

NEGLIGENCE – CAUSATION AND REMOTENESS CASES

POLICY

Lamb v Camden LBC [1981] 2 All ER 408

In 1972 the plaintiff let her house while she was away in America. In 1973, while replacing a sewer pipe in the road outside the plaintiff's house, contractors employed by the local council breached a water main causing the foundations of the house to be undermined and the house to subside. The house became unsafe, the tenant moved out, and the plaintiff moved her furniture into storage. The house was then left unoccupied to await repair. In 1974 squatters moved in but were evicted and the house was boarded up. In 1975 squatters again moved in and caused substantial damage to the interior of the house before being evicted. The official referee held that, although squatting was at the time a reasonably foreseeable risk, it was not likely to occur in the locality of the plaintiff's house and was therefore too remote for the plaintiff to be able to recover damages.

The Court of Appeal held, per Lord Denning MR: The range and limits of liability for negligence or nuisance were to be determined as a matter of judicial policy, and, applying that approach, the fact that the plaintiff rather than the council was responsible for keeping the squatters out and evicting them when they got in meant that the council was not liable for the damage, which in any event was damage against which the plaintiff herself should have taken precautions.

CAUSATION IN FACT

BUT FOR TEST

Barnett v Chelsea & Kensington Hospital [1968] 1 All ER 1068

Three night watchmen drank some tea. Soon afterwards all three men started vomiting. At about 8am the men walked to the casualty department of the defendants' hospital. The nurse telephoned the casualty officer, a doctor, to tell him of the men's complaint. The casualty officer, who was himself unwell, did not see them, but said that they should go home and call their own doctors. The men went away, and the deceased died some hours later from what was found to be arsenical poisoning. Cases of arsenical poisoning were rare, and, even if the deceased had been examined and admitted to the hospital and treated, there was little or no chance that the only effective antidote would have been administered to him before the time at which he died.

It was held in the QBD (Nield J.) that in failing to see and examine the deceased, and in failing to admit him to hospital and treat him, the hospital's casualty officer was negligent and did not discharge the duty of care which in the circumstances was owed to the deceased by the defendants as hospital authority; but the plaintiff had not discharged the onus of proving that the deceased's death was caused by the negligence, or, if there were a burden on the defendants of showing that his death was not due to the negligence, they had discharged that burden, with the consequence that the plaintiff's claim failed. Nield J. stated:

“My conclusions are: that the plaintiff has failed to establish, on the balance of probabilities, that the deceased’s death resulted from the negligence of the defendants, my view being that, had all care been taken, the deceased might still have died. My further conclusions, however, are that Dr. Banerjee was negligent in failing to see and examine the deceased, and that had he done so his duty would have been to admit the deceased to the ward and to have him treated or caused him to be treated”.

Robinson v Post Office [1974] 2 All ER 737

On 15th February the plaintiff slipped as he was descending a ladder from one of the Post Office’s tower wagons. The slipping was caused by oil on the ladder due to leakage of a pump. The plaintiff sustained a wound to his left shin. Some eight hours later he visited his doctor and was given an injection of anti-tetanus serum (ATS). Where a patient had had a previous dose of ATS the recognised test procedure in 1968 entailed waiting half an hour after injecting a small quantity of ATS to see whether the patient showed any reaction. The doctor did not follow that procedure but followed one of his own, waiting only a minute for a reaction before administering the balance of the full dose. The plaintiff did not suffer any reaction until 24th February when he began to show signs of a reaction and was admitted to hospital suffering from encephalitis. The plaintiff suffered brain damage. The trial judge held the Post Office wholly liable for the plaintiff’s injury. It was held by the Court of Appeal, inter alia, that:

(1) In the light of the plaintiff’s subsequent history it was most unlikely that, if the proper test dose procedure had been followed, the plaintiff would have shown a reaction within the period of half an hour before the administration of the full dose. The negligence of the doctor in failing to administer a proper test dose did not therefore cause or materially contribute to the plaintiff’s injury. *Bonnington Castings v Wardlaw* [1956] 1 All ER 615 applied.

(2) The administration of ATS by the doctor was not a novus actus interveniens since (a) he had not been negligent or inefficient in deciding to administer ATS, and (b) his failure to administer a proper test dose had had no causative effect.

Cummings (or McWilliams) v Sir William Arrol & Co [1962] 1 All ER 623

A steel erector fell seventy feet from a steel tower in the building of which he was assisting. He was killed by the fall and his widow and administratrix claimed damages from his employers for negligence and from the occupiers of the shipyard in which the tower was being built for breach of statutory duty under the Factories Act 1937, s26(2), in failing to provide a safety belt for use by the steel erector. If a safety belt had been worn by the deceased he would not have been killed by the fall. The deceased was an experienced steel erector, and on the evidence it was highly probable that he would not have worn a safety belt if one had been provided.

It was held by the House of Lords that assuming that the employers and the occupiers of the site were in breach of their respective duties in not providing a safety belt, nevertheless they were not liable in damages because their breach of duty was not the cause of the damage suffered since (a) on the evidence the deceased would not have worn a safety belt if it had been provided, and (b) there was no duty on the employers to instruct or exhort the deceased to wear a safety belt.

Bux v Slough Metals Ltd [1974] 1 All ER 262

In 1968 the plaintiff, who had a limited command of English, started employment in the die-casting foundry in the defendants' factory. In 1969 the new works director decided that goggles should be purchased and supplied to all employees. The plaintiff tried them on for a few days but found that they hampered his work because they misted up 'every three or four minutes'. Thereafter he did not wear them, telling the superintendent of the foundry that they were useless. He asked whether there were better ones available, but received no reply. In 1970 some molten metal was thrown up into his eyes.

The judge held that no breach of statutory duty had been established but that negligence had been made out. He also found the plaintiff guilty of contributory negligence by reason of his breach of regulations and therefore reduced the damages by 20 per cent. The Court of Appeal held:

(1) the duty imposed on the defendants by the regulations did not supersede the common law duty of the employer for the regulation was silent as to the legal position where an employer knew that the suitable goggles that he had provided were consistently not worn by his men when engaged in work involving risk to their eyes. The question whether instruction, persuasion or insistence with regard to the use of protective equipment should be resorted to, depended on the facts of a particular case, one of those being the nature and degree of the risk of serious harm liable to occur if the equipment were not worn. In the circumstances the evidence showed that the plaintiff would have worn the goggles if instructed to do so in a reasonable and firm manner followed up by supervision; accordingly the defendants were in breach of their common law duty to maintain a reasonably safe system of work by giving the necessary instructions and enforcing them by supervision.

(2) A substantial degree of blameworthiness had, however, to be attributed to the plaintiff in consequence of his own breach of statutory duty. His breach was not merely technical; it was a substantial, though partly excusable, cause of the accident. In the circumstances the appropriate degree of blameworthiness was 40 per cent rather than 20 per cent and the defendants' appeal would be allowed to that extent.

Bolitho v City & Hackney HA [1997] 4 All ER 771

A two-year-old boy, P, who had a past history of hospital treatment for croup, was readmitted to hospital under the care of Dr H and Dr R. The following day he suffered two short episodes at 12.40pm and 2pm during which he turned white and clearly had difficulty breathing. Dr H was called in the first instance and she delegated Dr R to attend in the second instance but neither attended P, who at both times appeared quickly to return to a stable state. At about 2.30pm P suffered total respiratory failure and a cardiac arrest, resulting in severe brain damage. He subsequently died and his mother continued his proceedings for medical negligence as administratrix of his estate. The defendant health authority accepted that Dr H had acted in breach of her duty of care to P but contended that the cardiac arrest would not have been avoided if Dr H or some other suitable deputy had attended earlier than 2.30 pm. It was common ground that intubation so as to provide an airway would have ensured that respiratory failure did not lead to cardiac arrest and that such intubation would have had to have been carried out before the final episode. The judge found that the views of P's expert witness and Dr D for the defendants, though diametrically opposed, both represented a responsible body of professional opinion espoused by distinguished and truthful experts.

He therefore held that Dr H, if she had attended and not intubated, would have come up to a proper level of skill and competence according to the standard represented by Dr D's views and that it had not been proved that the admitted breach of duty by the defendants had caused the injury which occurred to P.

The House of Lords held that a doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct where it had not been demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, in a rare case, if it could be demonstrated that the professional opinion was not capable of withstanding logical analysis, the judge would be entitled to hold that the body of opinion was not reasonable or responsible. The instant case was not such a situation since it was implicit in the judge's judgment that he had accepted Dr D's view as reasonable and although he thought that the risk involved would have called for intubation, he considered that could not dismiss Dr D's views to the contrary as being illogical. *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 and *Hucks v Cole* (1968) 4 Med LR 393 applied.

