should have offered Mr. Coxall alternative work. It seems strange that, on Brooke L.J.'s approach, the company apparently could have avoided liability simply by calling a meeting in order to discuss all the available options with Mr. Coxall, even if he had already been aware of them. (It is also unclear how Brooke L.J. concluded that the breach caused the damage in question, since the trial judge found that the claimant would have rejected a transfer to other work, if he had been offered it.)

Fifth, can an employer establish contributory negligence in a case like *Coxall*? The answer is almost certainly "yes". The defence was not raised in *Coxall*. However, Brown L.J. said, "had it been, it might well have relieved the appellants of part of their liability".

JESSE ELVIN

CAUSATION, LOSS AND DOUBLE RECOVERY

IN 1987, Mr. Primavera, a restaurant owner, was approached by the defendant, who offered him a loan for the development of a second restaurant, linked to an Executive Retirement Plan (ERP) for Mr. Primavera himself. The ERP promised a tax-free lump sum payment of £500,000 after seven years. However, the defendant neglected to tell Mr. Primavera that in order to qualify for the lump sum, he would have to draw a salary of not less than £334,000 per annum for at least three of the seven years. Unaware of this, Mr. Primavera paid himself a smaller salary. When he came to claim his lump sum in 1995, he found that the maximum that he could draw tax-free was £125,875. A claim form was issued against the defendant in respect of, amongst other things, £101,000 representing the tax payable on the rest of the lump sum. In the meantime, Mr. Primavera chose to continue with the ERP, paid himself a larger salary and, in 2000, qualified for the full £500,000 tax-free.

The question before the Court of Appeal in *Primavera* v. *Allied Dunbar Assurance plc* [2002] EWCA Civ 1327 was whether, in continuing with the ERP and qualifying for the full amount, Mr. Primavera had mitigated/avoided the whole of his loss. It might be thought that the law would have tackled this problem long ago, but Simon Brown L.J., delivering the leading judgment of the Court, readily admitted that he could "not pretend to have found [the issue] an easy one". After acknowledging that the arguments of both counsel had been persuasive, the Court determined that Mr. Primavera was entitled to the damages claimed.

The explanation for the Court of Appeal's difficulty, it is submitted, lies in the test that it was required to apply in order to determine whether the gains made by Mr. Primavera in deciding to continue with the ERP could be said to reduce the loss. That test, set out by Mustill L.J. (as he then was) in *Hussey* v. *Eels* [1990] 2 Q.B. 227, at 241, is to ask whether the fault that caused the loss also caused the gain, *i.e.* whether the gain was "part of a continuous transaction of which the [defendant's fault] was the inception". This test is said to exclude acts leading to a gain with which the defendant was not involved, or *res inter alios acta* (see Hirst L.J. in *Gardner* v. *Marsh and Parsons (a firm)* [1997] 1 W.L.R. 489 at 503).

This test is, it is suggested, utterly erroneous. Every day there are countless examples of benefits received by a claimant that mitigate or avoid his loss but could in no way be said to be part of a continuous transaction caused by the defendant's acts, since they are *res inter alios acta*. The surgeon who mends a broken arm, the physiotherapist who teaches an apparently permanently bed-ridden patient to walk again, the mechanic who repairs the car unusually cheaply, the work colleague whose knowledge of first aid saves the day: all of these, and very many others, mitigate and avoid the claimant's loss without any connection or reference to the defendant or his acts at all. It is obvious, for example, that a claimant whose arm is broken by the defendant's negligent act cannot recover for the loss of the use of the arm for the rest of his life if his arm has been repaired by a surgeon. Yet it is impossible to say that the effects of the surgeon's skill are caused by the defendant's act: they are the voluntary acts of a third party with whom the defendant has no connection.

It was on the basis of Mustill L.J.'s test that the Court of Appeal approached the fact that Mr. Primavera, in choosing to continue with the ERP, had apparently, in the end, got what he had bargained for. Simon Brown L.J. held (at para. [27]) that when the claim form was issued in 1996, the effects of the defendant's negligence were "spent" and that subsequent events could not be said to have been caused by it.

