWCA 81; [2006] ANZ Conv R 350.
[41] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound*) [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; [1961] 1 All ER 404; *Jolley v Sutton London Borough Council* [2000] UKHL 31; [2000] 3 All ER 409; [2000] 1 WLR 1082, 1091 (Lord Hoffmann).
[42] [1966] UKPC 1; [1967] 1 AC 617, 636; [1966] 2 All ER 709.
[43] [1969] VicRp 16; [1969] VR 136.
[44] Ibid 144.
[45] Ibid 146 (emphasis added).
[46] Ibid 144.
[47] Ibid.

[48] Ibid 145.
[49] *Hughes v Lord Advocate* [1963] UKHL 1; [1963] AC 837; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31.
[50] *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112, 121; [1962] ALR 379; 35 ALJR 170.
[51] [1969] VicRp 16; [1969] VR 136, 145-6.
[52] 2 NSWLR 72; (1983) 14 A Crim R 118.
[53] Ibid 87.
[54] Ibid 78.
[55] Ibid 78 (emphasis added).
[56] *March v Stramare (E and MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 531; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095.
[57] [1970] HCA 60; (1970) 125 CLR 383; [1971] ALR 253.
[58] Ibid 89.
[59] (1987) 9 NSWLR 310; (1987) 12 ACLR 202; [1987] Aust Torts Reports 80-106; (1987) 5 ACLC 587.
[60] Ibid 366.
[61] [1977] EWCA Civ 13; [1978] QB 791.
[62] Ibid 801.
[63] [2006] NSWCA 81; [2006] ANZ Conv R 350.
[64] Ibid [48].
[65] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 156 (Glass JA).
[66] Citations omitted.
[67] *Hughes v Lord Advocate* [1963] UKHL 1; [1963] AC 837; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31.
[68] *March v Stramare (E &MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 535; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095 (McHugh J).
[69] *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112; [1962] ALR 379; 35 ALJR 170.
[70] A fact which follows from the judgement of Viscount Simonds in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound*) [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126.
[71] (1987) 9 NSWLR 310; (1987) 12 ACLR 202; [1987] Aust Torts Reports 80-106; (1987) 5 ACLC 587.
[72] Ibid 310.
[73] [2003] VSC 27; (2003) Aust Torts Reports 81-692.
[74] Ibid [797].
[75] [2002] HCA 35; (2002) 211 CLR 317; 191 ALR 449; (2002) 76 ALJR 1348.
[76] [2003] VSC 27; (2003) Aust Torts Reports 81-692, [830]-[838].
[77] [1963] UKHL 1; [1963] AC 837; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31.
[78] Ibid 853, quoting Lord MacKintosh in *Harvey v Singer Manufacturing Co Ltd* [1959] ScotCS CSIH_2; [1960] SLT 178; [1960] SC 155, 172.
[79] *Hughes v Lord Advocate* [1963] UKHL 1; [1963] AC 837; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31.
[80] See for example ibid 846 (Lord Reid).
[81] Ibid 856.
[82] [2002] VSCA 18; (2002) 4 VR 252; [2002] Aust Torts Reports 81-645.
[83] Ibid [50].
[84] *Bourhill v Young* [1942] UKHL 5; [1943] AC 92; [1942] 2 All ER 396; [1942] SC (HL) 78; [1943] SLT 105.
[85] *Hughes v Lord Advocate* [1963] UKHL 1; [1963] AC 837; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31.
[86] *National Australia Bank Limited v Nemur Varity Pty Ltd* [2002] VSCA 18; (2002) 4 VR 252, [50]; [2002] Aust Torts Reports 81-.
[87] *Hughes v Lord Advocate* [1963] UKHL 1; [1963] AC 837, 858; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31.
(Lord Pearce).
[88] H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, 2002, 167.
[89] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound*) [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; [1961] 1All ER 404.
[90] *Overseas Tank Ship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1966] UKPC 1; [1967] 1 AC 617, 643; [1966] 2 All ER 709.
[91] *Mount Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383, 402; [1971] ALR 253 (Windeyer J).

APPEARANCES: For the appellant/plaintiff Metrolink Victoria Pty Ltd: Mr AG Uren QC with Mr JP Brett, counsel. Deacons, solicitors. For the respondent/defendant Inglis: Mr J Ruskin QC with Mr AN Murdoch, counsel. Ligeti Partners Lawyers.