The Empire Jamaica [1955] 1 All ER 452

The plaintiffs were the owners of a ship which collided with another vessel. The officer of the watch at the time of the collision was one S. S was not a certificated officer and had been signed on as "chief boatswain" but was treated as, and performed the duties of, second officer. By the relevant legislation the plaintiffs' ship was required to be provided with "at least the first and second mates duly certificated". The plaintiffs admitted liability for the collision, and now sought a declaration limiting their liability. The competency of S to perform his duties was not disputed.

It was held in the Admiralty Division (Willmer J.) that although the ship had put to sea with the privity of the plaintiffs in breach of the requirement to carry two certificated mates, there was no causal connection between the fact that S did not possess a certificate and the fact that his negligent navigation caused the collision; on the facts, the plaintiffs had provided the ship with a competent officer, were not guilty of any fault or privity in relation to the collision and were entitled to the declaration sought.

(*Note*: the plaintiffs sought, in an action against the owners of the *Garoet* and all persons claiming to have sustained damage by reason of the collision, a declaration that their liability in damages for loss or damage to vessels or property should be limited to £8 per ton for each ton of the tonnage of the *Empire Jamaica*, on the ground that the collision occurred without their actual fault or privity. By their defence the defendants pleaded that the plaintiffs caused or permitted the *Empire Jamaica* to be negligently navigated in an unseaworthy condition, alleging, among other allegations, that the plaintiffs did not provide a sufficient complement of certificated officers as required by the Merchant Shipping Ordinance 1899, and that the plaintiffs were privy thereto.)

PROOF OF CAUSATION

Pickford v Imperial Chemical Industries [1998] 3 All ER 462

The plaintiff was employed by the defendants as a full-time secretary. In May 1989 the plaintiff went to see her GP complaining of pain in both hands, which she had first noticed some seven months previously. Although her GP could find no abnormality on examination, he signed her off work for a short period. Thereafter, she consulted a number of doctors, who were unable to find any physical explanation for the pain. In September 1989 ICI terminated the plaintiff's employment as there was no work available for her for which she accepted she was fit. Thereafter, the plaintiff commenced proceedings against ICI for damages, claiming that by reason of their negligence she had contracted a prescribed disease, PDA4, in the course of her employment; that it was organic in origin; that it had been caused by the very large amount of typing which she had carried out on her word processor at speed for long periods of time without breaks or rest periods; and that ICI were negligent because they had failed to warn her of the foreseeable risk of contracting the disease and of the need to take rest breaks.

At the trial the judge heard conflicting medical evidence about the cause of the plaintiff's PDA4: in particular, whether it was an organic condition due to trauma or physical injury, as the plaintiff submitted, or whether its basis was psychogenic. The judge dismissed the plaintiff's action, holding that she had failed to establish that her condition was organic in origin or that it was caused by her typing work, as opposed to being merely associated with it. He also held that it was not reasonably foreseeable, in the state of knowledge about the condition in 1988 and 1989, that her work as a secretary would be likely to cause her to contract PDA4, nor were ICI required to specify rest pauses during the plaintiff's typing work since she had ample scope to interpose and rotate her typing with her non-typing work and it could reasonably be expected that she would do so without being told.

It was held in the House of Lords (Lord Steyn dissenting) that in order to succeed, the onus was on the plaintiff to prove that her condition had been caused by repetitive movements while typing. Although it was open to her employers to lead evidence in rebuttal to the effect that its cause was psychogenic and not organic, they did not have to prove that it was due to conversion hysteria. While failure to prove that alternative explanation was a factor to be taken into account in deciding whether the plaintiff had established an organic cause, it was no more than that since it still left open the question, in the light of the wider dispute revealed by the medical evidence, whether an organic cause had been established for the cramp so that it could be said to have been due to the plaintiff's typing at work. The Court of Appeal should not have interfered with the judge's decision that the plaintiff was not entitled to damages, since his findings that the condition was not reasonably foreseeable in her case and that ICI were not negligent in the respects alleged by her were soundly based on the evidence.

Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615

In an action for damages for negligence at common law, the onus of proving that the fault complained of caused, or materially contributed to, the injury complained of, as well as of proving the negligence or breach of duty lies on the plaintiff. The same onus of proof, namely, of proving breach of duty and that the breach caused or materially contributed to the injury, applies in an action for damages for breach of statutory duty, unless the statute or statutory regulation in question expressly or impliedly provides otherwise. The onus of proof that the injury was caused by the breach of duty is not shifted from a

plaintiff employee merely by the facts that there has been a breach of a safety enactment and that the employee has been injured in a way that could result from the breach.

The plaintiff, who had worked for eight years in the dressing shop of a foundry producing steel casings owned by the defendants, contracted pneumoconiosis through inhaling air which contained silica dust. The main source of this dust was from pneumatic hammers, one of which the plaintiff operated, but, throughout the material period, there was no known protection against dust produced by the operation of such a hammer. Part of the dust, however, which polluted the atmosphere which the plaintiff inhaled, came from operations conducted at swing grinders, as result of the ducts of dust-extraction plant for these grinders not being kept free from obstruction as provided by the Grinding of Metals (Miscellaneous Industries) Regulations 1925. The defendants admitted that they were in breach of this regulation, but maintained that, as there was no evidence to show the proportions of dust emanating from the various sources of dust in the dressing shop, the plaintiff could not show that the dust from the swing grinders contributed materially to the dust inhaled by him.

It was held by the House of Lords that the proportion of dust coming from the swing grinders and inhaled by the plaintiff had been shown on the evidence not to have been negligible and had contributed materially to his contracting pneumoconiosis; the defendants were, therefore, liable to him in damages for breach of statutory duty.

McGhee v National Coal Board [1972] 3 All ER 1008

The plaintiff was sent by the defendants, his employers, to clean out brick kilns. Although the working conditions there were hot and dirty, the plaintiff being exposed to clouds of abrasive brick dust, the defendants provided no adequate washing facilities. In consequence the plaintiff had to continue exerting himself after work by bicycling home caked with sweat and grime. After some days working in the brick kilns the plaintiff was found to be suffering from dermatitis. In an action by the plaintiff against the defendants for negligence the medical evidence showed that the dermatitis had been caused by the working conditions in the brick kilns, and that the fact that after work the plaintiff had had to exert himself further by bicycling home with brick dust adhering to his skin had added materially to the risk that he might develop the disease.

It was held in the Court of Session that the defendants had been in breach of duty to the plaintiff in failing to provide adequate washing facilities but that the plaintiff's action failed because he had not shown that that breach of duty had caused his injury, in that there was no positive evidence that it was more probable than not that he would not have contracted dermatitis if adequate washing facilities had been provided.

It was held by the House of Lords that a defendant was liable in negligence to the plaintiff if the defendant's breach of duty had caused, or materially contributed to, the injury suffered by the plaintiff notwithstanding that there were other factors, for which the defendant was not responsible, which had contributed to the injury. Accordingly the defendants were liable to the plaintiff because:

(1) a finding that the defendants' breach of duty had materially increased the risk of injury to the plaintiff amounted, for practical purposes, to a finding that the defendants' breach of duty had materially contributed to his injury, at least in the absence of positive proof by the defendants to the contrary;

(2) on the facts found, the plaintiff had succeeded in showing that, on a balance of probabilities, his injury had been caused or contributed to by the defendants' breach of duty.

Bonnington Castings v Wardlaw [1956] 1 All ER 615 and *Nicholson v Atlas Steel* [1957] 1 All ER 776 applied.

Wilsher v Essex AHA [1988] 1 All ER 871

The plaintiff was born prematurely suffering from various illnesses including oxygen deficiency. While in a special baby unit at the hospital where he was born a catheter was twice inserted into a vein of the plaintiff rather than an artery and on both occasions the plaintiff was given excess oxygen. The plaintiff was later discovered to be suffering from an incurable condition of the retina resulting in near blindness. The plaintiff's retinal condition could have been caused by excess oxygen but it also occurred in premature babies who were not given oxygen but who suffered from five other conditions common in premature babies and all of which had afflicted the plaintiff. The plaintiff brought an action against the health authority claiming damages for negligence and alleging that the excess oxygen in his bloodstream had caused his retinal condition. At the trial the medical evidence was inconclusive whether the excess oxygen had caused or materially contributed to the plaintiff's condition. The trial judge and Court of Appeal held the health authority liable.

It was held in the House of Lords that where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury. Instead the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury, although that link could legitimately be inferred from the evidence. Since the plaintiff's retinal condition could have been caused by any one of a number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him the plaintiff had not discharged the burden of proof as to causation. A retrial would be ordered.

