

# THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

## BREACH OF THE DUTY OF CARE IN NEGLIGENCE

### Introduction.

Having established that the defendant owed the claimant a duty of care, it is essential to show that the defendant breached that duty. In order to do this, two main questions have to be answered.

- 1). a) *The general legal question* : Whose standards does the defendant have to live up to? coupled with the important rider as to  
b) *The factual question* : Whether or not the defendant lived up to that standard?
- 2). a) *The legal question* : How careful should a person be in a given situation? (that is to say, what is the amount of care required of the defendant?) and  
b) *The factual question* in the circumstances of each case, Was the defendant careful enough?

The tort of negligence is illustrated by a vast number of cases making it hard to learn. The Duty, the Standard and the Quantum of Care embody aspects of the same notion, namely the concept of what a reasonable man would do, and foresee as necessary to do, in the light of all the given circumstances of the case. Dividing the ideas up into separate parts is not legally necessary, nor does the categorisation create separate rules of law, but it can make the subject more understandable and manageable. The concepts of reasonableness with regard to the duty of care, foresight and the standard and quantum of care are best grasped through illustration by a study of. case law.

### The Standard of Care.

**Blyth v Birmingham Waterworks**,<sup>1</sup> "*Negligence is the omission to do something which a reasonable man ... would do, or doing something which a prudent and reasonable man would not do.*"

A clear and simple example of what a reasonable and prudent person might do is provided in **Vaughan v Menlove**.<sup>2</sup> The defendant was warned by others that a hay stack on his land was liable to catch fire. He did nothing and decided to take that risk. The hay stack caught fire and destroyed the claimant's cottage. The court held that the defendant was liable to the consequences of his acts since he had not acted reasonably, by the standards of his peers, who had warned him of the danger and of the unreasonableness of not doing anything about it.

### The Standard of Care is that of the reasonable man.

The Standard is entirely '**Objective.**' It is immaterial that the defendant himself was possessed of extraordinary degrees of perception or was severely handicapped. The Standard is tailored to fit the circumstances of the situation, not the peculiarities of the defendant. For this reason one has to examine the circumstances, to see whether they required a special or higher standard of care.

One exception to this is regarding the physical abilities of the person, in relation to a danger for which he is not responsible. In **Goldman v Hargrave**,<sup>3</sup> it was stated that the law could not expect a person, who had to deal with a fire on his land resulting from natural causes, to do more than he was physically capable of doing and the court must take account of his individual circumstances.

### What Standard is required of a specialist?

For example, a person claiming to have a special skill, be it as a ship's master issuing a bill of lading or commanding a vessel, port pilot, ship repairer, lawyer or accountant. Once a person claims to have this skill he is judged by the standard of a reasonably competent practitioner of that art.

In **The Lady Gwendolen**,<sup>4</sup> Guinness owned a ship, which sailed recklessly up the Manchester ship canal, in fog, without the benefit of radar and collided. Despite the fact that Guinness were brewers by profession, once they bought a ship they had to live up to the standard of care required of shipowners. They had not instituted the control mechanisms that a careful ship operating company would employ. They owed a duty to other ships and had breached it. That breach caused loss for which they were held liable.

<sup>1</sup> **Blyth v Birmingham Waterworks** (1856) 11 Ex. 781, per Alderson. B

<sup>2</sup> **Vaughan v Menlove** (1837) 3 Bing N.C. 468.

<sup>3</sup> **Goldman v Hargrave** [1967] 1 A.C. 645

<sup>4</sup> **The Lady Gwendolen** [1965] P 294.

## CHAPTER FOUR

It was stated in **Whitehouse v Jordan**<sup>5</sup> " ...Where you get a situation which involves the use of some special skill or competence, the test as to whether there has been negligence or not is not the test of the man on top of the Clapham omnibus because he has not got this special skill".

What then, is the standard of care expected of a person, under a duty of care, who professes to have a special skill, for example a doctor? According to McNair J in **Bolam v Friern Barnet Hospital Management Committee**,<sup>6</sup> "The test is the standard of the *ordinary skilled* man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is a well established law that it is sufficient if he exercises the ordinary skill of an ordinary man exercising that particular art". The Court of Appeal decided that the exercise of a particular art meant that the standard of care required of a doctor was not tailored to a particular doctor but to the act, which he chose to perform. Young and newly qualified professional persons owe the same standard of care to their clients as highly experienced members of the profession.

This is reinforced in **Wilshire v Essex A.H.A.**<sup>7</sup> where it was stated that "It would be a false step to subordinate the legitimate expectation of the patient that he will receive from each person concerned with his care, a degree of skill appropriate to the task which he undertakes, to an understandable wish to minimise the psychological and financial pressures on hard-pressed young doctors."

The standard of care can in the context of contract be absolute. If a professional person promises to attain a result then a failure to do so would be breach of contract. However, most actions are framed in tort since professionals often do not promise a definite result.

In **Thake v Maurice**,<sup>8</sup> a surgeon who carried out a vasectomy and stated that it would be irreversible was not treated as a contractual guarantee of sterility. The contract is carried out in full but the objective is unfulfilled and the only remaining claim is for breach of duty of care. The standard is not absolute in tort merely that of the competent practitioner.

Since there can now be concurrent actions in tort and contract, the scope of tort actions is greatly increased. Where experts disagree on the standard procedures that would be adopted by professional persons and a substantial body of persons in the profession follow one or the other procedure it is not for the court to make a preference between procedures and should recognise either method as satisfying the standard. In **Gold v Haringey H.A.**<sup>9</sup> opinion was divided about 50/50 between doctors regarding whether or not a patient should be advised that female sterilisation is not always successful.

The Highway Code is not a law, but a failure to follow the code is a good indicator that the requisite standard of care has not been achieved. **Powell v Phillips**.<sup>10</sup>

Similarly, a failure to institute an effective ship's management plan under the UN ISM Code could possibly provide sufficient proof that a shipping company had breached its duties to others in the operation of a vessel involved in an accident.

### **Persons doing skilled tasks without claiming expertise.**

The basic standard required is that of an ordinary person. Thus in **Wells v Cooper**,<sup>11</sup>: a next door neighbour replaced a door knocker for his neighbour, free of charge as a favour. The screws he used were too small and the knocker came off injuring the householder. The court held that he was not liable because a normal householder is not expected to have the full professional standards of a joiner.

However, some fine judgements may be called for where a professional person is required to exercise skills from other professions in the course of his own work. In **Phillips v Whitely**,<sup>12</sup> a jeweller pierced ears for clients. He did not take the same care as a medical practitioner (G.P.) The court held that he was not liable

<sup>5</sup> **Whitehouse v Jordan** (1981) 1 W.L.R. 246. Per Lord Edmund Davies

<sup>6</sup> **Bolam v Friern Barnet Hospital Management Committee** [1957] 1 W.L.R. 582

<sup>7</sup> **Wilshire v Essex Area Health Authority** [1988] 1 All.E.R. 871. House of Lords.

<sup>8</sup> **Thake v Maurice** [1986] Q.B. 644

<sup>9</sup> **Gold v Haringey H.A.** [1988] Q.B. 481

<sup>10</sup> **Powell v Phillips** [1972] 2 All.E.R. 864.

<sup>11</sup> **Wells v Cooper** [1958] 2 Q.B. 265 :

<sup>12</sup> **Phillips v Whitely** [1938] 1 All.E.R. 566.

## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

because he had taken the same care as the ordinary reasonable jeweller. That was all that was required of him. Note however, that a modern jeweller may be expected to have greater skill today than in 1938.

### **Mere Errors of Judgement.**

Where a person is placed in a situation where he has to exercise his judgement and chose a course of action, provided the course of action was reasonable regarding the knowledge of the situation that he had at the time, the mere fact that he did not make, in hind sight, the correct choice, does not mean that he has committed a tort. It is better in some circumstances that a calculated gamble is taken than that nothing at all is done, e.g. an attempt to save someone's life during a complex medical operation. There is no general theory of liability without fault.

The general rule is that a professional will not be considered negligent for making a misdiagnosis, if his standard of care in making a diagnosis is of the level required in all his dealings. The court observed in **Crinon v Barnet Group H.M.C.**<sup>13</sup> that '*Unfortunate as it was that there was a wrong diagnosis, it was one of those misadventures, one of those chances, that life holds for people*'.

Obviously, a misdiagnosis may also result from a lapse in the requisite standard of care, which gives rise to liability in negligence. There is a hazy dividing line between an excusable mistake and an inexcusable negligent mistake.

In **Whitehouse v Jordan**,<sup>14</sup> it was alleged that an obstetrician pulled too hard during a forceps delivery, resulting in brain damage to the baby. In the Court of Appeal public policy reasons were advanced for not finding the defendant liable in negligence. The House of Lords was not in accord with the Court of Appeal over the policy issues, which is the main point of interest in the case. However, in the circumstances the court found that there was insufficient evidence for liability to attach to the obstetrician.

**The Quantum of Care.** The first step in determining whether there's been a breach of duty is to consider the objective standard of the ordinary skilled practitioner. The question that then arises is 'How far should a person go in guarding against risks?' This depends on a number of factors :-

- 1 How foreseeable is the risk?
- 2 How likely is the danger?
- 3 How serious are the potential dangers?
- 4 How useful is the activity in question?
- 5 How expensive or practicable are the precautions?
- 6 What is the usual practice in such situations?

This list is not exhaustive. It highlights the most common questions that the courts are likely to ask. Note that they are only factors not rules. Each case must be decided on the relevant circumstances, which will rarely duplicate themselves exactly in future situations. Nonetheless the cases provide a guideline as to what the court would be likely to decide in a given situation.

**Foreseeability.** The standard of care is based on what the reasonable man would have foreseen in the circumstances. Thus a defendant might not be liable because the harm to the claimant was not foreseeable. Lord Dunedin stated in **Fardon v Harcourt-Rivington**,<sup>15</sup> "*People must guard against reasonable probabilities, not fantastic possibilities.*"

What is foreseeable must be judged by the state of knowledge current at the time the incident occurred. Thus in **Roe v Minister of Health**,<sup>16</sup> the claimant went into hospital, in 1947, for a minor operation. He was paralysed because a spinal anaesthetic, which he was given, became tainted with phenol when it was put into a syringe, which had been stored in phenol. At that time it was not known that phenol could seep into the syringe through invisible cracks in the syringe. By the time of the trial in 1954 a better method of testing the integrity of phials had been developed. The court held that the defendants had not been negligent. Denning J said that the court could not look at the accident which occurred in 1947 "*with 1954 spectacles*".

<sup>13</sup> **Crinon v Barnet Group H.M.C.** [1959]

<sup>14</sup> **Whitehouse v Jordan** [1981] 1 ALL.E.R. 276. House of Lords.

<sup>15</sup> **Fardon v Harcourt-Rivington** [1932] 146 L.T. 391

<sup>16</sup> **Roe v Minister of Health** (1954) 2 Q.B. 66.

## CHAPTER FOUR

One cannot conclude of a foreseeable risk that on the balance of probabilities it might never happen, especially if the consequences are likely to be far reaching. Thus, in **Carmarthenshire County Council v Lewis**,<sup>17</sup> a four year-old child strayed from a school playground onto the road. A lorry driver swerved to avoid the child, but crashed and died in the process. The court held that whilst the risk had never occurred before, the defendant school authorities ought in the circumstances, reasonably to have foreseen and guarded against it.

### **Improbability of a foreseeable event occurring.**

If a risk is foreseeable but highly unlikely and especially if the consequences are unlikely to be severe, it may be justifiable not to take precautions to guard against the event occurring. Thus in **Bolton v Stone**,<sup>18</sup> the claimant was hit by a cricket ball whilst standing on the highway outside the cricket ground during a match. The fact that the distance from the wicket was so far and the small number of times anyone had ever succeeded in hitting a ball so far, meant that the risk was so slight that the defendant had been justified in not taking precautions to prevent a ball leaving the ground.