One of the cases cited by the Court was the recent decision of Sir Andrew Morritt V.-C. in *Needler Financial Services v. Taber* [2002] 3 All E.R. 501 in which a financial adviser negligently advised Mr. Taber to switch his pension from his existing scheme to a personal pension plan with a mutual assurance society. The result was that Mr. Taber's pension was worth considerably less than it would have been had he left it where it was. However, as a member of the society, Mr. Taber had received a windfall payment when the society demutualised in 1997, which the adviser claimed should be taken into account in mitigation of the loss. Morritt V.-C. disagreed. The demutualisation of the society certainly could not be said to have been caused by the negligent financial advice and therefore the gain was irrelevant.

This approach, though forced upon Morritt V.-C. by precedent, needs only to be stated for the problem to be seen. It turns a respectable and difficult argument, as to whether a benefit received by Mr. Taber could be said to mitigate his loss, into a foolish and hopeless argument that the demutualisation of a major national life assurance society was caused by negligent financial advice given to one of its members!

It is understandable that the courts should seize upon a bright line test like the "continuous transaction" when difficult questions of measuring loss are put before them. However, something of the courts' own misgivings about the test may be shown by the repeated reminders that the cases turn very much on their own facts: see, *e.g.*, *Gardner* at 503 per Hirst L.J.

A fresh approach is needed, and it is submitted that in the judges' repeated references to the importance of the facts and in the penultimate sentence of the judgment of Simon Brown L.J. (at para. [29]), there is a hint as to what sort of approach that might be. He there states his conclusion that the action taken by Mr. Primavera after 1995 was "speculation … on his own account".

The test to be imposed by the court may simply be whether the subsequent gains are *referable to the loss*. The mending of a broken arm by a surgeon is an act referable to the broken arm. Winning the lottery is not so referable, and so would not be taken into account.

Applying this approach to the cases, one might ask whether in *Needler* the gain was referable to the loss. The result would appear to be unchanged, that the gain was a windfall that cannot in truth be said to be referable to the loss Mr. Taber suffered in changing his pension plan. However, it can be seen that on this approach, the court is forced to tackle the issue directly.

Seen in this light, the reason for the Court of Appeal's concern in *Primavera* becomes clear: *Primavera* is a case very close to the line because the gain came about through the continuation of the plan through which the loss had arisen. In holding that Mr. Primavera's decision to continue with the ERP was speculation on his own account, Simon Brown L.J. makes the key decision: that what occurred was more akin to an investment not referable to the loss (so it is to be treated as it would be had Mr. Primavera invested in a different plan that just happened to result in a benefit) than to an attempt to mitigate the loss.

Asking whether the gain is referable to the loss is admittedly much less concrete than the bright-line test of continuous transaction. But it is for this very reason that it works so well—it enables the courts to consider the facts and the issues of policy involved, and to reach an honest and open decision based on the conclusions that they draw from those considerations.

S.B. MIDWINTER

CONTRACT: THERE'S STILL LIFE IN THE CLASSICAL LAW

THE case of *Carlton Communications plc and Granada Media plc* v. *The Football League* [2002] EWHC 1650 should serve as a cautionary tale for contract scholars seeking to promote a socio-legal approach to the development of contract law at the expense of the classical model. For such scholars, the development of an alternative to the classical law is thought necessary given "the devastating empirical finding of non-use" of contract law in sociological studies of contracting behaviour (D. Campbell, "Reflexivity and Welfarism in the Modern Law of Contract" (2000) 20 O.J.L.S. 477, 480). In parts of his recent work *Regulating Contracts* (Oxford, 1999) Hugh Collins argues that the legal rules frequently undermine the parties' agreement because, at least in the commercial context, "considerations of the long term business relation, the customs of the trade, and the success of the deal" (*ibid.* p. 271) are more important than the contractual planning documents in regulating the relationship. Quite simply, contracting parties do not start from the rules and doctrines of contract law in constructing their agreement—they start from the deal. While cases like *Williams* v. *Roffey* [1991] 1 Q.B. 1 demonstrate some judicial appreciation of this fact, *Baird Textile Holdings* v. *Marks and Spencer plc* [2001] EWCA Civ 274, [2000] 1 All E.R. (Comm) 737 reminds us that agreements (in that case lasting some thirty years) may still falter for want of a (legal) contract. *Carlton Communications* is another reminder of what the socio-legal vision is up against.

Carlton Communications was concerned with the fallout surrounding the collapse of the television company ONdigital and with it the fortunes of many lower league division football clubs. ONdigital later changed its name to ITV Digital, but is referred to as ONdigital throughout this note. ONdigital and the Football

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