Holtby v Brigham & Cowan Ltd [2000] 3 All ER 421

The claimant, H, was exposed to asbestos dust while working for several years as a marine fitter. For about half the period that he worked as a fitter, his employer was B Ltd. For the remainder, he was employed by other employers doing similar work in similar conditions; in some cases for periods of years, in others for periods measured in months. He developed asbestosis and brought an action for personal injury against B Ltd. At trial, the judge held that B Ltd had been negligent and in breach of statutory duty, but that it was liable only for the damage which it had caused. He further found that H's condition would have been less severe if he had only sustained exposure to asbestos dust whilst working for B Ltd. Accordingly, he reduced the general damages and certain heads of special damages by 25%, even though B Ltd had not expressly pleaded that it was responsible only for a portion of the disability.

The Court of Appeal held that where a claimant suffered injury as a result of exposure to a noxious substance by two or more persons, but claimed against one person only, that person would be liable only to the extent that he had contributed towards the disability. In such circumstances (Clarke LJ dissenting), the onus of proving causation remained on the claimant and, strictly speaking, the defendant did not need to plead that others were

responsible in part. However, it was preferable that it should do so, and the matter certainly had to be raised and dealt with in evidence since the defendant would otherwise be at risk of being held liable for everything. Such cases, however, were not to be determined on onus of proof. Rather, the question was whether at the end of the day, and on a consideration of all the evidence, the claimant had proved that the defendant was responsible for the whole or a quantifiable part of the disability. Although questions of quantification might be difficult, the court had to do the best it could, using its common sense, to achieve justice not only to the claimant but to the defendant, and among defendants. Moreover, in the absence of some unusual feature, such as periods of exposure to a particularly dangerous blue asbestos during some periods, the correct approach was to divide responsibility on a time exposure basis. In the instant case, there was ample evidence to support the judge's conclusion. Although it might be said that he should have made B Ltd liable only to 50%, he was not to be criticised for erring on the side of generosity to H. *Thompson v Smiths Shiprepairers Ltd* [1984] 1 All ER 881 applied.

Fitzgerald v Lane and another [1987] 2 All ER 455

The plaintiff walked briskly onto a pelican crossing when the lights were showing green for traffic and red for pedestrians. When he reached the centre of the road he was struck by the first defendant's car and was thrown onto the other side of the road, where he was struck by a car driven in the opposite direction by the second defendant. The plaintiff sustained multiple injuries and in particular injury to the neck which resulted in partial tetraplegia. It was held in the Court of Appeal:

(1) On the judge's finding that each of the three parties was equally at fault and applying the principle that in apportioning liability under s1(1) of the Law Reform (Contributory Negligence) Act 1945 the court was required to consider the position between the plaintiff and each defendant separately, the plaintiff was only entitled to recover from the defendants half, and not two-thirds, of the total damages awarded, each defendant being liable to make an equal contribution to the amount recoverable by the plaintiff.

(2) Where there were two or more separate possible causes of a plaintiff's injuries, a defendant was liable in negligence to the plaintiff if it was established that the defendant's breach of duty had created a risk that injury would be caused or had increased an existing risk that injury would ensue, notwithstanding that the existence and extent of the contribution made by the defendant's conduct in causing the plaintiff's injury could not be ascertained. On the facts, the second defendant's negligent driving had created a risk that physical injury involving tetraplegia might be caused to the plaintiff or had increased the existing risk that such injury would ensue, and accordingly the second defendant was liable to the plaintiff. The fact that the first defendant happened to collide with the plaintiff a few seconds before the second defendant had done so did not entitle the second defendant to avoid liability for the injury by claiming that the plaintiff had not adduced sufficient evidence to prove his case against him.

LOSS OF CHANCE

Kitchen v RAF Association and others [1958] 2 All ER 241

The plaintiff's husband, who was serving in the RAF and was then on leave, was electrocuted, when using domestic electrical equipment in the kitchen of his home, and died. Through a voluntary organisation information

concerning her case was forwarded to the second defendants, a firm of solicitors who had offered to help members of the RAF and their dependants. They were, as the court found, negligent in their conduct of the matter on the plaintiff's behalf, failing to pursue proper inquiries how it had been possible for the accident to have happened, allowing the twelve months' limitation period for bringing proceedings under the Fatal Accidents Acts, 1846 to 1908, to expire without beginning an action and failing to distinguish between a claim under those Acts and a claim under the Law Reform (Miscellaneous Provisions) Act 1934. The maximum amount which the plaintiff could have recovered in an action under the Fatal Accidents Acts was £3,000, though her chances of success were uncertain. The plaintiff was awarded £2,000 damages.

It was held in the Court of Appeal that the right of action under the Fatal Accidents Acts which the plaintiff lost was a right of substance and the award of damages for the second defendants' negligence should not be nominal; there being no appeal against the award of damages in so far as it exceeded nominal damages, the award, though generous, would stand.

Hotson v East Berkshire AHA [1987] 2 All ER 909

In 1977 the plaintiff, then 13 years old, injured his hip in a fall. He was taken to a hospital run by the defendant health authority, where the injury was not correctly diagnosed, and was sent home. After five days of severe pain, the plaintiff was taken back to the hospital; the nature and extent of his injuries was then discovered and he was given emergency treatment. The nature of the hip injury was such that a severe medical condition causing deformity of the hip joint, restricted mobility and general disability was likely to develop, and did in fact develop, leaving the plaintiff with a major permanent disability at the age of 20. At the trial of the action the judge found that even if the authority's medical staff had correctly diagnosed and treated the plaintiff when he first attended the hospital there was still a 75% risk of the plaintiff's disability developing, but that the medical staff's breach of duty had turned that risk into an inevitability, thereby denying the plaintiff a 25% chance of a good recovery. The judge awarded the plaintiff damages which included an amount of £11,500 representing 25% of the full value of the damages awardable for the plaintiff's disability, which were assessed at £46,000. The Court of Appeal affirmed the judge's decision. The authority appealed.

It was held in the House of Lords that the crucial question of fact which the judge had had to determine was whether the cause of the plaintiff's injury was his fall or the health authority's negligence in making an incorrect diagnosis and delaying treatment, since if the fall had caused the injury the negligence of the authority was irrelevant in regard to the plaintiff's disability. That question was to be decided on the balance of probabilities. Accordingly since the judge had held that on the balance of probabilities, given the plaintiff's condition when he first arrived at the hospital, even correct diagnosis and treatment would not have prevented the disability from occurring, it followed that the plaintiff had failed on the issue of causation and the issue of quantification considered by the judge therefore never arose, because questions concerning the loss of a chance could not arise where there had been a positive finding that before the duty arose the damage complained of had already been sustained or had become inevitable. The appeal would therefore be allowed.

Allied Maples Group v Simmons & Simmons [1995] 4 All ER 907

The plaintiffs wished to expand by 'cherry picking' certain businesses and shop properties of another furnishing group, G. Four of the properties which the plaintiffs wished to acquire were vested in G's subsidiary company, K. The defendant firm of solicitors advised the plaintiffs on a take-over. The defendants sent a draft agreement to G's solicitors which contained a warranty to the effect that G had no liabilities in respect of the properties. G's solicitors returned the draft with the warranty deleted. The sale proceeded. Following the acquisition it became apparent that K had first tenant liabilities which led to claims being made against the plaintiffs. The plaintiffs brought an action against the defendants to recover as damages substantial losses suffered as a result of defaults by a sublessee.

On the trial of a preliminary issue as to liability the judge held that the defendants were in breach of duty in failing to advise on the effect of deleting the warranty and, on the issue of causation, he held that if the defendants had given the further advice on first tenant liability which they ought to have given, the plaintiffs would have taken steps to obtain a warranty from G or to protect themselves in some other way from the open-ended liability arising from K's first tenant liability. The judge further held that, on the balance of probability, G would have offered some form of protection against first tenant liability if asked and that if K's stores had not been included in the deal it would not have gone ahead. The defendants appealed.