Similarly in **Thorne v Northern Group H.M.C.**,<sup>19</sup> a widower, whose wife had made her way out of hospital where she was a patient and then gone home and committed suicide, failed in a claim for damages against the H.M.C. He alleged that there had been negligence on the part of the hospital, claiming that the defendants should have prevented his wife from leaving, as they knew she was suffering from depression. The court held that the defendants were not liable. She was intent on self-destruction and the fact that she seized an opportunity to leave, did not mean that the defendants were negligent.

Contrast this with **Selph v Ilford & District H.M.C.**,<sup>20</sup> where a hospital was found to have been negligent in allowing a 17 year old patient, known to be a suicide risk, to climb through a window ... and on to a roof, before jumping to the ground where he was found seriously injured. It was accepted that reasonable care demanded adequate supervision, which included continuous observation by duty nurses in the ward. There had been a breach of that duty by the hospital. To look after four suicide risks with adequate care would require a minimum of three nurses in a ward containing 27 patients.

To demonstrate how unpredictable these matter may be, consider **Knight v Home Office**,<sup>21</sup> where, despite being observed every 15 minute by staff in a prison hospital, a mentally disturbed prisoner with known suicidal tendencies managed to hang himself. The court felt that a prison hospital could not be expected to operate the same standards as a specialist psychiatric hospital and the level of government funding must be taken into account.

### **How serious are the potential dangers?**

The care to be taken is relative to the seriousness of the injury risked and the likelihood of its occurring. In **Paris v Stepney B.C.**<sup>22</sup> a one eyed man employed by the defendant got a splinter in his one good eye because the defendant did not supply him with goggles to wear whilst working. The court held that the defendant employer owed him a higher duty of care because of the greater seriousness of an eye injury in his particular case.

Seriousness of the injury is also linked to the degree of likelihood of it occurring. Thus in **Haley v London Electricity Board**,<sup>23</sup> the court held that with 7000 registered blind persons living in London it was foreseeable that unless adequate precautions were taken a blind person would fall into a hole in a pavement. The claimant, a blind person fell into a trench because he did not see the warning sign and there were no barriers. The Board was held liable.

<sup>17</sup> **Carmarthenshire County Council v Lewis** [1955] A.C. 549.

<sup>18</sup> **Bolton v Stone** [1952] A.C. 450.

<sup>19</sup> **Thorne v Northern Group H.M.C** (1964) 108 S.3.484.

<sup>20</sup> **Selph v Ilford & District H.M.C.** (1970)

<sup>21</sup> **Knight v Home Office** [1990] 3 All.E.R. 237.

<sup>22</sup> **Paris v Stepney B.C.** [1951] A.C. 367.

<sup>23</sup> **Haley v London Electricity Board** (1965) A.C. 778.

## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

### How useful is the activity in question?

If the activity is very useful or of great social utility the defendant's actions may be excused. However, no matter how socially useful an activity is, if the risk is unjustifiable the activity could not be excused. In **Watt v Hertfordshire C.C.**<sup>24</sup> there were so many fires at the same time that a fire station ran out of its normal forms of transport. It used a flat-backed lorry to carry a heavy jack to an emergency. The fireman, travelling with the jack on the back of the lorry, was injured when the jack rolled over. The court held that the emergency justified the risk of travelling without specialist gear to secure the jack.

### How expensive or practicable are the precautions?

If the risk is small, the harm that may be suffered is minor, the activity is useful but the cost of absolute precautions is very large, then the taking of reasonable precautions should be adequate. Thus in **Latimer v A.E.C.**<sup>25</sup> after exceptionally heavy rain a factory was flooded by water which combined with oil in a factory to make the floor slippery in places. The defendant factory owners ordered workers to spread as much sawdust as possible over the floors, but eventually exhausted supplies of sawdust. The claimant slipped and sustained injury. The court held that the defendants had taken reasonable precautions. The risk posed by the oily patches was not so great as to justify closing down the entire factory.

**Usual Practice.** If a defendant follows '*a usual and normal practice*', the claimant will have to do a lot to establish a breach of duty. Even when there are two schools of thought as to what is best practice the defendant is unlikely to be found negligent as long as he acted '*... in accordance with the practice accepted by a responsible body of ... men skilled in that particular art*'. according to **Bolam v Frien H.M.C.**<sup>26</sup>

To establish liability where deviation from a normal practice is alleged, it was stated in **Hunter v Hanley**<sup>27</sup> that it must be proved :-

- a). that there was a usual and normal practice.
- b). that the defendant had not accepted that practice.
- c). that the course the defendant had adopted was one which no professional man of ordinary skill would have taken if he had acted with ordinary care.

However, it should be noted that simply because a practice is usual and customary does not necessarily make it acceptable. Thus Lord Tomlin remarked in **Bank of Montreal v Dominion Guarantee Co.**<sup>28</sup> that '*Neglect of duty does not cease by repetition to be neglect of duty.*' So, long use does not necessarily make a usual and approved practice reasonable.

### The Burden of Proof in the Tort of Negligence.

The burden of proof can be likened to a see-saw. Initially the burden of proof is on the claimant regarding all three elements of a negligence action, namely, Duty of Care, Breach of Duty and Causation. If on his own evidence and any admissions by the defendant, the plaintiff fails to make out more than a 50 /50 case he has failed to discharge the onus put on him.

Proof must go beyond the realm of pure conjecture into that of reasonable inference. Where the plaintiff produces a prima facie case, then the defendant can either specifically rebut the inference or produce alternative, reasonable explanations, consistent with his not being negligent or that even if negligent, the negligence did not cause the accident. If the defendant successfully does this then the burden is back on the plaintiff. The defendant does not have to satisfy the court of how the accident happened. The judge has to decide on the plaintiff's evidence and admissions

- a). Whether facts are shown from which the court can deduce the existence of a legal duty of care owed by the defendant to the plaintiff.
- b). Whether that evidence is such that he can reasonably conclude that the defendant was negligent.
- c). That, that negligence caused the damage to the plaintiff.

<sup>24</sup> **Watt v Hertfordshire C.C.** [1954] 1 W.L.R. 835.

<sup>25</sup> **Latimer v A.E.C.** [1953] A.C. 643.

<sup>26</sup> **Bolam v Frien Barnet Hospital Management Committee** [1957] 1 W.L.R. 582

<sup>27</sup> **Hunter v Hanley** [1955] SLT 213

<sup>28</sup> **Bank of Montreal v Dominion Guarantee Co** [1930] A.C. 659 :

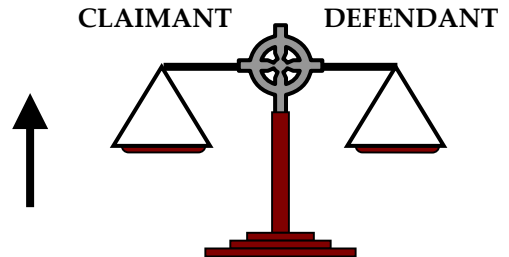
## CHAPTER FOUR

If there is a negative answer to any of these questions he must find for the defendant. If not he must decide on all the evidence whether in fact the defendant was negligent, and if so, whether that negligence was a cause of the damage.

### THE BALANCE OF PROBABILITIES

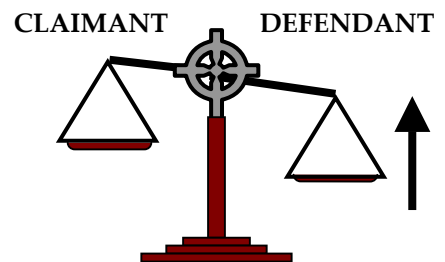
#### STEP 1

The scale is balanced at the outset of a trial.  
The onus is on the claimant to tip the scale in his favour.  
If the claimant fails to make his case, the claim fails.  
If the claimant succeeds then move on to stage 2



#### STEP 2

The onus is on the defendant to tip the scale back up in his favour  
If the defendant fails to rebut the claimant's case,  
the claimant succeeds and the defendant fails.  
If the defendant succeeds at this stage, then progress to  
Stage 3.

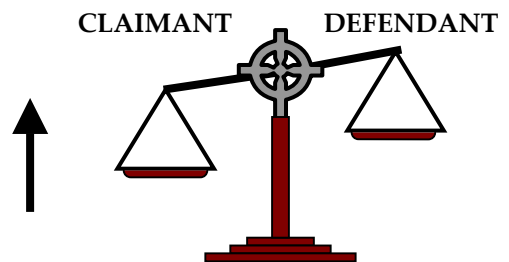


#### STEP 3

The onus is now back on the claimant to rebut the defence  
and tip the scale back in his favour.

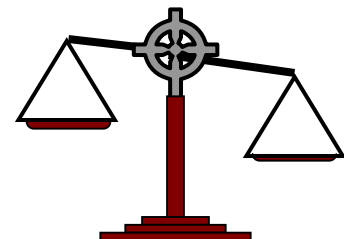
#### ENDGAME

If the claimant fails to rebut the defence, the claim fails.



#### ENDGAME

If the claimant succeeds then he wins.



Note that this see-saw will apply to each point of claim and to each counter-claim. Note further that in respect of counter-claims, the defendant, as counter-claimant is effectively the claimant on that issue and the onus is therefore on the defendant qua claimant to make that claim as per STEP 1, etc.

**The Civil Evidence Act 1968.** Where a defendant has been convicted of a criminal offence in relation to the same conduct being used for a civil action, a plaintiff may succeed in an action simply by referring to that fact and will probably succeed unless the defendant can prove that he was not negligent. Since the burden on the prosecution in criminal law is beyond all reasonable doubt, in most cases the lesser burden of a balance of probabilities will nearly always be satisfied.

## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

**Res Ipsa Loquitur.** (*The see-saw commences at Stage 2 with the burden of proof on the defendant*).

The facts speak for themselves. Morris LJ stated in **Roe v Minister of Health**,<sup>29</sup> that *res ipsa loquitur* is a rule, not a doctrine. 'It is a short way of saying that the plaintiff submits that the facts and circumstances proved by him establish a *prima facie* case against the defendant.'

It is a general rule in the tort of negligence that where the defendant is in complete control of a particular event, and an accident occurs which does not ordinarily occur if adequate care is taken, then the accident itself affords reasonable evidence of negligence. The defendant will be held liable, unless he can advance an explanation of the accident, consistent with the exercise of proper care by him.

This rule is known as *Res Ipsa Loquitur* or *Res Ipsa* for short, and is demonstrated by the case of **Byrne v Boadle**.<sup>30</sup> A bag of flour fell on the claimant's head from the third floor of a flour warehouse. The defendant claimed that the claimant could not prove his case. However, the court refused to accept this and stated that in the circumstances of the case, the facts spoke for themselves in the absence of proof to the contrary by the defendant and thus the claimant had proved his case.

The rule is not called for where all the relevant facts and circumstances are known. It is then the normal question of whether or not the inference should be drawn of causative negligence on the defendant's part. Thus, in **Barkway v South Wales Transport**,<sup>31</sup> a passenger was killed when the bus he was travelling in left the road. It was accepted in the trial that a burst tyre had caused the accident. The court held the defendant liable on the facts, since he had not taken sufficient care to check the condition of the tyres and further stated that the rule of *res ipsa loquitur* was not needed.

The basis of the rule is that the accident speaks for itself, because its occurrence was so improbable without the defendant's negligence and that the reasonable man could reasonably infer, from common experience, that it was so caused. For the maxim to apply it must be shown that:

- a) the thing which did the damage was under control of the defendant;
- b) the occurrence was such that it would not normally have happened if adequate care had been taken by the defendant.

A lack of explanation is essential but the facts must nonetheless indicate negligence. In **Cassidy v Minister of Health**,<sup>32</sup> the plaintiff had entered hospital for treatment of two stiff fingers and came out with four stiff fingers. Denning expressed the view that the plaintiff was entitled to say: "*That should not have happened if due care had been used. Explain it if you can*".

By contrast, in **Eassom v L.N.E.R.**<sup>33</sup> a child fell from a train. The court held that the defendant was not in control of all the doors on a train throughout the journey. There was no direct implication of negligence. Thus the *Res Ipsa Loquitur* was not applicable.

If, after a successful submission of *Res Ipsa Loquitur*, the defendant merely gives an explanation of how it might have happened, this will not be sufficient to shift the burden of proof back onto the plaintiff, especially if the explanation involves the admission of negligence by the defendant.

Thus in **Colvilles v Devine**,<sup>34</sup> the plaintiff was injured after an explosion. The defendant claimed that this may have happened because of a fire, resulting from the ignition of particles in an oxygen stream by friction. The court upheld a submission of *Res Ipsa Loquitur*. The defendant was liable because there had been no inspection of filters in the oxygen stream which amounted to negligent maintenance of the system.

Once *Res ipsa loquitur* is successfully raised, the defendant, in order to shift the burden of proof over to the plaintiff, must establish on a balance of probabilities that the incident was due to a specific cause not connoting negligence on his part, or that he used all reasonable care, that is to say, the burden is greater than 50/50.

<sup>29</sup> **Roe v Minister of Health** [1954] 2 Q.B. 66 per Morris LJ

<sup>30</sup> **Byrne v Boadle** [1863] 2 H & C 722

<sup>31</sup> **Barkway v South Wales Transport** [1950] 2 All.E.R. 460

<sup>32</sup> **Cassidy v Minister of Health** (1951) 2 K.B. 343

<sup>33</sup> **Eassom v L.N.E.R.** [1944] K.B. 421

<sup>34</sup> **Colvilles v Devine** [1969] 1 W.L.R. 475

## CHAPTER FOUR

In **Moore v Fox**,<sup>35</sup> Moore was cleaning a de-rusting tank containing a liquid chemical maintained at a temperature of 140 degrees Fahrenheit. It was controlled by a gas burner under the tank. An explosion occurred, which killed Moore. Fox was unable to account for the incident in anyway which established that he had not been negligent. The court held that his widow could rely on *Res Ipsa Loquitur* in her claim for damages.

### Conclusions :

Breach of the duty of care is a question of fact in every case and is to be determined by the courts. As such, this introduces an element of uncertainty and unpredictability into the practice of law and the prosecution of claims for liability in the tort of negligence.

However, businessmen and professional can, by ensuring that they bear firmly in mind the general standards of good practice within their industry, minimise the risk of accidents occurring, and if they should occur, minimise the risk of being held to account for the consequences of those accidents.

In determining the level of care that is required in any given circumstance, some thought should be given to what things could possibly go wrong if a certain course of action is adopted. If such thought is genuinely considered, steps can be taken to minimise any risks, which as indicated by the courts in past cases, are deemed to be unacceptable. Outlandish risks do not have to be taken into account.

Finally, it is not enough to say to a claimant *"If you think I have done something wrong, prove it."* It may well be that if the courts consider that in the absence of any explanation to show you have taken care, the only possible explanation is that you have acted negligently then by application of the *res ipsa* rule you will be found liable for the consequences of that act or omission.

This is a mild version of the concept of being *"Guilty unless you can prove your innocence."* Thus justification for this exception to the rule of *"innocent till proven guilty"* lies in the fact that otherwise, where a defendant is in total control of the information about what occurred, a claimant could not discharge the initial burden of proof. Defendant could be encouraged to establish total knowledge zones in their operations, knowing that they could then act with impunity and without regard to the safety of others, who would be powerless to hold them to account.

### SELF ASSESSMENT QUESTIONS

- 1 What is the importance and significance of the notion of the standard of care in the tort of negligence?
- 2 What standard is required of a consignee shipping goods?
- 3 What standard is required of a sea carrier?
- 4 What standard is required of a master issuing a bill of lading or other shipping documents?
- 5 What standard is required of a surveyor of goods or cargo?
- 6 What is the importance and significance of the notion of the quantum of care in the tort of negligence?
- 7 How much, if anything at all, is anyone expected to foresee when organising an activity?
- 8 How much of a protection is it to abide by usual practice in the industry when ordering one's business affairs?
- 9 What is the notion of Res Ipsa Loquitur about and how significant is it for claimants and defendants?

<sup>35</sup> **Moore v Fox** [1956] 1 All.E.R. 182



# THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

## RE MOTENESS OF DAMAGE AND CAUSATION IN THE TORT OF NEGLIGENCE

### Introduction.

Even after the plaintiff has shown that the defendant owed him a Duty of Care and that there has been a breach of that duty, the plaintiff still has to show that the injury which he has sustained was caused by that breach as a result of the defendant's conduct, and that the damage suffered was not too remote a consequence of that breach.

The normal object of a tort action is to decide where the ultimate consequence of harm should rest, on the plaintiff or the defendant,<sup>36</sup> or on both. It is a practical question to be determined on the facts of each individual case, since no formula or series of formulae will go all the way to solving it. Ultimately the decision becomes a matter of policy and expediency since every court judgement is a reaction of society to an event.

It is possible to provide guidelines as to how the courts deal with the problem of allocating responsibility for the consequences of harm but care is required in the application of these 'Rules of Law'. The courts allow themselves a considerable amount of discretion as to which rule is applicable in a particular circumstance. This area of the law is very flexible. The best way to get a 'feel' for the way the courts deal with the problem is through decided cases. In order to succeed the plaintiff has to prove two things:

- a) That the defendant's conduct has caused the plaintiff's loss (i.e. causation) and
- b). That the damage suffered by the plaintiff was not too remote (i.e. remoteness).

### Causation : The 'BUT FOR' Test.

It must be remembered that causation is only a stage, which must be successfully negotiated by the plaintiff. The case will not be decided solely on the basis that the plaintiff has satisfied the '**Test of Causation**,' but the stage acts as a filter so that the plaintiff will lose his case if he fails to establish causation. The court asks "*whether or not the damage would have occurred 'BUT FOR' the defendant's breach of duty?*"

Lord Denning stated in **Kirby v MacLean**,<sup>37</sup> that '*... if the damage would not have happened but for a particular fault, then that fault is the cause of the damage; if it would have happened just the same, fault or no fault, the fault is not the cause of the damage.*'

**Barnett v Chelsea & Kensington H.M.C.**<sup>38</sup> is perhaps the best example of the application of the *But For Test*. Three night-watch-men went to a hospital at 8 A.M. complaining that they had been vomiting since drinking tea approximately three hours earlier. They were not examined by the duty medical casualty officer, but told to go home and call their own doctors. The plaintiff's husband was in fact suffering from arsenic poisoning and he died approximately five hours later. The plaintiff sued the hospital in respect of negligent treatment. The court held that the defendants were not liable to the plaintiff, as their negligence had not caused the plaintiff's husband's death. Even if he had been examined he would still have died from poisoning and so the defendant's negligence was not the cause of death.

**Cutler v Vauxhall Motors**,<sup>39</sup> The claimant grazed his ankle due to the defendant's negligence. Due to a condition of varicosity which was at that time unknown to the claimant, an ulcer developed and the claimant had to receive hospital treatment, suffered pain and discomfort and lost £173 wages. It was shown that the operation would have had to take place sooner or later, with or without the graze. The graze was not therefore the '*but for*' event regarding hospital treatment - though of course it meant that the claimant received treatment sooner than he otherwise would have. Thus the claimant's action failed.

**Performance Cars v Abraham**<sup>40</sup> The defendant crashed into the claimant's Rolls Royce causing damage to a wing and bumper. However, the claimant's car had already been bumped by X and was awaiting a re-spray. The court held that it was not possible to establish that '*but for*' the second collision, the claimant's car would not have required the re-spray. Accordingly the defendant was not liable for the cost of the re-spray.

<sup>36</sup> there may even be more than one potential defendant.

<sup>37</sup> **Kirby v MacLean** [1952]

<sup>38</sup> **Barnett v Chelsea & Kensington H.M.C.** [1969] 1QB 428

<sup>39</sup> **Cutler v Vauxhall Motors** [1971]1QB 418

<sup>40</sup> **Performance Cars v Abraham** [1962].

## CHAPTER FOUR

**McWilliams v Sir William Arrol.**<sup>41</sup> The defendant was under a statutory duty to provide the claimant employee with a safety belt, but failed to do so. The employee fell whilst working without a safety belt and his widow claimed damages for breach of statutory duty. The court held that since even if the claimant had been provided with a safety belt he would not have worn it, it was not true to say that 'but for the omission' to provide a belt, contrary to the duty, the claimant would not have fallen.

### **Two independent causes occurring simultaneously.**

Where two independent acts would both have caused the incident, e.g. where two independent fires, started by the negligence of different persons, converge to cause the claimant's loss the 'but for test' is not applicable and both parties will be held liable. The claimant can sue either of the parties for the whole loss.

**Mc Ghee v N.C.B.**<sup>42</sup> The plaintiff developed dermatitis. His employer had not provided washing facilities at the work place. The defendant was unable to prove that the plaintiff would have contracted the disease even if the facilities had been provided. The plaintiff was not able to prove by what percentage if at all the failure had caused his disease though it was accepted that the failure did increase the risk somewhat of the plaintiff contracting the disease. The court held as a matter of policy that in the absence of any proof by the defendant the plaintiff won.

**Hotson v East Berkshire H.A.**<sup>43</sup> The plaintiff had a fall. The hospital incorrectly diagnosed the plaintiff's condition, which developed into a serious disability. Even with a correct diagnosis and treatment it was 75% certain that the serious disability would have developed in any case. The court held that the cause of the disability was the fall. The plaintiff could not recover 25% the appropriate damages for the disability on the basis that there was a lost 25% - 75% chance of avoiding the disability with correct treatment. There can be no damages for lost opportunity. Causation is required. Either something causes something or it does not.

### **Situations where the burden of proof shifts to the defendant.**

If two persons are involved in a situation where either of those persons may have caused the loss, but it is not possible to show which person actually caused the loss both are liable. The burden of proof is on the defendant to show he was not responsible.

**Cook v Lewis.**<sup>44</sup> The first and second defendants both fired guns at the same time. One of the bullets hit the claimant though whose bullet was not clear. The court held that the claimant could sue either or both of the defendants for the whole of the damage.

Similarly if the defendant's act is so closely linked to the loss that it is difficult to distinguish whether or not the defendant's act actually caused the loss then he may be held liable unless he can show that his act did not cause or contribute to the loss.

**McGhee v N.C.B.**<sup>45</sup> the claimant employee worked in hot dirty conditions in a brick kiln for the defendant. There were no washing facilities so the claimant had to cycle home in his dirty clothes. He contracted dermatitis. The employee claimed that if there had been washing facilities he would not have contracted the disease. The House of Lords held there was no medical proof that this was so but that the failure to provide washing facilities materially increased the risk of the claimant contracting the disease, and thus held the defendant liable.

**Wilsher v Essex A.H.A.**<sup>46</sup> The claimant was born prematurely and required extra oxygen. The defendant administered an excessive dose, which may have been the cause of incurable damage to his retina that rendered him virtually blind. There are other possible causes of such damage and it was not possible for the claimant to show conclusively that the oxygen was the actual cause. The claimant had thus failed to establish causation and so failed to recover damages.

<sup>41</sup> **McWilliams v Sir William Arrol** [1962] 1WLR 295

<sup>42</sup> **Mc Ghee v N.C.B.** [1973] 1 Q.B. 418

<sup>43</sup> **Hotson v East Berkshire Health Authority** (1987) A.C. 750

<sup>44</sup> **Cook v Lewis** (1952) 1 DLR 1

<sup>45</sup> **McGhee v National Coal Board** [1973] 1 WLR 1

<sup>46</sup> **Wilsher v Essex Area Health Authority** [1988] A.C. 1074

## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

**Kay v Ayrshire & Arran A.H.B.**<sup>47</sup> The claimant suffered from meningitis and was treated with penicillin. Meningitis often leads to deafness. The claimant was given an overdose of penicillin and on recovering from the meningitis was found to be deaf. The court held that there was no medical proof that an overdose of penicillin could cause deafness and so the claim failed.