It was held in the Court of Appeal that where the plaintiff's loss resulting from the defendant's negligence depended on the hypothetical action of a third party, either in addition to action by the plaintiff or independently of it, the issue fell within the sphere of quantification of damages dependent on the evaluation of the chance that the third party would have taken the action which would have enabled the loss to be avoided, rather than causation, where the plaintiff could only succeed if he showed on the balance of probability that the third party would have taken that action. Accordingly, once the plaintiff proved on the balance of probability as a matter of causation that he would have taken action to obtain a benefit or avoid a risk, he did not have to go on to prove on the balance of probability that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff. Instead, the plaintiff was entitled to succeed provided he showed that there was a substantial, and not merely a speculative, chance that the third party would have taken the action to confer the benefit or avoid the risk to the plaintiff. The evaluation of a substantial chance was a question of quantification of damages, the range lying somewhere between something that just qualified as real or substantial on the one hand and near certainty on the other. Since the plaintiffs had shown that if they had been given the right advice on K's first tenant liabilities they would have sought to negotiate with G to obtain protection, they then only had to show that there was a substantial chance that they would have been successful in negotiating total or partial protection and (Millett LJ dissenting) as they had done so, the evaluation of that chance was a matter for the judge determining quantum in the light of further evidence on that matter. The appeal would therefore be dismissed.

CAUSATION IN LAW

MULTIPLE CAUSES

SUCCESSIVE CAUSES

***Performance Cars v Abraham* [1961] 3 All ER 413**

The plaintiffs were the owners of a motor car which was damaged by a collision with a motor car driven by the defendant, who admitted liability. The damage to the plaintiffs' car necessitated respraying. About two weeks earlier the plaintiffs' car had been involved in another collision which had also made respraying necessary. The plaintiffs obtained judgment in default against the driver responsible for the first collision but that judgment was not satisfied. The Court of Appeal held that the plaintiffs were not entitled to recover the cost of respraying from the defendant, because that damage did not flow from his wrongful act.

***Carslogie Steamship Co v Royal Norwegian Government* [1952] 1 All ER 20**

The plaintiffs' vessel, Heimgar, suffered damage in a collision with the defendants' vessel, Carslogie, for which, it was admitted, the Carslogie was solely to blame. After temporary repairs to the Heimgar had been effected in England the ship proceeded to a port in the US where permanent repairs could be carried out. During her voyage the vessel sustained heavy weather damage which necessitated immediate repair. The vessel remained in dry dock for fifty days. The plaintiffs claimed damages for loss of charter hire during the ten days attributable to the collision damage.

The House of Lords held that the defendants were only liable for such loss of profit suffered by the defendants as resulted from the defendants' wrongful act; during the time that the Heimgar was detained in dock she had ceased to be a profit-earning machine because the heavy weather damage had rendered her unseaworthy; and, therefore, the plaintiffs had sustained no damage by reason of the fact that for ten days the vessel was undergoing repairs in respect of the collision damage.

***Baker v Willoughby* [1968] 2 All ER 236**

In September 1964, the plaintiff suffered serious injuries to his left leg in an accident on the highway caused by the negligent driving of the defendant. The plaintiff was less well able as a result of the accident to compete in the labour market, and his earning capacity was reduced. In November 1967, in the course of the plaintiff's employment he was an innocent victim of an armed robbery in which he received gunshot wounds necessitating the immediate amputation of his defective left leg.

It was held in the QBD that the plaintiff's loss from the traffic accident in September 1964 was in no way reduced by the amputation of his leg consequent on the injury to him in the robbery in November 1967, and accordingly the damages which would have been recoverable from the defendant immediately prior to his injury in the robbery should not be reduced.

***Jobling v Associated Dairies* [1981] 2 All ER 752**

In 1973 the plaintiff slipped and fell in the course of his employment, the accident being caused by the employers' breach of statutory duty. The plaintiff suffered a back injury and was thereafter able to do only light work. His earning capacity was reduced by 50%. He brought an action against his employers, but before the action came on for trial he was found in 1976 to be suffering from a spinal disease which was unrelated to the accident but which rendered him wholly unfit to work.

The House of Lords held that in the circumstances the damages awarded to the plaintiff for loss of earnings were to be assessed according to the principles that the vicissitudes of life were to be allowed for and taken into account when assessing damages so that the plaintiff was not over-compensated, and that a supervening illness apparent and known of before the trial was, whether it was latent or not at the time of the prior injury, at the time of the trial a known vicissitude about which the court ought not to speculate when it in fact knew. Accordingly, the employers were not liable for any loss of earnings suffered by the plaintiff after the onset of the disease in 1976.

Per Curiam: When a plaintiff has suffered disabling injuries from two or more successive and independent tortious acts the question whether the supervening disability caused by the second tort should be disregarded when assessing the first tortfeasor's liability for loss of earnings remains open.

Per Lord Wilberforce: To attempt a solution of the problems arising where there are successive causes of incapacity according to classical juristic principles and common law rules is in many cases no longer possible because other sources of compensation (eg criminal injuries compensation, sickness benefit etc) may, if not taken into account in assessing damages, lead to the plaintiff being ultimately over-compensated.

***Heil v Rankin and another* (2000) The Times LR, June 20**

The plaintiff was a police dog handler. In 1987 he had been involved in a serious and frightening criminal incident. In 1993 an accident involving the first defendant caused him minor injury and also triggered a condition of post traumatic stress disorder, which had initially manifested itself after the 1987 incident, and he was unable to continue in the police force. The trial judge took into account the possibility that the plaintiff's post-traumatic stress disorder might have been triggered by some future tortious incident in the course of his police service and reduced the amount of damages.

The Court of Appeal held that the effect of supervening events upon compensation was to be approached in general terms to provide just and sufficient but not excessive compensation, rather than on the basis general logical or universally fair rules. In discounting the sum that would otherwise represent the plaintiff's loss of earnings to retirement by a percentage to reflect the risk that he would not in any event serve until retirement age, the judge did no more than apply what had become known as the "vicissitudes" principle. Here the danger was not under-compensation of the plaintiff but over-compensation of him, if future vicissitudes were not taken into account under the normal principle. In conclusion, the judge discounted the plaintiff's chance of working to retirement too heavily. The assessment of 25 per cent was too low and an assessment of 50 per cent would be substituted.

NOVUS ACTUS INTERVENIENS

NATURAL EVENTS

***Carslogie Steamship Co v Royal Norwegian Government* [1952] 1 All ER 20**

See above.

***The Oropesa* [1943] 1 All ER 211**

A collision occurred at sea between the Oropesa and the Manchester Regiment, whereby the latter vessel was so seriously damaged that the captain ordered the majority of the crew to take to the lifeboats. He then decided to go with 14 of the crew to the Oropesa in another lifeboat. He hoped to persuade the captain of the Oropesa to take the Manchester Regiment in tow or to arrange for salvage assistance and, in any event, to arrange for messages for help to be sent out and to obtain valuable advice. This lifeboat capsized, as a result of which nine of the crew lost their lives.

The Court of Appeal held that the action taken by the captain was the natural consequence of the emergency in which he was placed by the negligence of the Oropesa and, therefore, there had been no break in the chain of causation, and the seaman's death was a direct consequence of the negligent act of the Oropesa.

ACTS OF THIRD PARTIES

***Stansbie v Troman* [1948] 1 All ER 599**

The plaintiff, a painter and decorator engaged under contract in doing work at the defendant's house, left the house unoccupied while he went to obtain material, and, in order that he might be able to secure re-entry, pulled back the catch of the Yale lock of the front door. He was away from the house for two hours, and during his absence a thief entered the premises by the front door and stole a quantity of jewellery.

The Court of Appeal held that in the circumstances the plaintiff owed a duty to the defendant to take care of the premises, there had been a breach of that duty, and the entry of the thief which caused the damage was the direct result of the plaintiff's negligence.

***Home Office v Dorset Yacht Co* [1970] 2 All ER 294**

Ten borstal trainees were working on an island in a harbour in the custody and under the control of three officers. During the night seven of them escaped. It was claimed that at the time of the escape the officers had retired to bed, leaving the trainees to their own devices. The seven got on board a yacht moored off the island and set it in motion. They collided with another yacht, the property of the plaintiffs, and damaged it.

The House of Lords held, inter alia, that the fact that the immediate damage to the property of the plaintiffs was caused by the acts of third persons, the trainees, did not prevent the existence of a duty on the part of the officers towards the plaintiffs because (per Lord Reid) the taking of the yacht and the damage to the other was the very kind of thing which the officers ought to have seen to be likely, or (per Lord Morris and Pearson) the right of the officers to control the trainees constituted a special relation which gave rise

to an exception to the general rule that one person is under no duty to control another to prevent his doing damage to a third.