**Fitzgerald v Lane**.<sup>48</sup> The Claimant walked onto a pelican crossing which was green for cars and red for pedestrians. He was hit twice in succession by two separate cars. It was established that both drivers had been driving negligently. The court of first instance divided the liability three ways between the claimant, the first and second defendants. Before the Court of Appeal the second defendant asserted that the claimant had failed to show that his negligence has caused any of his injuries. The Court of Appeal held that the defendant had to show that he had not caused the injuries, since his actions had increased the existing risk that such an injury would take place.

### **Two successive causes.**

Where a claimant suffers successive injuries before the trial, one of which is caused by the defendant's negligence then the claimant may recover if the second event is the result of a wrongful act by another, but not if it is due to the vicissitudes of life. Since a latter defendant takes his victim as he finds him, for better or for worse, and would not have to compensate for prior losses sustained by a claimant, this makes sense. Similarly, if the defendant were to be held liable for the vicissitudes of the claimant's life then the claimant would be better off due to the defendant's negligence than he otherwise would have been.

**Baker v Willoughby**.<sup>49</sup> The defendant had hit the claimant whilst he was crossing the road and the claimant's leg was permanently injured. Before the trial the claimant was hit in the leg by a bullet during an armed robbery and the leg was amputated. The court held that the defendant could not rely on the later incident to reduce the amount of damages due to the claimant.

Contrast **Baker v Willoughby** with **Jobling v Associated Dairies**.<sup>50</sup> The claimant employee injured his back at work and his earning capacity fell by 50%. Before the trial he contracted myelopathy and thus could not work at all. The court held that the claimant could only recover for the loss of wages from the time of the injury up to the time that he contracted the disease.

### **Remoteness of Damage :**

Once causation has been established, that is to say the defendant's act or omission was a dominant cause and therefore amounted to a breach of duty, remoteness is considered to determine which consequences the defendant should be held liable for. Two tests have been used to determine remoteness of damage

- a). The *Directness Test* established by **Re Polemis**.<sup>51</sup>
- b). The *Foreseeability Test* established by **The Wagonmound No1**.<sup>52</sup>

Today the *Foreseeability Test* has displaced the *Directness Test*. The crucial question now, is therefore, whether the defendant ought reasonable to have had in contemplation the possible effect of his activities on the claimant. If the court believes that the defendant could not reasonably have foreseen the damage then it can hold that the damage caused was too remote to be actionable.

**THE WAGON MOUND (No1)**, established that a defendant is only liable for the consequences of his act that a reasonable man would have foreseen. Furnace oil was leaked from the defendant's vessel into Sydney Harbour due to the defendant's negligence. Wind and waves carried the oil to the claimant's wharf and formed a coating of slime on the claimant's slipway. A vessel belonging to a third party was being repaired at the claimant's wharf. Welding work was stopped whilst the claimant consulted with experts to find out if there was any danger of fire. He was told that furnace oil on water could not ignite. Welding was resumed. The oil mixed with fabric on the water and molten metal from the welding process ignited the rags. The third party's ship and the claimant's wharf were both damaged by fire.

<sup>47</sup> **Kay v Ayrshire & Arran Area Health Board** [1987] 2 All ER 417

<sup>48</sup> **Fitzgerald v Lane** [1987] QB 718

<sup>49</sup> **Baker v Willoughby** [1970] AC 467

<sup>50</sup> **Jobling v Associated Dairies** [1982] AC 794

<sup>51</sup> **Re Polemis and Furness Withy & Co** [1921] 3 KB 560

<sup>52</sup> **The Wagonmound No1** [1961]. AC 388

## CHAPTER FOUR

The Court of Appeal held that damage by pollution was foreseeable and the claimant could recover for that damage, but damage by fire was not foreseeable and so the claimant could not recover. Note that the court of first instance had already found as a fact that, on the evidence presented to the court, in the circumstances of the case the fire had not been foreseeable.

In **Wagon Mound (No2)**,<sup>53</sup> the ship owner subsequently sued the defendant the owner of the Wagon Mound. This time different facts were presented by the vessel's owner the court, which found as a fact that damage by fire was foreseeable and so the shipowner's fire damage claim succeeded.

The application of the Remoteness Test varies as to whether it is applied to Damage to the Person, Damage to Property or Damage to Economic interests.

### **Remoteness and Damage to the Person and the Egg-Shell Skull Rule.**

Whilst the **Wagonmound** said that the defendant is only liable for what the reasonable man would have foreseen, this does not affect the validity of the Thin Skull Rule which states that the defendant must take his victim as he finds him.

**Dulieu v White**,<sup>54</sup> per Kennedy J: '*.. if a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not an unusually thin skull or an unusually weak heart.*'

**Smith v Leech Brain & Co.**<sup>55</sup> The claimant's husband died of cancer three years after being burned on the lip by molten metal. It was not known at the time of the accident that the claimant had any form of pre-malignant cancer. The defendant argued that he was not responsible for his death as this was not a reasonably foreseeable consequence of his negligence. The court rules that a tortfeasor (*one who commits the wrong complained of*) must take his victim as he finds him. The test was not that '*the defendant could have foreseen that the burn would induce cancer*' but whether '*the defendant could have reasonably foreseen that the claimant's husband would be burnt.*' The answer to the question was YES so the defendant was liable.

**Bradford v Robinson Rentals.**<sup>56</sup> The claimant was forced to drive a van without a heater in exceptionally cold weather. The claimant suffered frostbite, which he was abnormally susceptible to. The court held that frostbite was of the same type of damage as that which a person exposed to cold conditions might expect to suffer. The defendant was liable under the thin skull rule. The defendant had to take his victim as he found him, which included abnormal susceptibility to frostbite.

**Robinson v Post Office.**<sup>57</sup> A Post Officer employee grazed his leg when he fell off a step of a ladder which had a coating of oil. He received treatment from his own doctor. The doctor failed to conduct tests to establish whether or not the defendant might be allergic to anti-tetanus serum. Evidence was adduced that even if he had been tested there would have been no indication of allergy. The employee contracted encephalitis and suffered brain damage. The court ruled that the defendant was liable for the encephalitis as well as the leg injury. The defendant employer had to take his victim as he found him and the need for an anti-tetanus injection was a reasonably foreseeable consequence of the claimant's fall.

The type of damage must be in the same category of damage as that which was foreseeable, but the courts are more flexible in their attitude as to what fits into the category in actions for damage to the person than they are regarding actions for damage to property. Nonetheless the category of damage must be foreseeable.

**Hughes v Lord Advocate.**<sup>58</sup> Whilst away taking a tea-break, workmen left a manhole uncovered. A ten year-old boy climbed down the manhole, knocking over a paraffin lamp, left as a marker by the workmen. The presence of explosive gases resulted in an explosion, which badly burned the boy. The defendant claimed that the explosion was too remote to be foreseen by them. The court held that as long as injury by burning was foreseeable, it did not matter that the method by which the burning occurred was unforeseeable.

<sup>53</sup> **Wagon Mound (No2)** [1967] 1 AC 617

<sup>54</sup> **Dulieu v White** [1901] 2 KB 669

<sup>55</sup> **Smith v Leech Brain & Co. Ltd** [1962] 2 QB 405

<sup>56</sup> **Bradford v Robinson Rentals Ltd** [1967] 1 WLR 337

<sup>57</sup> **Robinson v Post Office** [1974] 1 WLR 1176

<sup>58</sup> **Hughes v Lord Advocate** [1963] AC 837

## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

Contrast **Hughes v Lord Advocate** with **Doughty v Turner Manufacturing Co.**<sup>59</sup> An asbestos lid slipped into a caldron of molten metal. The asbestos, due to an unexpected chemical reaction, caused the caldron to explode injuring the claimant. The court ruled that injury by splashing was foreseeable, but an explosion was not, so the defendant was not liable.

Once a person has suffered damage the defendant cannot be heard to complain that the harm caused was greater than he could have foreseen. It was stated by Lord Reid in **Hughes v Lord Advocate** that '*..a defendant is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable.*'

**Tremain v Pike.**<sup>60</sup> The defendant's farm was rat infested. The claimant contracted Weil's Disease, at that time considered to be a rare disease, by coming into contact with rat's urine. The claimant's action for damages failed since the defendant could only reasonably have foreseen harm from a rat's bite or poisoning due to food contamination.

Note that what is foreseeable changes with advances in public knowledge of dangers. Today, the danger of Weil's Disease is well known and documented, so any controller of rat infested land would now be expected to foresee that danger and owe a duty to others to take all practicable steps to deal with that threat.

### **Remoteness and Economic Damage.**

The rule that the defendant is not entitled to complain that the extent of damage is greater than would otherwise have been due to P's situation does not apply to economic damage.

**Liesbosch Dredger v SS. Edison.**<sup>61</sup> The defendant's vessel struck the Liesbosch and sank it. The Liesbosch was engaged in a contract to clear a harbour. The contract included a very severe penalty clause. The owners of the Liesbosch did not have enough money to go out and buy a new dredger and were forced to hire a replacement vessel at an exorbitantly high price to avoid paying the penalty clause. The court ruled that :-

- a). The claimant could recover the cost of a new dredger.
- b). The claimant could recover the cost of hiring a dredger for a reasonable period of time to allow the claimant a chance to replace the Liesbosch.
- c). The claimant could not recover the hire cost from that point in time onwards since the claimant's impecuniosity could not be taken into account. The loss was too remote.

**Weller v Foot & Mouth Disease Research Institute.**<sup>62</sup> Widgery. J. points out that whilst **Hedley Byrne v Heller** recognises that a duty of care may arise in the giving of advice and may afford an action for indirect or economic loss the case does not decide that '*an ability to foresee indirect or economic loss to another as a result of one's conduct automatically imposes a duty to take care to avoid that loss.*'

**Dodd Properties v Canterbury City Council.**<sup>63</sup> The plaintiff did not bother to make repairs pending outcome of the court case and a decision on liability. The building was still usable. The court assessed the cost of repairs at the time of the trial, even though the damage could have been repaired at an earlier date. Cash flow was merely one of the business reasons for not repairing the damage earlier so the Liesbosch was not applied.

### **Remoteness and intention to cause loss.**

Where a defendant intends to cause a claimant loss, or is reckless as to whether the claimant suffers loss or not, then the '*Reasonable Foresight Test*' is not applicable.

**Quinn v Leatham.**<sup>64</sup> The defendant induced a third party to break her contract of employment with the claimant. Lord Lindley stated that '*..... the intention to injure the plaintiff ..... disposes of any question of remoteness of damage.....*'

<sup>59</sup> **Doughty v Turner Manufacturing Co Ltd** [1964] 1QB 518

<sup>60</sup> **Tremain v Pike** (1969) 1 WLR 1556

<sup>61</sup> **Liesbosch Dredger v SS. Edison** [1933] AC 448

<sup>62</sup> **Weller v Foot & Mouth Disease Research Institute** (1966) 1 QB 569

<sup>63</sup> **Dodd Properties v Canterbury City Council** [1980] 1 W.L.R. 433.

<sup>64</sup> **Quinn v Leatham** [1901] AC 495

## CHAPTER FOUR

**Scott v Shepherd.**<sup>65</sup> The defendant threw a lighted squib (firework) into a market place. Various persons caught the squib and threw it away from themselves in order to protect themselves. Ultimately the squib exploded blinding the claimant. The court held that since the defendant had intended to scare people in general he was liable for the claimant's loss even though he did not intend to injure anyone in particular.

### **Novus Actus Interveniens. (New intervening event)**

The significant feature is that a sequence of events is not sufficient to prove liability. The act or omission complained of must be the dominant cause. A sequence of events (*'The chain of causation'*) may be broken by the act of another person (*novus actus interveniens*) or incident. There is disagreement as to whether *Novus Actus Interveniens* is part of Causation or of Remoteness. By discussing the topic after causation and remoteness the problem of classification is avoided. In reality the chain is not broken at all since unless the defendant's act is *'an active cause'* of the loss satisfying the *'but for test'* then there will be no causation in the first place. The nub of the question is that the new, intervening event is of such a character that it would be unjust to hold the defendant liable for the loss.