***Lamb v Camden LBC* [1981] 2 All ER 408**

In 1972 the plaintiff let her house while she was away in America. In 1973, while replacing a sewer pipe in the road outside the plaintiff's house, contractors employed by the local council breached a water main causing the foundations of the house to be undermined and the house to subside. The house became unsafe, the tenant moved out, and the plaintiff moved her furniture into storage. The house was then left unoccupied to await repair. In 1974 squatters moved in but were evicted and the house was boarded up. In 1975 squatters again moved in and caused substantial damage to the interior of the house before being evicted. The official referee held that, although squatting was at the time a reasonably foreseeable risk, it was not likely to occur in the locality of the plaintiff's house and was therefore too remote for the plaintiff to be able to recover damages. The Court of Appeal held:

(Per Lord Denning MR) The range and limits of liability for negligence or nuisance were to be determined as a matter of judicial policy, and, applying that approach, the fact that the plaintiff rather than the council was responsible for keeping the squatters out and evicting them when they got in meant that the council was not liable for the damage, which in any event was damage against which the plaintiff herself should have taken precautions.

(Per Oliver LJ) Where the consequence of a negligent act or a nuisance resulted from, or would not have occurred but for, the intervention of an independent human act over which the tortfeasor had no control and for which he was not responsible or was not employed to prevent, the tortfeasor was not liable for that damage which was foreseeable merely as a possibility, because, given the unpredictability of human behaviour, the bare possibility of the damage that occurred, however unpredictable, was always likely to be foreseeable. Instead, the tortfeasor was only liable for that damage which a reasonable man in the position of the tortfeasor would have foreseen if he had thought about it, which, in turn, was only damage resulting from behaviour which, viewed objectively, was very likely to occur. Since a reasonable man would not reasonably have foreseen that by breaking a water pipe when working on the road he would cause the plaintiff's house to be invaded by squatters, the damage was too remote.

***Ward v Cannock Chase DC* [1985] 3 All ER 537**

The plaintiff lived in a house in a row of terraced houses. The other houses in the row were owned by the council and let to tenants but, as a result of council policy to develop the area for industrial purposes, the houses were not relet or maintained as they fell vacant. Many of the houses suffered damage as a result of the acts of vandals and thieves, including the wholesale removal of tiles, bricks and timber. In October 1982, as a result of vandalism, the rear wall of the house which adjoined the plaintiff's house collapsed, causing damage to the roof of the plaintiff's house. In November the council agreed to repair the damage caused to the plaintiff's house, but it failed to carry out the repairs. In December the council temporarily rehoused the plaintiff and his family. Vandals broke into the plaintiff's property and removed parts of the building. As a result the repairs to the house were not carried out and it rapidly deteriorated until by December 1983 it was beyond repair. Between December 1982 and March 1984 thieves removed various chattels from the house and the plaintiff's adjoining land. The council admitted liability for negligence. It was held in the Chancery Division:

(1) The test of whether an intervening act of an independent third party made damage suffered by the plaintiff too remote for the original tortfeasor to be liable for it had variously been expressed. Applying the test of reasonable foreseeability, it was reasonably foreseeable that if the adjoining house were to collapse serious damage might be caused to the plaintiff's house, that if serious damage were caused to the plaintiff's house it might have to be vacated until it was repaired, that if the necessary repairs were not carried out expeditiously the house would become unoccupied, and that if the house were to remain unoccupied for any length of time vandals and thieves would be likely to break in. Furthermore, there was a sufficient connection for remoteness of damage purposes between the council's breach of duty, the plaintiff's house becoming unoccupied and the damage caused thereto by vandals and thieves. Accordingly, whatever test was applied there was a chain of causation leading from the council's breach of duty to the damage to the plaintiff's house and such damage was not too remote to be recoverable.

(2) In regard to the damage to and theft of the plaintiff's chattels, the council was under a duty of care to keep the adjoining property in a safe condition because failure to do so risked damage to the fabric of the plaintiff's house rather than because of the risk that otherwise vandals might damage or steal the plaintiff's chattels. Such damage or theft was not a reasonably foreseeable consequence of the house becoming unoccupied because it was to be expected that the plaintiff would have taken steps to safeguard his chattels. The plaintiff was therefore not entitled to damages for the damage to or theft of his chattels.

***Smith and others v Littlewoods Organisation* [1987] 1 All ER 710**

The defendants purchased a cinema with a view to demolishing it and replacing it with a supermarket. They took possession on 31 May 1976, closed the cinema and employed contractors to make site investigations and do some preliminary work on foundations, but from about the end of the third week in June the cinema remained empty and unattended by the defendants or any of their employees. On 5 July a fire was started in the cinema which seriously damaged two adjoining properties, one of which had to be demolished.

The House of Lords held, inter alia, that the defendants were under a general duty to exercise reasonable care to ensure that the condition of the premises they occupied was not a source of danger to neighbouring property. Whether that general duty encompassed a specific duty to prevent damage from fire resulting from vandalism in the defendants' premises depended on whether a reasonable person in the position of the defendants would foresee that if he took no action to keep the premises lockfast in the comparatively short time before the premises were demolished they would be set on fire with consequent risk to the neighbouring properties. On the facts and given particularly that the defendants had not known of the vandalism in the area or of previous attempts to start fires, the events which occurred were not reasonably foreseeable by the defendants and they accordingly owed no such specific duty to the plaintiffs.

ACTS OF THE CLAIMANT

***Wieland v Cyril Lord Carpets* [1969] 3 All ER 1006**

The plaintiff suffered an injury caused by the admitted negligence of the defendants. The movement of her head was constricted by a collar which had been fitted to her neck. In consequence she was unable to use her bifocal

spectacles with her usual skill and she fell while descending stairs, sustaining further injuries.

It was held in the QBD that the injury and damage suffered because of the second fall were attributable to the original negligence of the defendants so as to attract compensation from them. Per Eveleigh J: it can be said that it is foreseeable that one injury may affect a person's ability to cope with the vicissitudes of life and thereby be a cause of another injury and if foreseeability is required, that is to say, if foreseeability is the right word in this context, foreseeability of this general nature will suffice.

***McKew v Holland, Hannen & Cubitts & Co* [1969] 3 All ER 1621**

The plaintiff sustained injury in the course of his employment for which the defendants were liable. As a result, on occasions, he unexpectedly lost control of his left leg which gave way beneath him. His leg collapsed as he made to descend some steep stairs where there was no handrail. He tried to jump so that he would land in a standing position rather than falling down the stairs. On landing he suffered a severe fracture of the ankle.

The House of Lords held that the act of the plaintiff in attempting to descend a steep staircase without a handrail in the normal manner and without adult assistance when his leg had previously given way on occasions was unreasonable; accordingly the chain of causation was broken and the defendants were not liable in damages for his second injury; alternatively the plaintiff's act of jumping did not amount to reasonable human conduct.

***Pigney v Pointers Transport Services* [1957] 2 All ER 807**

In July 1955, P was injured in an accident which occurred in the course of his employment by the defendants, and in circumstances in which they were liable to P for negligence. After the accident P suffered from anxiety neurosis and depression caused by it. These so sapped his powers of resistance that in January 1957, he hanged himself.

It was held at Norwich Assizes that P's widow was entitled to damages for the following reasons: (1) the damage sustained by her was damage due to P's death and that was directly traceable to P's injury in the accident for which the defendants were responsible and P's criminal act in taking his own life did not break the chain of causation, and (2) although it was against public policy to allow any man to benefit by his own criminal act, yet it was not against public policy that the widow should recover damages since the damages awarded in this action did not form part of P's estate.

***Reeves v MPC* [1999] 3 All ER 897**

The plaintiff sued as administratrix of L, who had committed suicide while in police custody. The police had known that L was a suicide risk because of incidents on earlier occasions when he had been in custody; and because the police surgeon who had examined L on the day in question had considered that he was a suicide risk and that he should be kept under observation. L had hanged himself shortly after the examination, by tying his shirt through the spyhole on the outside of his cell door; he had been able to do that because the flap in the cell door had been left down. The House of Lords held:

(1) Where the law imposed a duty on a person to guard against loss by the deliberate and informed act of another, the occurrence of the very act

which ought to have been prevented could not negative causation between the breach of duty and the loss. That was so not only where the deliberate act was that of a third party, but also when it was the act of the plaintiff himself, and whether or not he was of sound mind. It followed in the instant case, bearing in mind the police's admission that they had breached their duty of care towards L, that the defences of novus actus interveniens and volenti non fit injuria were not available to the commissioner.

(2) For the purposes of s1(1) of the Law Reform (Contributory Negligence) Act 1945, a plaintiff's deliberate and intentional act in causing injury to himself constituted 'fault', as defined in s4 of the Act. Thus, since the fact that L's suicide did not prevent the police's breach of duty from being a cause of his death did not mean that his suicide was not also a cause of his death, both causes contributed to his death and the 1945 Act applied and provided the means of reflecting that division of responsibility in the ward of damages. In all the circumstances, the appropriate division was to apportion responsibility equally. Damages were reduced to £4,345.

Meah v McCreamer (No. 2) [1986] 3 All ER 897

The plaintiff suffered severe head injuries and brain damage when the car in which he was a passenger was involved in an accident caused by the negligence of his driver. Following the accident the plaintiff underwent a marked personality change and developed a propensity to attack women. Two of his victims were awarded damages against the plaintiff, who brought an action against the driver and his insurers to recover the amounts awarded to the two victims. In the QBD it was held that the plaintiff's action would be dismissed for the following reasons-

(1) Adopting a robust approach, the damages awarded to the plaintiff's victims were too remote to be recoverable by the plaintiff from the defendants, because (a) the plaintiff was not seeking to recover in respect of his own injuries or direct financial loss but in respect of the indirect loss he had suffered as a result of having to pay damages to third parties, who could not have sued the driver directly because he owed them no duty and the damage suffered by them at the plaintiff's hands was too remote vis-à-vis the driver, and (b) if the plaintiff were to recover it would expose the defendants and other defendants in similar cases to an indefinite liability for an indefinite duration.

(2) The damages awarded to the plaintiff's victims were not recoverable by him from the defendants because it would be contrary to public policy for him to be indemnified by the defendants for the consequences of his crimes.

Clunis v Camden HA [1998] 3 All ER 180

On 24 September 1992 the plaintiff, who had a history of mental disorder and of seriously violent behaviour, was discharged from the hospital where he had been detained as the result of an order under s3 of the Mental Health Act 1983. Under s117 of the 1983 Act the health authority was under a duty to provide after-care services. However, the plaintiff failed to attend appointments arranged for him by the medical officer, and his condition deteriorated. On 17 December, in a sudden and unprovoked attack, the plaintiff stabbed a man to death. At his trial he pleaded guilty to manslaughter on the grounds of diminished responsibility and was ordered to be detained in a secure hospital. The plaintiff brought an action for damages against the health authority alleging that it had negligently failed to treat him with reasonable professional care and skill. The Court of Appeal held:

(1) The rule of public policy that the court would not lend its aid to a plaintiff who relied on his own criminal or immoral act was not confined to particular causes of action, but only applied if the plaintiff was implicated in the illegality and was presumed to have known that he was doing an unlawful act. In the instant case, the plaintiff's plea of diminished responsibility accepted that his mental responsibility was substantially impaired but did not remove liability for his criminal act, and therefore he had to be taken to have known what he was doing and that it was wrong. It followed that the health authority had made out its plea that the plaintiff's claim was based on his crime of manslaughter.

(2) Having regard to the fact that under the 1983 Act the primary method of enforcement of the obligations under s117 was by complaint to the Secretary of State, the wording of the section was not apposite to create a private law cause of action for failure to carry out the duties under the statute. Moreover, bearing in mind the ambit of the obligations under s117 and the statutory framework, it would not be fair, just and reasonable to impose a common law duty of care on an authority. The plaintiff could not, therefore, in the instant case establish a cause of action arising from the failure by the health authority or the responsible medical officer to carry out their functions under s117 of the 1983 Act.

REMOTENESS OF DAMAGE

THE CONTRASTING APPROACH OF THE APPELLATE COURTS

Re Polemis (Polemis v Furness, Withy & Co) [1921] 3 KB 560

Among the cargo of a ship was certain benzine and/or petrol in tins in cases, and owing to leakage there was petrol vapour in the hold. While some of the cases of benzine were being shifted by the charterers' servants, a board was negligently knocked down into the hold, the ship burst immediately into flames and was totally destroyed. Arbitrators found that the fire arose from a spark igniting the petrol vapour in the hold; that the spark was caused by the falling board coming into contact with some substance in the hold; and that the causing of the spark could not reasonably have been anticipated from the falling of the plank, though some damage to the ship might reasonably have been anticipated.

The Court of Appeal held that the charterers were liable for all the direct consequences of the negligent act of their servants, even though the consequences could not reasonably have been anticipated. Whether the damage that ensues from an act or omission can be reasonably anticipated is only material as evidence of negligence.

The Wagon Mound (Overseas Tankship v Morts Dock & Engineering) [1961] 1 All ER 404

By the carelessness of the defendants' servants furnace oil from a ship was spilt into a bay. The oil spread over the water to the plaintiffs' wharf, which was some six hundred feet distant and at which the plaintiffs were carrying out repairing work to a ship, including the welding of metal. Molten metal from the plaintiffs' wharf fell on floating cotton waste which, smouldering, ignited the furnace oil on the water. The plaintiffs' wharf sustained substantial damage by fire. In an action by the plaintiffs for damages for negligence it was found as a fact that the defendants did not know and could

not reasonably have been expected to know that the furnace oil was capable of being set alight when spread on water.

The Privy Council held that the test of liability for the damage done by fire was the foreseeability of the injury by fire and, as a reasonable man would not, on the facts of this case, have foreseen such injury, the defendants were not liable in negligence for the damage, although their servants' carelessness was the direct cause of the damage.

Per Curiam: it is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule.

The Wagon Mound (No. 2), Overseas Tankship v Miller Steamship [1966] 2 All ER 709

Two of the plaintiffs' vessels were undergoing repairs at Sheerlegs Wharf, Morts Bay in Sidney Harbour. Due to the carelessness of the defendant's engineers a large quantity of furnace oil overflowed on to the surface of the water and drifted to Sheerlegs Wharf, where it subsequently caught fire causing extensive damage to the plaintiffs' vessel.

The Privy Council held that on the evidence in the present case (which was different from that in the *Wagon Mound (No. 1)*) there would have been present to the mind of a reasonable man in the position of the engineer of the defendant that there was a real risk of fire, through a continuing discharge of furnace oil on the water, and his knowledge that oil so spread was difficult to ignite and that that would occur only very exceptionally would not, in the circumstances of this discharge, make such a reasonable man think it justifiable to neglect to take steps to eliminate the risk; accordingly negligence, for which the defendant was vicariously responsible, was established, the damages were not too remote and the plaintiffs were entitled to recover on the issue of negligence.

Wagon Mound (No. 1) distinguished on the facts.

[Editorial Note. The difference in the findings of fact on which the different result reached in the present case to that reached in *Wagon Mound (No. 1)* is based is analysed at p. 717, letters G and H. It is also pointed out that law in regard to contributory negligence in New South Wales at the time of the first trial may have had bearing on what evidence was then tendered (see p. 717, letter E) ...]

MANNER OF OCCURRENCE

Hughes v Lord Advocate [1963] 1 All ER 705

Near the edge of a roadway, was a manhole over which a shelter tent had been erected, and four paraffin warning lamps were placed at its corners. Two boys took one of the paraffin lamps into the tent to explore. The plaintiff tripped over the lamp, which fell into the manhole. An explosion followed. The plaintiff was thrown into the manhole and suffered severe burns.

The House of Lords held that although in the law of negligence the duty to take reasonable care was confined to reasonably foreseeable dangers, the fact that the danger actually materialising was not identical with the danger

reasonably foreseeable did not necessarily result in liability not arising; in the present case the happening of an accident of the type that did occur, namely, an accident to a child through burns, was reasonably foreseeable, and the further fact that the development of the accident as it actually happened (namely, the occurrence of the explosion) could not reasonably have been foreseen did not absolve the defendants from liability, and accordingly the plaintiff was entitled to recover damages for negligence. *Glasgow Corpn. v Muir* [1943] 2 All ER 44 distinguished.

***Doughty v Turner Manufacturing* [1964] 1 All ER 98**

The plaintiff workman was injured at the factory where he worked when another workman inadvertently knocked a loose compound asbestos cement cover and caused it to fall into a cauldron of extremely hot molten liquid. The extreme heat caused the asbestos cement to undergo a chemical change creating or releasing water, which turned to steam which one or two minutes later caused an eruption of the molten liquid from the cauldron.

The Court of Appeal held that the employers were not liable because the eruption which injured the plaintiff was unforeseeable by a reasonable man at the time when the accident happened, and because, although risk by splashing was foreseeable this was an accident of an entirely different kind, its cause being the intrusion of a new and unexpected factor, namely, the chemical change of the compound asbestos cement at high temperatures. *The Wagon Mound* [1961] 1 All ER 404 applied. *Hughes v Lord Advocate* [1963] 1 All ER 705 distinguished.

***Crossley v Rawlinson* [1981] 3 All ER 674**

The defendant was driving his lorry along a main road when a tarpaulin on the lorry caught fire. He pulled in and stopped the lorry at the side of the road about 100 yards away from an AA post where the plaintiff, an AA patrolman, was on duty. The plaintiff saw the fire, grabbed a fire extinguisher and ran alongside the road towards the lorry intending to put out the fire. As he was running he tripped in a hole which was obscured by grass, and was injured. He brought an action against the defendant for damages for personal injuries.