**Lamb v Cambden. L.B.**<sup>66</sup> The defendant council's negligence caused a property to be vacated. This in turn resulted in losses for which the council was liable i.e. repair work and lost revenue. However, trespassers moved in and caused even more damage, which the court held the council was not liable to account for. The claimant should have taken measures to safeguard the property whilst it was empty.

Would the court have ordered the council to have covered any costs incurred by a careful absentee owner in hiring private security to ensure the property was not further damaged?

**Compare Lamb v Cabden with Ward v Cannock Chase D.C.**<sup>67</sup> The defendant caused damage to the claimant's property causing it to be vacated. The defendant wilfully delayed paying for the repairs. The property was exposed in the meantime in an area with a high incidence of vandalism. The property was further vandalised. The council was held liable for the additional damage.

### **Intervening act of the claimant and Novus Actus Interveniens.**

If the claimant's conduct amounts to a *Novus Actus Interveniens* the defendant will not be liable. However care must be taken to distinguish between contributory negligence by the plaintiff and *Novus Actus Interveniens*.

**McKew v Holland & Hannen.**<sup>68</sup> The plaintiff was slightly injured in his left leg due to the defendant's negligence and was liable to lose control of his left leg on times. Whilst in the company of relatives who were willing and able to help him, the plaintiff attempted unaided to descend a steep flight of stairs, which had no hand rails. A spasm caused him to lose control of his leg and he fell down the stairs and broke his ankle. The court held that the plaintiff's actions amounted to a *Novus Actus Interveniens* and his claim for the broken ankle failed.

Contrast **McKew v Holland** with **Wieland v Cyril Lord Carpets.**<sup>69</sup> The plaintiff was injured due to the defendant's negligence and had to wear a surgical collar which prevented her from using her bifocal glasses properly. She fell whilst descending a flight of stairs. The court ruled that she could recover for the fall. It was not unreasonable for her to wear the glasses. The first injury meant that she could not cope with tasks which were reasonable and foreseeable vicissitudes of life.

**Emeh v Kensington & Chelsea & Westminster A.H.A.**<sup>70</sup> Emeh did not wish to have any more children and had a sterilization operation. The operation was unsuccessful due to negligence by the surgeon. The claimant became pregnant. The court refused to rule that the plaintiff's refusal to have an abortion broke the chain of causation. Whilst this may have been a way of mitigating the loss, by limiting the effect of the pregnancy the decision to have an abortion is a major ethical dilemma for the individual and something that should not be regarded as a reasonable step to have to take in order to mitigate loss.

<sup>65</sup> **Scott v Shepherd** (1773) 2 W.Bl. 829

<sup>66</sup> **Lamb v Cambden. L.B.C.** [1981] QB 625

<sup>67</sup> **Ward v Cannock Chase D.C.** [1986] Ch 546.

<sup>68</sup> **McKew v Holland & Hannen & Cubbitts (Scotland) Ltd** [1969] 2 All.E.R. 1621. House of Lords.

<sup>69</sup> **Wieland v Cyril Lord Carpets** [1969] 3 All.ER 1006.

<sup>70</sup> **Emeh v Kensington & Chelsea & Westminster A.H.A.** [1985] Q.B. 1012.

## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

**Pigney v Pointer's Transport Services.**<sup>71</sup> The defendant negligently caused the plaintiff injury. The plaintiff became depressed by the injuries and committed suicide. The court ruled that the defendant was liable for the plaintiff's death.

### **Intervening acts of nature.**

A defendant will not be held responsible for independent intervening acts of nature.

**Carslogie S.S. v Royal Norwegian Government.**<sup>72</sup> The claimant's ship was damaged in a collision and received temporary repairs. She then sailed to the U.S. where permanent repairs were intended. The vessel ran into a storm and sustained serious damage. The court held that the defendant was not liable for the storm damage.

### **Intervening act of a 3rd party.**

If a third party causes the loss and not defendant then the defendant will not be held liable for that loss.

**The Orepesa.**<sup>73</sup> Two ships were in collision. The captain of the claimant's vessel then set off in a rowing boat with 16 of his crew to try and save the claimant's vessel. The rowing boat overturned and several crew were drowned. The court held that the captain's efforts were reasonable and so the chain of causation was not broken by his acts. The defendant was liable for the deaths of the sailors.

**Scott v Shepherd.**<sup>74</sup> The squib thrower could not claim that the acts of the persons who threw the squib away from themselves to protect themselves - or in fright - was a *novus actus interveniens* - since their acts were involuntary instinctive acts - not deliberate reasoned acts.

**Knightley v Johns.**<sup>75</sup> The defendant's negligence caused an accident in a tunnel. A senior police officer forgot to seal off the tunnel before sending a police cyclist down the tunnel against the stream of traffic where he was hit by a car coming the other way. The court ruled that the defendant was not liable.

**Rouse v Squires.**<sup>76</sup> The defendant's negligence caused his lorry to jack-knife. A few minutes later the second defendant's car ran into the claimant and killed him. The first defendant was held 25% liable for the claimant's death since the second accident was a natural and probable and foreseeable consequence of the first accident.

**Lamb v Cambden Borough Council.**<sup>77</sup> Council workmen broke a water main causing serious damage to the claimant's house. When the claimant moved out (pending repairs) squatters moved in and caused an additional £30,000 worth of damage. The court awarded the claimant damages in respect of flooding but not for the damage caused by the squatters, as this was not a reasonably foreseeable result of the council's breach.

## SELF ASSESSMENT QUESTIONS

- 1 What functions does law fulfil? What is the significance and importance of identifying the function of a particular law governing international trade transactions?
- 2 Identify the various ways of classifying law and discuss the significance and importance of the classification that a particular law governing international trade transactions falls into.

<sup>71</sup> **Pigney v Pointer's Transport Services** [1957] 1 W.L.R. 1121.

<sup>72</sup> **Carslogie S.S. v Royal Norwegian Government** [1952] AC 292

<sup>73</sup> **The Orepesa** (1943) Probate 32

<sup>74</sup> **Scott v Shepherd** (1773) 2 W.Bl. 829

<sup>75</sup> **Knightley v Johns** [1982] 1 All ER 851

<sup>76</sup> **Rouse v Squires** (1973) QB 889

<sup>77</sup> **Lamb v Cambden Borough Council** [1981] QB 625

## CHAPTER FOUR

### CONTRIBUTORY NEGLIGENCE

Where the plaintiff by his own negligence contributes to the negligent damage that is caused to him by the defendant, the defendant may be allowed to have the damages awarded against him reduced to take into account the fact that the plaintiff has negligently contributed to his own loss. Points to note about contributory negligence :-

- a). It relates exclusively to the issue between the defendant and the plaintiff. It is not concerned with the issue between co-defendants.
- b). It's rules are only applicable where both the plaintiff and the defendant have been at fault and the fault of each was an operative cause of the injury to the plaintiff.
- c). Although called contributory negligence, its operation is not limited to the tort of negligence.

#### **The common law position.**

The common law was reluctant to permit apportionment of damages. Either the plaintiff would have to bear the entire loss or the defendant would have to compensate the plaintiff for his loss. The result was that if the plaintiff 's negligence contributed to his loss, his claim would fail.

**Butterfield v Forrester.**<sup>78</sup> Conversely if the defendant had the last opportunity to avoid the incident then the defendant would be held to liable for the plaintiff's loss. <sup>79</sup>

In Maritime claims the common law allowed for a 50/50 apportionment of damages. The result was that either the claimant and the defendant met half the cost of the loss each or the claimant or the defendant paid for all of the loss.

#### **The Statutory Position under S1(1) Maritime Conventions Act 1911.**

Following an International Convention signed by the UK, the Act provides that '*where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault.*'

The result of this was that at least in cases of maritime collisions the common law rules were not applicable. This led to calls for the common law rules to be altered to allow apportionment of loss relative to the fault of each party.

#### **The Law Reform (Contributory Negligence) Act 1945.**

**s1(1) The Law Reform (Contributory Negligence) Act 1945.** *Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damage recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.*

**s1(4) L.R.(C.N.) Act 1945** *Damage includes loss of life and personal injury.*

**s1(4) L.R.(C.N.) Act 1945** *Fault covers negligence, breach of statutory duty or other act or omission which gives rise to liability in tort, or would apart from this act give rise to a defence of contributory negligence.*

**s1(2) L.R.(C.N.) Act 1945** *Where damages are reduced under the Act, the court shall first find and record the total damages which would have been recovered had the complainant not been at fault.*

Before the defendant can establish a case for apportionment of damages under the rules of contributory negligence the defendant must prove

- a). That the claimant was at fault. This in turn involves
  - i). Discussing the meaning of Fault.
  - ii). What standard of care is required of the claimant.
- b). That the claimant's negligence was a cause of the damage suffered by the claimant.

<sup>78</sup> **Butterfield v Forrester** [1809] 11 East 60

<sup>79</sup> see **Davies v Mann** (1842) 10 M & W 546



## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

### **Fault : There is no reciprocal duty of care.**

In order to plead contributory negligence the defendant need not prove breach of a duty of care owed to him by the plaintiff. What he has to show is that the plaintiff failed to take reasonable care for his own safety in respect of the risk which defendant's negligence exposed him.

**Nance v British Columbia Electric Rly.**<sup>80</sup> per Viscount Simon *"when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary ... is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury."*

**Davies v Swan Motors.**<sup>81</sup> The plaintiff rode on the offside step of a dustcart. The defendant overtook the cart in a bus and a collision ensued whereby the plaintiff was killed. The court ruled that the dustcart driver and the bus driver were both negligent and jointly liable but the plaintiff's damages were reduced because of his contributory negligence in riding on the step knowing it was a dangerous thing to do.

If the defendant cannot show that the plaintiff was at fault then the plaintiff will recover in full. It is possible that the plaintiff's negligence is so great and the defendant's so small that the plaintiff recovers nothing at all.

### **The Standard of care owed to himself by the plaintiff.**

The standard of care required of the plaintiff is judged by objective criteria similar to that required of a defendant though it may be less stringent in its application.

**Jones v Livox Quarries.**<sup>82</sup> Per Lord Denning *'... a person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.'*

**Froom v Butcher.**<sup>83</sup> The plaintiff was not wearing a seat belt when due to the defendant's negligence his car was in a collision with defendant's car. The failure to wear a seatbelt resulted in the plaintiff sustaining greater injuries than he otherwise would have done. The court ruled that the plaintiff's damages be reduced by 20% to take account of that failure.

Similarly in **O'Connell v Jackson.**<sup>84</sup> The court ruled that a plaintiff had contributed to his own injuries by not wearing a crash helmet whilst riding his moped.

### **Alternative Danger : The Rule in the Bywell Castle Case.**<sup>85</sup>

The plaintiff will not have contributed negligence if, by the defendant's negligence, he was placed in a dilemma, and *'in the agony of the moment'* he chose the wrong alternative.

**Jones v Boyce.**<sup>86</sup> The coupling joining a stage coach to the train of horses broke and a stage coach careered off out of control. The plaintiff, a passenger on the top of the coach decided to jump off to safety and broke his leg in the process. The coach came safely to rest at the side of the road so in the event the plaintiff would have been safer if he had stayed where he was. The court ruled that the claimant could recover in full.

**Clayards v Dethick & Davis.**<sup>87</sup> The defendant obstructed the entrance to the claimant's stables. One of the claimant's horses was injured trying to get around the obstruction. The court held that the defendant was liable for all the loss.

**Adams v Lancashire & Yorkshire Rly.**<sup>88</sup> The claimant must not take disproportionate risks. A passenger fell off a train trying to close a door whilst the train was moving. There was plenty of room in the carriage and the train had almost reached the station. The claimant failed to recover. The risk was unnecessary.