It was held in the QBD that although it was reasonably foreseeable that a person such as the plaintiff might attempt to come to the defendant's aid and might run along the path towards the fire, it was not reasonably foreseeable that such a rescuer would suffer any injury while running along the path towards the scene of danger, and accordingly, even though the defendant's negligence had caused the fire, it had not caused the plaintiff's injuries. The plaintiff's action would therefore be dismissed.

***Jolley v Sutton LBC* [2000] 3 All ER 409**

A small boat was abandoned in the grounds of a block of flats owned and occupied by the defendant local authority. The boat, which was left on a grass area where children played, became derelict and rotten. The claimant, a 14-year-old boy, attempted to renovate the boat with a friend, and jacked it up in order to repair the hull. He was under the boat when it fell on him, causing severe injuries. Subsequent proceedings were based primarily on alleged breaches of the Occupiers' Liability Acts 1957 and 1984.

The judge held that the boat was a trap or allurement to children, that play could take the form of mimicking adult behaviour, that it was reasonably foreseeable that children would meddle with the boat at the risk of some physical injury, that the authority was in breach of its duty to the claimant as occupier of the land and that accordingly it was liable for his injury. On appeal, the authority conceded that it had been negligent in failing to remove the boat with its rotten planking, but contended that its negligence only created a foreseeable risk of children climbing on the boat and being injured by the rotten planking giving way. The Court of Appeal held that the claimant had been engaged in an activity very different from normal play, and that it was not reasonably foreseeable that an accident could occur as a result of the boys deciding to work under a propped-up boat.

The House of Lords held that a finding or admission of want of care on the part of a defendant established that it would have cost him no more trouble to avoid the injury which had occurred than he should have taken in any event. In those circumstances, the defendant would be liable for the materialisation of even relatively small risks of a different kind. Moreover, the ingenuity of children in finding ways of doing mischief to themselves or others should never be underestimated. For those reasons, in the instant case the judge had been correct to describe the risks as being one that children would meddle with the boat at the risk of some physical injury. Moreover, his observation that play could take the form of mimicking adult behaviour was a perceptive one, and he was justified in holding that an accident of the type which had occurred was reasonably foreseeable.

TYPE OF HARM

***Bradford v Robinson Rentals* [1967] 1 All ER 267**

The plaintiff was employed by the defendants. In January 1963, at the time when it was known to the defendants that the weather was likely to be very severe, he was sent on a journey to change a colleague's old van; the round journey was between 450 and 500 miles and would involve about twenty hours' driving. The old van and the new van were unheated. As a result of cold on the journey, and despite precautions taken by the plaintiff, he suffered injury by frostbite, which was unusual in England.

It was held at Devon Assizes that the plaintiff had been called on to carry out an unusual task that would be likely to expose him to extreme cold and considerable fatigue, and thereby the defendants had exposed him to a reasonably foreseeable risk of injury; although the injury that he in fact suffered was not itself unusual, yet it was an injury of the kind that was foreseeable (namely, injury from exposure to cold), and, as liability did not depend on the precise nature of the injury suffered being itself reasonably foreseeable, the defendants were liable to the plaintiff in negligence. *Hughes v Lord Advocate* [1963] 1 All ER 705 applied.

***Tremain v Pike* [1969] 3 All ER 1303**

In the course of and in consequence of his employment as a herdsman on the defendants' farm, the plaintiff in March 1967 contracted Weil's disease, a disease carried by rats but very rarely contracted by humans by reason of their very slight susceptibility to the disease. It was held at Exeter Assizes:

(1) a master's duty of care to his servants was to take reasonable steps to avoid exposing them to a reasonably foreseeable risk of injury, and, on the

facts of the case, the plaintiff's illness was not attributable to any breach of this duty.

(2) if (contrary to holding (1) above), the defendants were in breach of duty in that they ought to have known of the extent of the infestation in March 1967, and ought to have foreseen that the plaintiff was, or might be, exposed to some general hazard involving personal injury, illness or disease in consequence of the infestation, they were still immune from liability on the grounds that Weil's disease was at best a remote possibility which they could not reasonably foresee, and that the damage suffered by the plaintiff was, therefore, unforeseeable and too remote to be recoverable.

(3) the kind of damage suffered by the plaintiff, being a disease contracted by contact with rats' urine, was entirely different from the effect of a rat-bite, or food poisoning by the consumption of food or drink contaminated by rats, and the defendants could not reasonably foresee the risk of this initial infection.

EXTENT OF HARM

Vacwell Engineering v BDH Chemicals [1969] 3 All ER 1681

Vacwell were manufacturers of plant and equipment designed to produce transistor devices. The plant required the use of certain chemicals. BDH were manufacturers and distributors of chemicals, which they had supplied to V over a period of time. BDH advertised boron tribromide as a new entry in their catalogue. It was known that boron tribromide reacted on contact with water, emitting a toxic vapour, but neither of the parties knew that it reacted violently and exploded on contact with water. V gave BDH an order for 400 glass ampoules of boron tribromide. These were supplied and a label affixed to each ampoule bore the warning words "harmful vapour". While two physicists were engaged on washing the labels off some 40 to 100 ampoules prior to using them in the manufacturing apparatus, an explosion occurred, killing one of the two men and causing extensive damage to V's premises. The overwhelming probability was that the explosion occurred as a result of the deceased physicist's dropping into the sink one or more of the glass ampoules, which had shattered, so releasing boron tribromide into the water which in turn shattered the remaining ampoules in the sink. V claimed damages against BDH. It was held in the QBD that BDH were liable to V because, inter alia:

(1) an explosion, albeit of a minor kind, was reasonably foreseeable as a result of BDH's breach of contract, and although an explosion of the magnitude which occurred was not reasonably foreseeable, it was caused by, and was the direct result of, the supply by BDH of boron tribromide without an adequate warning label, and on the facts of the case (including in particular the valuable and delicate glassware which constituted the equipment with which the chemical was to be used), the damage was not too remote to be recoverable.

(2) BDH were negligent in that (a) it was their duty to take reasonable care to ascertain major industrial hazards of chemicals marketed by them and to give warning of such hazards to their customers, and they failed to comply with this duty by failing to provide and maintain a system for carrying out adequate research into scientific literature to ascertain known hazards and by failing to carry out adequate research into the literature available to them on boron tribromide, and (b) it was a foreseeable consequence of the supply of boron tribromide without a warning – and a fortiori with an irrelevant

warning about harmful vapour – that, in the ordinary course of industrial use, it could come into contact with water and cause a violent reaction and possibly an explosion with damage to property of the type although not of the magnitude which occurred and, on the facts of the case, the immersing of a large number of ampoules together in water did not constitute contributory negligence by V.

Note: BDH appealed against the decision of Rees J. However, before the end of the hearing of the appeal counsel for BDH told the Court of Appeal that general terms of agreement had been reached between the parties on the basis that the appeal be allowed and the order of Rees J be varied by providing, inter alia, that judgment be entered for the plaintiffs on the issue of liability in negligence limited to 80 per cent of damages. It was also agreed that the parties go before the official referee, for the assessment of damages, on the basis that that part of Rees J's judgment dealing with remoteness of damage in negligence should not be challenged. Lord Denning MR held that the result of the agreement at which the parties had arrived would be very likely almost the same as the court would have arrived at if it had been fully argued and discussed. The appeal was allowed and the order of Rees J varied accordingly. See [1970] 3 All ER 553.

EGGSHELL SKULLS

***Smith v Leech Brain & Co* [1961] 3 All ER 1159**

Smith was employed by the defendants as a labourer and galvanizer. Whilst lowering articles into a tank of molten metal, a piece of molten metal splattered out and burned his lip. He later contracted cancer, underwent operations, and died. It was found that the defendants had been negligent, and that the burn was the promoting agency, promoting cancer in tissues which already had a pre-malignant condition.

It was held in the QBD that for the purposes of assessing damages a tortfeasor took his victim as he found him, and the decision in *Overseas Tankship v Morts Dock & Engineering* did not override this principle; accordingly, since the type of injury which Smith suffered, was reasonably foreseeable, the defendants were liable for the damages claimed, although they could not reasonably have foreseen the ultimate consequences of the initial injury, namely, that the burn would cause cancer from which Smith would die.

***Robinson v Post Office* [1974] 2 All ER 737**

On 15th February the plaintiff slipped as he was descending a ladder from one of the Post Office's tower wagons. The slipping was caused by oil on the ladder due to leakage of a pump. The plaintiff sustained a wound to his left shin. Some eight hours later he visited his doctor and was given an injection of anti-tetanus serum (ATS). Where a patient had had a previous dose of ATS the recognised test procedure in 1968 entailed waiting half an hour after injecting a small quantity of ATS to see whether the patient showed any reaction. The doctor did not follow that procedure but followed one of his own, waiting only a minute for a reaction before administering the balance of the full dose. The plaintiff did not suffer any reaction until 24th February when he began to show signs of a reaction. The plaintiff suffered brain damage. The trial judge held the Post Office wholly liable for the plaintiff's injury.

The Court of Appeal held, inter alia, since it was foreseeable that, if oil were negligently allowed to escape on to a ladder, a workman would be likely to slip and sustain the type of wound in question and that such an injury might well require medical treatment, it followed that the Post Office were liable for the encephalitis suffered by the plaintiff in consequence of that injury. The Post Office were bound to take the plaintiff as they found him, ie with an allergy to a second dose of ATS, and if it was foreseeable that as a result of their wrongful act he might require medical treatment, they were, in the absence of a novus actus interveniens, liable for the consequences of the treatment applied even though they could not have reasonably foreseen those consequences or that they could be serious. *Smith v Leech Brain & Co* applied; *Tremain v Pike* distinguished.

CLAIMANT'S IMPECUNIOSITY

Liesbosch Dredger v SS Edison [1933] AC 449

While the dredger *Liesbosch* was lying moored alongside a breakwater the steamship *Edison* fouled the dredger's moorings and carried her out to sea, where she sank and was lost. The owners of the Edison admitted sole liability for the loss. Under a contract with the Harbour Commissioners the owners of the *Liesbosch* were engaged in constructive work in the harbour, for which a dredger was necessary and for which they were using the *Liesbosch*. The owners of the *Liesbosch* had staked their capital and credit on the successful result of the contract. The loss of the *Liesbosch* stopped the work and, being unable from want of funds to purchase any suitable dredger which was for sale, on May 4 1929, they hired a dredger, the *Adria*, which was more expensive in working than the *Liesbosch*, and required the attendance of a tug and two hopper barges. The Harbour Commissioners bought the *Adria* from her owners and on September 5 1930, they resold her to the owners of the *Liesbosch* for the same sum payable in instalments.

The House of Lords held that the measure of damages was the value of the *Liesbosch* to her owners as a profit-earning dredger at the time and place of her loss; and that it should include:

- (1) A capital sum made up of (a) the market price on November 26 1928, of a dredger comparable to the *Liesbosch*; (b) the cost of adapting the new dredger and of transporting and insuring her; and (c) compensation for disturbance and loss suffered by the owners of the *Liesbosch* in carrying out their contract during the period between November 26 1928, and the date on which the substituted dredger could reasonably have been available for use, including in that loss such items as overhead charges and expenses of staff and equipment and the like thrown away, but neglecting any special loss or extra expense due to the financial position of one or other of the parties.
- (2) Interest upon that capital sum from November 26 1928.

Martindale v Duncan [1973] 2 All ER 355

The plaintiff was a private hire driver. His taxi was damaged in a road accident on 27th November 1971. The plaintiff obtained an estimate of the cost of repairs on 1st December, and a solicitor's letter on his behalf was sent to the defendant's insurers at about the same date. On 26th January the insurers wrote confirming that there was no dispute as to liability and agreed to repairs being put in hand. The district registrar included as damages a sum of £160 for loss of profit for the first four weeks whilst the taxi was off the road and a further sum of £220 for the hire of a car at £22 a week for the following ten weeks until the repairs had been completed. The defendant appealed against the award of £220 contending that the repairs ought to have

been put in hand within a week of the accident and the plaintiff had thereby failed to mitigate his loss.

The Court of Appeal dismissed the appeal. Although there was authority for the proposition that impecuniosity was no excuse for failing to mitigate damage, the plaintiff's case was entirely different since he was seeking in the first instance to recover his damages from the defendant's insurers, rather than claiming against his own insurers and until the repairs had been authorised he could not be certain that he would stand in a good position vis-à-vis the insurers. *Dredger Liesbosch v Steamship Edison* distinguished.

***Dodd Properties v Canterbury CC* [1980] 1 All ER 928**

In 1968 a multi-storey car park was erected next door to the plaintiff's building. As a result of pile-driving operations for the foundations serious structural damage was caused to the plaintiff's building. Liability was at first denied by the defendants but was admitted shortly before the hearing of the action in 1978, but the issue of quantum remained contested. The plaintiffs had not carried out any repairs at the date of hearing, claiming that to have done so in 1970 (which was the earliest date when it was physically possible to have carried out repairs) would have caused them a degree of financial stringency and that in any event it would not have made commercial sense for them to have repaired the building before they were sure of recovering the expenditure from the defendants, because that expenditure was not going to produce a corresponding increase in income. The plaintiffs accordingly contended that the damages should be assessed as at the date of hearing, being £30,327 for the cost of repairs and £11,951 for the disruption to the business. The defendants contended that the damages should be assessed as at 1970, being £11,375 for the repairs and £4,108 for the disruption. The Court of Appeal held:

(1) Where a building was damaged by a tortious act and put in need of repair, the cost of repairs was to be assessed according to the broad and fundamental principle regarding damages, namely that they were compensatory and should as far as possible put the injured party in the same position as if the wrong had not been committed. Applying that principle, the cost of repairs was to be assessed at the earliest date when, having regard to all the circumstances, they could reasonably be undertaken, rather than the date when the damage occurred.

(2) The financial stringency (which did not amount to impecuniosity or financial embarrassment) in which the plaintiffs would have been placed had they carried out the repairs in 1970, the fact that it made commercial sense to postpone the repairs until the outcome of the action, the fact that the plaintiffs were not in breach of any duty owed by them to the defendants for their failure to carry out the repairs earlier, and were thus for practical purposes not under a duty to mitigate the damages if they could not afford to do so, and the fact that the defendants had wrongly denied liability, leaving the plaintiffs to establish their rights by litigation, were all circumstances to be considered in deciding the date at which the cost of repairs was to be assessed. Taking those circumstances into account and applying the compensatory principle of damages to the facts, the cost of the repairs was to be assessed as at the date of the action, ie 1978. *Liesbosch* distinguished.

Perry v Sidney Phillips [1982] 3 All ER 705

Jarvis v Richards (1980) 124 SJ 793

***Alcoa Minerals v Broderick* [2000] 3 WLR 23**

A smelting plant which had been operated by the defendant since 1972 generated and dispersed into the atmosphere pollutants, noxious gases and corrosive dust, which the plaintiff claimed caused corrosion to the galvanised zinc panels of the roof of his nearby house and other injury to his property and health. When the damage had first occurred he had repaired it but by 1989 the damage had occurred again and he was unable to pay for the necessary repairs. In 1990 he commenced proceedings against the defendant claiming damages in nuisance. In his statement of claim he put his special damage at \$211,140. Over the next few years the Jamaican economy was subject to rapid inflation and the value of the Jamaican dollar fell, consequently, the cost of repairing the roof increased considerably and in March 1994 the plaintiff was allowed to amend the figure for special damage to \$938,400. In February 1995 the judge found for the plaintiff, awarded him special damages of \$938,400 and granted an injunction. The Privy Council held:

- (a) that the general rule in tort that damages should be assessed at the date of breach was subject to exceptions and if adoption of the rule produced injustice the court had a discretion to take some other date;
- (b) that in contract and in tort there was no absolute rule that damages which resulted from the impecuniosity of the innocent party were too remote or that such impecuniosity was to be ignored when deciding the appropriate date for the assessment of damages;
- (c) that the plaintiff's claim involved only one head of damage, the cost of repairing the roof, which damage was a direct consequence of the tort, and the plaintiff's lack of funds did not give rise to a second head of damage which could be isolated and attributed separately;
- (d) that it was foreseeable that if the house of a person in the position of the plaintiff was seriously damaged he would not or might not have the wherewithal to repair it and that his ability to do so would depend on his establishing the liability of, and recovering damages from, the defendant and, consequently, the increased cost of repairing the damage was not too remote;
- (e) that the plaintiff had behaved reasonably in waiting until money was available from the defendants to pay for the repairs and therefore was not in breach of his duty to mitigate his loss;
- (f) that it would be a hardship for the plaintiff not to get the cost of repair as at the date when it was first established that the defendant had to pay; and
- (g) that, accordingly, justice required that the date of judgment by the trial judge be taken as the date for the assessment of special damages.