<sup>80</sup> **Nance v British Columbia Electric Railway** [1951] AC 601

<sup>81</sup> **Davies v Swan Motors** [1949] 2 KB 291

<sup>82</sup> **Jones v Livox Quarries** [1952] 2 KB 608

<sup>83</sup> **Froom v Butcher** [1975] 3 All ER 520

<sup>84</sup> **O'Connell v Jackson** [1971] 1 QB 270

<sup>85</sup> **Bywell Castle** (1879) 4 PD 219

<sup>86</sup> **Jones v Boyce** [1816] 1 Stark 493

<sup>87</sup> **Clayards v Dethick & Davis** [1848] 12 QB 439

<sup>88</sup> **Adams v Lancashire & Yorkshire Railway** (1869) LR 4 CP 739

## CHAPTER FOUR

**Harrison v B.R.**<sup>89</sup> A guard was injured pulling a passenger (*who had attempted to board the train while it was moving and then found himself in difficulties*) onto a moving train. The guard's instructions were to put the brakes on not to assist passengers in such situations. The court apportioned liability 80/20 to take account of the claimant guard's contribution to his loss.

### **Standard of care required of children.**

It is possible that there is an age below which a child cannot be held to be contributorily negligent though this is not clear. The courts do seem to have a more lenient attitude towards young children.

**Gough v Thorne.**<sup>90</sup> A lorry driver indicated to three children that it was safe for them to cross the road. A bubble car overtook the lorry and seriously injured a 13 year old. The court ruled that the claimant was not contributorily negligent. Per Denning L: '*A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her.*'

**Yachuk v Oliver Blaise Co.**<sup>91</sup> The defendant sold petrol to a 9 year-old child who said it was for his mother. The child played with the petrol and was burnt. The court held that the defendant was negligent for supplying the child. The plaintiff was not contributorily negligent for he was too young to know or understand the dangers of playing with petrol.

**Oliver v Birmingham & Midland Bus Co.**<sup>92</sup> The plaintiff, a 4 year old child, was crossing the road holding his grandfather's hand. A bus approached suddenly without warning. The grandfather panicked and let go of the child's hand and the child was injured. The court held that the defendant was liable and notwithstanding the grandfather's negligence rules that the plaintiff could recover full damages.

### **Standard of care and workmen.**

The policy behind an employer's statutory duty of care under the Factory Acts is to afford protection to employees. The courts are reluctant to impose too high a standard on employees where it would undermine the intention of the Acts to make employers insist on employees acting in their own best interests.

**Caswell v Powell Duffryn Collieries** (1940) : Per Wright L: *what is all important is to adapt the standard of negligence to the facts, and to give due regard to the actual conditions under which the men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety.*'

### **Causation in Contributory Negligence.**

The plaintiff's negligence does not have to contribute to the accident, merely to the extent of the plaintiff's injuries.

**Froom v Butcher** : Failure to wear a seatbelt did not cause the accident - but increased the plaintiff's injuries which reduced the plaintiff's award for damages.

**Owens v Brimmell.**<sup>93</sup> The plaintiff accepted a lift with a driver whom he knew to be drunk. The court held that the plaintiff was contributorily negligent.

**Stapley v Gypsum Mines.**<sup>94</sup> The plaintiff and his partner were told to bring down the roof of a mine because it was unsafe. The plaintiff and his workmate tried unsuccessfully to collapse the roof and then decided to carry on working as normal. The roof then collapsed on them killing the plaintiff. Was the plaintiff the sole author of his loss or was the workmate (*and thus the defendant, as his employer under the principles of vicarious liability*) a contributor to the plaintiff's loss. The plaintiff was found 80% liable for his own loss.

<sup>89</sup> **Harrison v British Railways Board** (1981) 3 All ER 679

<sup>90</sup> **Gough v Thorne** (1966) 1 WLR 1387

<sup>91</sup> **Yachuk v Oliver Blaise Co** (1949)

<sup>92</sup> **Oliver v Birmingham & Midland Omnibus Co** (1933) 1 KB 35

<sup>93</sup> **Owens v Brimmell** [1977] QB 859

<sup>94</sup> **Stapley v Gypsum Mines** [1953] AC 633

# THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

## DEFENCES TO A LEGAL ACTION FOUNDED IN THE TORT OF NEGLIGENCE

### **Consent : Volenti non fit inuria.**

Consent is a complete defence where the defendant can show that the plaintiff consented to take the risk of suffering loss. Thus a boxer cannot complain if he is hurt during the normal course of a boxing contest by his opponent, provided his opponent does not step outside the rules governing the contest. A person who has voluntarily waived or abandoned a right cannot enforce it.

There are three elements

- a). There must be consent, contractual or non-contractual, express or implied by the plaintiff either to actual harm or damage or the risk of such.
- b). It must be under such circumstances that he must be deemed to forego his legal remedy.
- c). Such consent must be full, free and unfettered, without fraud, duress or other factor deemed to impair consent.

The defence applies to intentional and unintentional harm. There is no reason to suggest that the defence is limited to risk of harm and not to actual harm done, though it is more difficult to prove consent to the latter. Equally there does not appear to be any legal difference between:

- a). Consent given after the risk has arisen and its nature appreciated and
- b). Consent given before such circumstances.

### **Contractual situations.**

It is a general rule that in a contractual / tort situation, it is not normally permissible to disregard a contractual limitation of liability and to allege a wider liability in tort. However, on occasions there may be an implied term in a contract at sports meeting etc which may be supported by the court. Spectators may be found to have accepted the risk of a reasonably expectable peril and of occurrences, which a reasonable promoter is not expected to guard against.

**Hall v Brooklands.**<sup>95</sup> A spectator was injured at a car-racing meeting. The court ruled that there had been an implied acceptance of risk.

**Murray v Harringay Arena.**<sup>96</sup> A child was struck on the head by a puck at an ice hockey meeting. The ticket carried a risk warning. The court held that the defendant was not liable.

### **Non-contractual situations.**

Implied consent may be to harm but not to intentionally inflicted harm or negligently caused loss arising from the non-contractual presence of an individual at a sporting event. In **Potter v Carlisle Golf Club.**<sup>97</sup> a trespasser was struck by a ball, on a golf course. Mere knowledge of a danger without more, does not mean a person has surrendered the right to a legal remedy.

**Bowater v Rowley Regis.**<sup>98</sup> A carter was injured by a runaway horse. He has previously warned the defendant, his employer, that the horse was dangerous. The court held that the defendant was liable. The defence of consent failed. The plaintiff was not employed to manage difficult horses and had not undertaken the risk involved.

**Smith v Baker.**<sup>99</sup> The defendant was injured by a falling stone during the construction of a railway. Consent was no defence. The plaintiff knew of the danger and continued to work but there was no evidence that he had voluntarily undertaken the risk of injury.

**Dann v Hamilton.**<sup>100</sup> The plaintiff was a voluntary passenger in a car driven by Hamilton who was drunk. She was injured and he was killed in an accident. She claimed damages against his estate. The court held she had not consented to absolve Hamilton from liability for negligence. Note however, that today she would probably be found contributorily negligent and may even be criminally liable.

<sup>95</sup> **Hall v Brooklands Auto Racing Club** [1933] 1 KB 205

<sup>96</sup> **Murray v Harringay Arena** [1951] 2 KB 529

<sup>97</sup> **Potter v Carlisle Golf Club** :

<sup>98</sup> **Bowater v Rowley Regis Corp** [1944] KB 476

<sup>99</sup> **Smith v Baker** [1891] AC 325

<sup>100</sup> **Dann v Hamilton** [1939] 1 KB 509

## CHAPTER FOUR

### Consent & rescue cases.

The defendant will be held liable for harm suffered by a rescuer who enters upon a scene & attempts, being aware of the fact that there is an element of risk involved, to rescue those placed in danger by the defendant's negligence. The defendant cannot absolve himself of liability for any harm suffered by the plaintiff on the basis of consent.

- 1). In all cases the defendant must be in fault before the defence issue arises in that he negligently created the situation which prompted the plaintiff to go to the rescue.
- 2). All relevant circumstances must be considered in assessing the balance of risks to determine whether the plaintiff's intervention was justified or not.

If contributory negligence is an issue, was the plaintiff contributorily negligent? The general principle is '*Danger invites rescue. The cry of distress is the summons to relief. The law recognises as normal these reactions, when tracing the conduct to its consequences. The wrong that imperils life is a wrong to the imperilled victim. It is also a wrong to his rescuer.*' per Cardozo J : **Wagner v International Railway**.<sup>101</sup>

- 3). Continuity between the commission of the wrong and the effort to avert the consequence is not broken by the exercise of volition by the rescuer.  
Per Cardozo J: '*The law does not discriminate between the rescuer oblivious of peril and one who counts the cost. It is sufficient if the rescue whether impulsive or deliberate is the child of the occasion.*'
- 4). The conduct of a third party that leads to the harmful event is not a *Novus Actus Interveniens* rendering the conduct too remote, if that conduct is of a kind the defendant should have foreseen and guarded against.

**Haynes v Harwood**.<sup>102</sup> Children frightened a horse left unguarded by the defendant, which bolted and was then brought to a stop in a crowded street by a policeman, who sustained injuries in the rescue. Children are attracted to horses and are likely to tease them, so the horse should not have been left unattended. The owner was liable for the policeman's injuries.

- 5). Similarly, if the plaintiff's intervention as a rescuer is what the negligent defendant should have foreseen as a probable consequence of his faulty conduct.

It will take very strong circumstances to make the court accept a defendant's plea that the rescuer was guilty of contributory negligence or consented to the harm suffered.

**Baker v Hopkins**.<sup>103</sup> A & B used a fuel powered tool engine to clean a well. On the second day of the cleaning operation they were overpowered by fumes from the cleaning tool's engine. The plaintiff, a doctor, went down the well to assist the men but was also overcome by the fumes. The court held that the claimant had not been negligent. His conduct did not contribute to his loss. The law would not deem that he had consented to the risk.

**Brandon v Osborne Garrett**.<sup>104</sup> A wife attempted to pull her husband away from falling glass. She was injured in the leg along with her husband. The court held that she could recover damages.

**Morgan v Ayles**.<sup>105</sup> The plaintiff ran out to try and save a child from being run over by a negligently driven motorbike. The court held that the plaintiff could recover.

**Hyyet v G.W.R.**<sup>106</sup> The plaintiff attempted to avert the danger of paraffin oil exploding. The court held that the claimant's actions were reasonable and he could recover for his injury.

**Cutler v United Dairies**.<sup>107</sup> A runaway horse and cart had entered a field out of harm's way. The plaintiff attempted to arrest the vehicle and was injured. The court ruled that he could not recover damages.

<sup>101</sup> **Wagner v International Railway**. [1921] 232 NY Rep 176

<sup>102</sup> **Haynes v Harwood** [1935] 1 KB 146

<sup>103</sup> **Baker v Hopkins** [1959] 3 All ER 225

<sup>104</sup> **Brandon v Osborne Garrett** [1924] 1 KB 548

<sup>105</sup> **Morgan v Ayles** [1942] 1 All ER 459

<sup>106</sup> **Hyyet v G.W.R.** [1948] 1 KB 345

<sup>107</sup> **Cutler v United Dairies** [1933] 2 KB 287

## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

### **The Defence of Statutory Authority.**

If a statute authorises the commission of what would otherwise be a tort, the injured party has no remedy at all, unless the statute provides some form of compensation. Courts will not impute to legislation any intention to take away private rights of individuals without compensation unless the defendant proves that there was such an intention. The burden of proof is on the defendant.

**Vaughan v Taff Vale Railway.**<sup>108</sup> Sparks given off by a steam engine caused a fire. The Taff Vale Railway Company operated by statutory authority and it was shown at that time that it was not possible to operate steam engines without sparks being given off, so the defendant was not liable for the consequences of flying sparks. Effectively Parliament had placed the risk upon property owners neighbouring the railways. It was thus for them to ensure that there was nothing inflammable close to the lines.

### **REMEDIES AVAILABLE FOR VICTIMS OF TORT**

**Damages.** Damages are only recoverable once only.<sup>109</sup>

Kind of damages include :-

- a) **Contemptuous damages** - most likely in libel cases where the claimant may not even recover his costs. **Derring v Uris.**<sup>110</sup> A Doctor who was forced to do experiments in a German war cam in order to survive was given a penny damages but ordered to pay the court costs because the court thought that his case had no merits.
- b) **Nominal Damages** - when the claimant's legal rights are infringed but he has suffered no actual damage.<sup>111</sup>
- c) **Punitive or exemplary Damages.** Awarded where the defendant's behaviour is oppressive, arbitrary or unconstitutional or where the defendant's conduct is calculated to make a profit for himself which he anticipates will exceed any court award of compensation to be payable to the plaintiff.
- d) **Real, substantial or ordinary damages.** Generally unliquidated, to compensate the claimant for his loss, injury or damage suffered, as far as possible to restore him to the condition he was in before the tort - restitutio in integrum.

**Self Help.** But the self-helper must not himself break the law.

**Injunctions.** There are various kinds of injunctions.

- a). **Interlocutory Injunction.** Temporary injunction until a full court hearing can be held.
- b). **Mandatory Injunctions.** This forces the defendant to do something.
- c). **Quia Timet Injunctions.** An injunction granted where no damage has yet been caused but where the applicant fears damage will result unless the defendant's activities are curtailed.

Sometimes the court will award Damages in lieu of an injunction.

**Specific Restitution of Property.** This is most appropriate for trespass to property, conversion etc.

<sup>108</sup> **Vaughan v Taff Vale Railway** [1860] 5 H & N 679

<sup>109</sup> see **Fetter v Beale** 1 Ld. Raym 339

<sup>110</sup> **Dering v Uris** [1964] 2 QB 669

<sup>111</sup> See **Constantine v Imperial Hotels** [1944] KB 693, where a cricketer was refused entry into a hotel.

## CHAPTER FOUR

### VICARIOUS LIABILITY

#### Introduction :

Vicarious liability is that situation where one party is liable for the tortious act of another because there is a particular relationship between the parties and the tort is in some way connected to that relationship. The relationship which best illustrates this is that of employer and employee. In this situation the generally accepted view of the basis of liability is that if all the elements of the tort are proved against the employee then the employer is answerable for it if it was committed in the course of the employee's employment. It can be said therefore that an employer is responsible for any tort which is committed by the employee in the course of his employment.

#### Who is an employee?

It is important to distinguish an employee from an independent contractor not only because an employer is not generally liable for the acts of an independent contractor but also for purposes of industrial safety legislation and national insurance payments. It is generally said that an employee works under a contract of service whereas a contractor works under a contract for services. While the description of the contract by the parties may be evidence it is not conclusive.<sup>112</sup>

At one time, the test for the relationship was thought to be one of control - that is to say a contract of services was one where the employer could not only order what should be done, but also, how it was to be done.<sup>113</sup>

However it has now been recognised that the absence of such control is not conclusive proof against the existence of a contract of services and attempts to find a more suitable test have been made.

One of the better known tests to ascertain whether a contract is one of service or of services is that laid down in **Short v Henderson**.<sup>114</sup> Lord Thankerton said that a contract of service has the following characteristics :

- i) A master's power to select his servant :
- ii) Payment of remuneration :
- iii) Master's right to control the method of work and
- iv) Master's right to suspend or dismiss.

One of the most helpful comments was that of Lord Denning in **Stevenson v Macdonald**.<sup>115</sup> He said that one feature which seems to run through a contract of services is that a man is employed as part of a business, and his work is done as part of the business whereas under a contract for services the work is not integrated into his business but only accessory to it.<sup>116</sup>

It can be said nowadays that control is no longer the sole determining factor; other factors may be of importance, such as provision of own tools, power of hiring, and financial risk later.

A particular problem may arise in respect of borrowed employees as distinct from the employees of independent contractors. This is the situation where A is the general employer of B, but C, by agreement with A (which may or may not be a contractual agreement) is making temporary use of B's services and B, in the course of employment commits a tort against X, a third party.<sup>117</sup>

#### Course of employment.

For the employer to be vicariously liable, the employee's act must have been in the course of his employment. The act will be within the course of employment if it is expressly or impliedly authorised by the employer, or is an unauthorised manner of carrying out an authorised act, or is necessarily incidental to something which the employee is employed to do.

In deciding whether an employee's act is within the scope of his employment it is best to consider the differing kinds of acts which may occur.

<sup>112</sup> See **Ferguson v John Dawson** (1976) 3 All.E.R. 8817.

<sup>113</sup> See **Collins v Hertfordshire C.C** (1947) KB 598.

<sup>114</sup> **Short v Henderson** (1946) 62 TLR 427.

<sup>115</sup> **Stevenson, Jordan & Harrison v Macdonald & Evans** (1952) 1 TLR 10.

<sup>116</sup> see also **Ready Mixed Concrete v Ministry of Pensions** (1968) 1 All.E.R. 433.

<sup>117</sup> **Mersey Docks v Coggins** (1947) AC 1

## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

### a) Careless acts of an employee.

By far the commonest kind of wrong is one due to the unlawful carelessness of the employee. Such an act may still be in the course of employment even if the employee is not acting strictly in the performance of his duty. **Century Insurance Co v N.I.R.T.B.**<sup>118</sup> A petrol tanker driver smoked whilst delivering petrol to a garage even though he had been forbidden from doing so. An explosion destroyed the garage.

However, if the courts consider that there has been to great a deviation from employment, then the employer won't be liable. In **Storey v Ashton**,<sup>119</sup> a driver had been sent to deliver wine and collect empty bottles. On the return trip he obliged a friend by driving off in another direction. Held He was outside the scope of his employment; "every step he drove was away from his duty".

### b) Mistakes by an employee.

**Bayley v Manchester Railway.**<sup>120</sup> A porter mistakenly pulled the claimant, a passenger) from a train, believing it was going in the wrong direction and the passenger was injured. The court held that the railway company was liable as his employer. The porter was doing, albeit in a blundering manner, his normal job of seeing that passengers got on the right train.

Another application of this idea of a mistaken act by an employee is an act done to protect the employer's property. An employee has implied authority to take steps which are reasonable in all the circumstances, to protect it, and it is a question of degree as to whether or not there had been an excess of this implied authority which would take the act outside the course of the employee's employment.

**Abrahams v Deakin.**<sup>121</sup> An employee suspected a person of having attempted to steal from the employee's employer. After the supposed attempt had ceased the employee then, mistakenly tried to arrest the suspect. The court held that the employers were not vicariously liable, since the arrest after the supposed theft had ceased wasn't made to protect the employer's property but out of vindictiveness.

Compare **Abrahams v Deakin** with **Polland v Parr.**<sup>122</sup> A carter reasonably but mistakenly believed that a boy had been stealing sugar from the carter's cart. He struck the boy who fell, and a cart-wheel went over his foot. Held : The act was within the carter's course of employment and thus the employers were vicariously liable. The blow, although somewhat excessive, was not sufficient to render it outside the scope of employment.

### c) Intentional wrongs of an employee.

Here two rules are settled.

- i) The act done may still be within the course of employment, even if it is expressly forbidden by the employer. The prohibition of an act, or a class of acts will only prevent the employer being liable if it actually restricts what the servant is employed to do. If the prohibition merely forbids a particular mode of doing an act, then it will not prevent the employer being liable. Classification of the nature of a prohibition will be a question of fact in each case.

**Limpus v L.G.O.C.**<sup>123</sup> A driver of the defendant's bus had printed instructions not to race with or obstruct other busses. He disobeyed this, and obstructed the claimant's busses causing a collision. The court held that the defendant was liable since what the driver did was merely to carry out in an improper manner that which he was in fact employed to do i.e. promote his employer's passenger service business.

A particular problem as regards prohibitions by employers is the situation where an employee gives a lift to an unauthorised person and cases in this area show conflicting views.

<sup>118</sup> **Century Insurance Co v N.I.R.T.B.** (1942) AC 509.

<sup>119</sup> **Storey v Ashton** LR 4 QB 476

<sup>120</sup> **Bayley v Manchester Railway** (1873) LR 8 CP 148 :

<sup>121</sup> **Abrahams v Deakin** (1891) 1 Q.B. 516.

<sup>122</sup> **Polland v Parr & Sons** (1927) 1 KB 236.

<sup>123</sup> **Limpus v L.G.O.C** (1862) 1 H+C 526

## CHAPTER FOUR

**Twine v Bean's Express.**<sup>124</sup> A van driver had been forbidden to give lifts to unauthorised persons and there was a notice to this effect on the dashboard. Due to the driver's negligence, his unauthorised passenger was killed. The court ruled that the employer was not liable since at the time of the accident the employee was not acting in the course of his employment.

Similarly in **Conway v Wimpey**,<sup>125</sup> an employee despite a prohibition, gave a lift to a employee of another firm, on a dumper truck on a building site, who was injured by his negligent driving. Held. The employer was not liable since the servant was not acting in the course of his employment. Contrast

**Rose v Plenty.**<sup>126</sup> a milkman, despite a prohibition by his employer engaged a 13 year old boy to help him, and the boy was injured by the milkman's negligent driving while he was a passenger on the float. The court held that the employer was liable. The milkman was, by engaging the boy, acting in the course of his employment since his job was to deliver milk and engaging the boy helped him to do this.

- ii) The servant is not necessarily acting outside the scope of his employment merely because he intends to benefit himself and not his employers - if the dishonesty occurs whilst the employee is carrying out the type of task which he is employed for; and where an employer by his own negligence, whether this lies in his choice of employees or in the manner in which he supervises them, induces or facilitates the theft by his employees of goods entrusted to them, he may be liable.

**Lloyd v Grace.**<sup>127</sup> The defendant, a firm of solicitors, employed a managing clerk who conducted their conveyancing business without supervision. The claimant, a widow, owned some cottages. She wanted to increase her income on them. She went to see the defendants for advice. The clerk tricked her into transferring ownership of the cottages to him, which he promptly sold keeping the profit to himself. The court held that the defendant was liable.

**Morris v Martin.**<sup>128</sup> The claimant sent her fur coat to be cleaned and the cleaners with her permission sent it on to the defendant's who were specialist cleaners. A third party, the defendant's employee, was given the job of cleaning it, stole the coat. The court held that the defendant was liable.

### The position of the negligent employee

The injured party can choose to sue either the employer or the employee. Usually it is the employer who is sued since the employee is unlikely to be able to pay substantial damages. The fact that an employer is found vicariously liable for the acts of his employee in no way relieves the employee of his own liability to his employer who may sue to recover the damages paid out to the injured party. The employers rights are to be found under :-

- 1 the **Civil Liability (Contribution) Act 1978** and
- 2 at common law, and in particular in the case of **Lister v Romford Ice & Cold Storage Co.**<sup>129</sup> An employer or his insurance company, suing in subrogation, can sue the employee for breach of an implied term in the contract of employment that he will indemnify his employer against any loss resulting from his wrongful act.

There has since been an agreement between employers/insurers and trade unions that the rights will not be exercised. Usually such actions would be bad for industrial relations and could lead to damaging strikes, but an impecunious underwriter or a trustee in bankruptcy may not feel constrained to follow this practice. To be binding an actual agreement with consideration on both sides would be needed.

<sup>124</sup> **Twine v Bean's Express** (1946) 62 TLR 458 :

<sup>125</sup> **Conway v Wimpey** (1951) 2 KB 206

<sup>126</sup> **Rose v Plenty** (1976) 1 W.L.R. 141 :

<sup>127</sup> **Lloyd v Grace. Smith & Co** (1912) AC 716

<sup>128</sup> **Morris v Martin** (1966) 1 QB 716

<sup>129</sup> **Lister v Romford Ice & Cold Storage Co** (1957) 1 All.E.R. 125



## THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

### Principal and agent

Unless they are in the relationship of employer/employee, there is no general liability on a principal for the tortious acts of his agent. The law does however impose such liability in two specific instances.

- i) **Statements** If an agent, in carrying out his function of bringing his principal into contractual relations with a third party makes a false statement then the principal will be liable. This liability it seems will cover fraudulent statements<sup>130</sup> and also negligent statements statements.<sup>131</sup>
- ii) **Vehicles.** An owner of a motor vehicle is vicariously liable for the negligence of anyone who is driving it with his consent and on his behalf..<sup>132</sup>

### Independent Contractors.

As a general rule a person who engages an independent contractor is not liable for the torts committed by the contractor or the contractor's employees, provided he has not authorised the acts (expressly or impliedly) and he has taken reasonable care to select a competent contractor and given adequate supervision and instruction. However there are exceptions to the general rule.

In certain situations, the person who engages the contractor to carry out the work remains liable so that whilst he delegates the work to the contractor he is not legally permitted to delegate the duty and responsibility to the contractor.

- a) **Non delegable duties.** The majority of statutory duties such as for example the duties under the Factories Act 1961 are non delegable.<sup>133</sup> If a person has a statutory power to do something which would otherwise be unlawful then if he delegates the exercise of this power to a contractor he may still be liable for the acts of the contractor.<sup>134</sup>
- b) **Withdrawal of support.** In general, landowners have a right to have their land or buildings supported by those of his neighbour. If the neighbour employs an independent contractor, who, by his actions activates withdrawal of that support, the neighbour will be liable.<sup>135</sup>
- c) **Operations on the highway.** Where work is done by an independent contractor, the employer is liable if the contractor negligently causes damage to a highway user or to an occupier of premises adjoining the highway. Thus in **Hardaker v Idle D.C.**<sup>136</sup> the claimant's house was damaged by independent contractors, employed by the council, who negligently repaired a fractured gas pipe. The court held that the council was liable for the damage to the house.
- d) **Strict liability.** In situations where the law imposes strict liability irrespective of fault a person may be held responsible for the acts of his independent contractors. The most important illustration of this being the Rule in **Rylands v Fletcher** : other examples are escape of fire & damage caused by animals.
- e) **Extremely Hazardous Acts.** The person engaging an independent contractor to perform an extra-hazardous act may be liable for the contractor's acts.<sup>137</sup>
- f) **Other cases.** Where the person engaging an independent contractor remains liable for the contractor's acts include :-
  - i) the duty of a contractual bailee to safeguard his bailor's goods.
  - ii) an employer's duty to ensure the safety of his employees.
  - iii) a hospital's duty of care towards patients.

It should be noted that a person engaging a contractor is not vicariously liable for merely collateral negligence. For the person to be liable the tortious act by the independent contractor must be one he was engaged to do and not merely an act connected with what he was engaged to do. **Padbury v Holloway.**<sup>138</sup>

<sup>130</sup> **Mullens v Miller** (1882) 22 Ch.D 194

<sup>131</sup> **Gosling v Anderson** (1972) 223 E.G. 1743.

<sup>132</sup> **Morgans v Launchbury** (1973) AC 127.

<sup>133</sup> **Gray v Pullens** (1864) 5 B+S 970.

<sup>134</sup> **Darling v A.G** [1950] 2 All.E.R. 793

<sup>135</sup> **Bower v Peate** (1876) 1 QB 321.

<sup>136</sup> **Hardaker v Idle D.C.** (1896) 1 QB 335 :

<sup>137</sup> **Honeywill & Stein v Larkin** (1934) 1 KB 191 and **Matania v N.P.B.** (1936) 2 All.E.R. 633.

<sup>138</sup> **Padbury v Holloway** (1912) 28 T.L.R. 494.

## CHAPTER FOUR

### VICARIOUS LIABILITY - SUMMARY

**Definition** : The situation where one party is liable for the tortious act of another because there is a particular relationship between the parties. The best illustration of this is that of an employer who is liable for any tort committed by an employee whilst acting in the course of his employment.

**Employee** : Someone hired under a contract of service - not under a contract for services. <sup>139</sup>

#### Course of Employment

- a) **Careless Acts.**<sup>140</sup>
- b) **Mistaken Acts**<sup>141</sup>
- c) **Intentional Acts. There are two rules**
  - i) expressly forbidden acts may still be in the course of employment if the prohibition merely refers to the mode of doing the act. <sup>142</sup>
  - ii) An act may still be in the course of employment even if the employees act for their own benefit.<sup>143</sup>

#### The Rights of the employer against the employee.

**Statute : Civil Liability (Contribution Act 1978.**

**Common Law : Lister v Romford Ice.**<sup>144</sup>

#### Principal and Agent.

- i) Statements : <sup>145</sup>
- ii) Vehicles : <sup>146</sup>

#### Independent Contractors.

In general there will be no liability provided they are given adequate selection, supervision and instruction. Exception

- a) Statutory Duties - eg Factory Act 1961
- b) Withdrawal of support. <sup>147</sup>
- c) Operations on the highway.<sup>148</sup>
- d) Strict liability.
- e) Extremely hazardous Acts. <sup>149</sup>
- f) Other cases : i) Bailee's duty : ii) Safety of employees : iii) hospital patients.

#### Collateral Negligence

**Padbury v Holloway.**<sup>150</sup>

<sup>139</sup> **Ferguson v Dawson** [1976] 3 All.E.R. 817. **Collins v Herts CC** [1947] KB 598 : **Short v Henderson** [1946] 61 TLR 427 and : **Stevenson, Jordan & Harrison v Macdonald & Evans** [1952] 1 TLR 101 : **Ready Mixed Concrete v Ministry of Pensions** [1968] 1 All.E.R. 433. Denning L.J. ; **Mersey Docks & Harbour Bd v Coggins & Griffiths** [1947] AC 1 regarding borrowed employees.

<sup>140</sup> **Century Insurance v N.I.R.T.B.** [1942] AC 509 ; **Story v Ashton** (1869) LR 4QB 476

<sup>141</sup> **Bayley v Manchester Rly** (1873) LR 89 CP 148 ; **Abrahams v Deakin** (1891) 1 QB 516 ; **Polland v Parr (1927)** 1 KB 236

<sup>142</sup> **Limpus v London General Omnibus Co** (1862) H+C 526 eg driving a bus in a forbidden manner Contrast **Twine v Beans's Express** (1946) TLR 458 & **Conway v Wimpey** (1951) 2 KB 206 regarding unauthorised lifts.

<sup>143</sup> **Lloyd v Grace, Smith & Co** (1912) AC 716 and **Morris v C.W.Martin** (1966) 1 QB 716 regarding dishonest employees.

<sup>144</sup> **Lister v Romford Ice & Cold Storage** (1957) 1 All.E.R. 125

<sup>145</sup> **Mulins v Miller** (1882) 22 Ch 194 and **Gosling v Anderson** (1972) 223 EG 1743

<sup>146</sup> **Morgans v Launchbury** 1973 AC 127

<sup>147</sup> **Bower v Peate** (1876) 1 Q.B.D. 321.

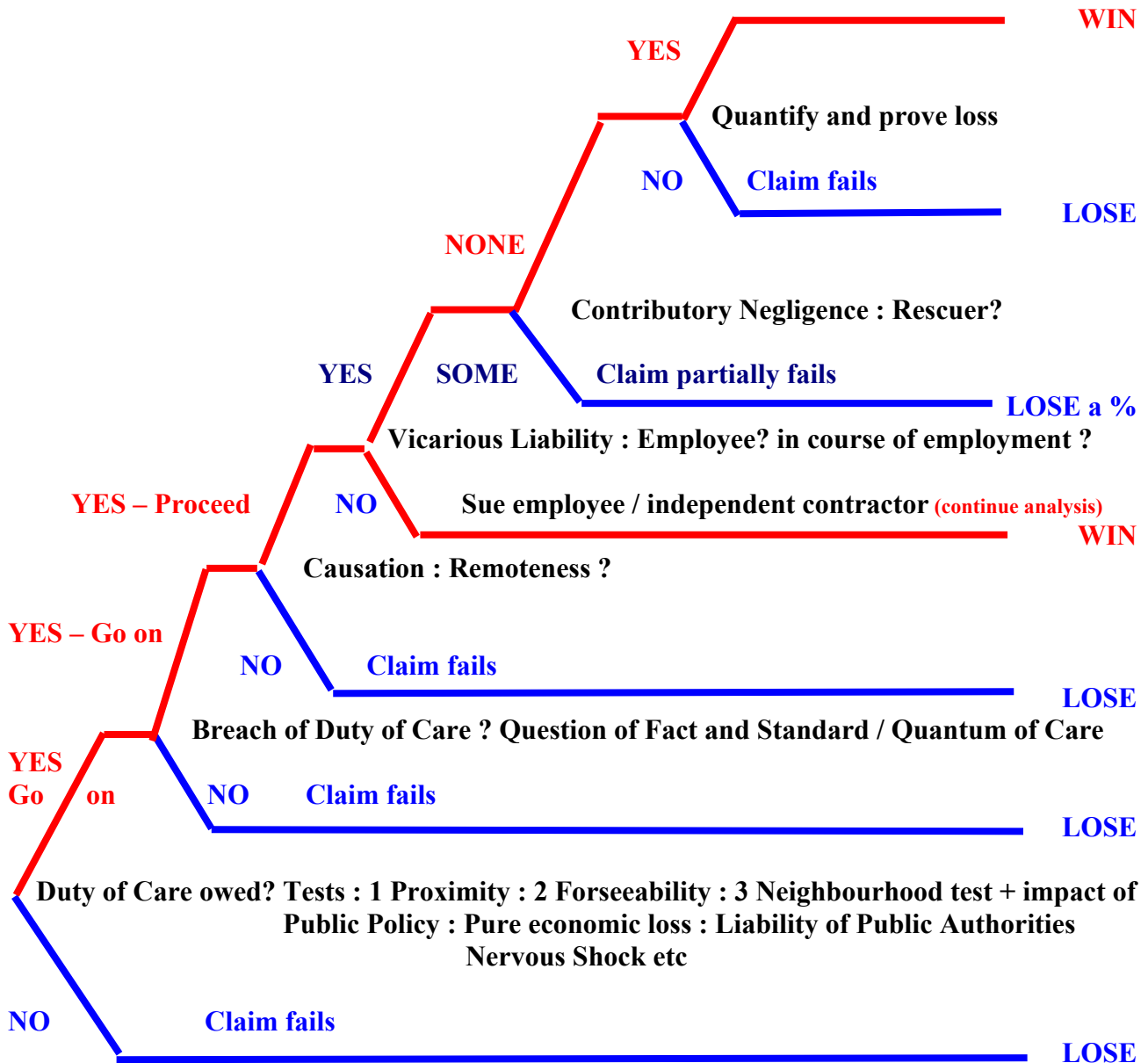
<sup>148</sup> **Hardaker v Idle District Council** (1896) 1 Q.B. 335

<sup>149</sup> **Honeywill v Larkin** (1934) 1 KB 191 - **Matania v N.P.B.** (1936) 2 All.E.R. 633

<sup>150</sup> **Padbury v Holloway & Greenwood Ltd** (1912) 28 TLR 494.

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

NEGLIGENCE DECISION TREE



Decision trees provide an ideal tool of analysis for solving problem questions in exams and planning how to argue a case in court either for claim or defence. If you analysis the layout of claims and defences and the judgements in the higher courts (*Appeal Cases reports are ideal for this*) you will find that they virtually all follow a clearly defined structure.

They also provide an analytical tool for assessing risks and the chances of success or failure.

It is better to research to a plan in a disciplined manner. This will avoid wasting time reading un-useful material and will enable you to write in a constructive manner.

Depending upon the circumstances, you may wish to insert detailed sub-questions to deal with specific issues, such as co-defendants – joint tort-feasors etc.

You can also insert relevant, major cases into your analysis.

Note that you may need to construct more than one decision tree to cover each separate claim and indeed to deal with counter-claims. Alternatively, you can combine all elements of a case on a larger wall chart.