



**TONY WEIR
ON THE CASE**



Tony Weir On The Case

© The Estate of JA Weir, 2012

The right of JA Weir to be identified as the author of this work under the Copyright, Designs and Patents Act 1988 is hereby asserted.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of the Publisher, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation.

ISBN: 978-1-84946-388-1

Published by Hart Publishing Ltd, Oxford

Tony Weir

2 April 1936 to 14 December 2011



Tony celebrating his 70th birthday, April 2006

They say that in the unchanging place,
Where all we loved is always dear,
We meet our morning face to face
And find at last our twentieth year . . .

They say (and I am glad they say)
It is so; and it may be so;
It may be just the other way,
I cannot tell. But this I know:

From quiet homes and first beginning,
Out to the undiscovered ends,
There's nothing worth the wear of winning,
But laughter and the love of friends

Hilaire Belloc, *Dedicatory Ode*, in Verses 55, 59 (1910)
quoted in Tony Weir, 'Friendships in the Law'
(1991–92) 6/7 *Tulane Civil Law Forum* 61, at 93

**TONY WEIR'S CAMBRIDGE LAW JOURNAL
CASENOTES**

Liability for Syntax

(1963) 21 Cambridge Law Journal 216

A person may, quite apart from statute, contract or fiduciary relationship, be under a duty to take care that what he says is true, even when the only damage which could result from reliance on it is pecuniary. This is new law, and the unanimous House of Lords decision of *Hedley, Byrne & Co. v. Heller & Partners Ltd.* [1963] 3 W.L.R. 101 which pronounces it greatly extends both the scope of the tort of negligence and the protection afforded to financial interests by the law of torts. The House achieved this result by using inferences from *Nocton v. Lord Ashburton* to annul the implications of *Derry v. Peek* and then drawing on old cases of assumptual liability in the general spirit of *Donoghue v. Stevenson*.

So the duty does exist; but when? The two clues are the careful formulations of the rule made by their lordships and their observations on previous cases. The duty exists on the facts of *Cann, Candler* and *Woods*, but not on those of *Le Lievre, Robinson* nor (but only by virtue of the antecedent waiver) in the present case. It is not proposed here to analyse those fact situations nor yet the different but compatible formulations of the rule made or approved in the judgments, but to note two notions which recur in them before discussing some of the effects of this very important decision.

Lord Devlin observes that this is ‘. . . not . . . a responsibility imposed by law . . . (but) . . . a responsibility that is voluntarily accepted or undertaken . . .’. This sounds very curiously in a tort suit. One does not say that a careless motorist is liable to his victim for undertaking to drive; liability is imposed because he drove carelessly. Surely, then, the man who makes careless statements is liable in negligence not because he undertook to speak, but because he spoke heedlessly. This seems clear, first because there would presumably be no liability for undertaking to speak and then keeping quiet, and secondly because the defendant may be liable for speaking even if he failed, unreasonably, to realise that his words were likely to be acted on. The ‘undertaking’, then, is nothing but the positive aspect of the absence of waiver; it is an

explanatory construction, not a fact which must be separately found.

The concept of ‘special relationship,’ on which the duty is said to depend, may yet have a great future, but it is a dangerous one in so far as it tempts one to categorisation, to say that, for example, publisher/reader might be a special relationship whereas barrister/client might not. Such categories are a tolerable means of stating the law, but a very bad way of developing it, as the fateful categories of occupier’s liability have surely shown. But if ‘special relationship’ does not refer to a nominate and recurrent social connection, what does it mean? If the fact which establishes the special relationship is of itself sufficient to establish liability, then the central term is otiose and could well be dropped. Is there such a fact?

It seems that there is. The various formulations of their lordships can, it is suggested, be reduced to this, that if the plaintiff’s reliance on the defendant’s careless statement was in ‘all the circumstances reasonable’, then he can recover. Thus it is objectively unreasonable to rely on a remark made at a cocktail party, on hearsay of any kind, on advice tendered to another, on a recommendation accompanied by a waiver of responsibility, on information which prudence would verify, or on revelations made by one who claims no expertise. Reliance will be made more reasonable by the defendant’s knowledge that it will take place, but not by the plaintiff’s credulity. If, as is submitted, all the various factors which appear in the judgments as tending to or away from liability can be related to the reasonableness of the plaintiff’s reliance, then the very difficult questions of proximity, undertaking, professional skill, service and special relationship can be avoided as separate issues, unless, indeed, they are needed as methods of creating exceptions to the new rule.

In view of the general condemnation of *Candler*, it may be unpopular to regret the decision which has overturned it; but there are grounds for serious unease. It is, of course, a policy decision, since the previous law looked in the other direction. As such, it is consistent with the economic view that investment and extension of credit should be encouraged to the extent of imposing

some of their risks on liability insurers, the social view that the quality of a service should not depend on remuneration, and the moral view that where fault can be found, there liability should be imposed. On that, nothing need be said, but the observation that any other decision would leave the law ‘defective’ and ‘illogical’ deserves some scrutiny.

Now a law journal is no place for considerations of justice, but a glance at the plaintiffs in this line of cases reveals that their claims to redress are not indisputably high. They made bad business deals, having taken only a free opinion before hazarding their wealth in the hope of profit, no part of which, had it eventuated, would they have transferred to the honest person whom they now seek to saddle with their loss. The defectiveness of a system which refuses in such a case to sever the risk of loss from the chance of profit is not obvious. It would admittedly be defective if it were made impossible for the investor to share the risk, but Woods could have consulted a stockbroker, Cann could have retained his own valuer, the plaintiffs here could have found a credit investigation agency; had they done so, the system would have afforded them a remedy, through the appropriately commercial institution of contract, against such of their advisers as were careless; the risk on the adviser would be justified by the fee. One can hope, perhaps, that in most cases it will continue to be ‘reasonable’ to rely only on a word one has bought.

A legal system is illogical if it is inconsistent in relevant matters. Now the old law of negligence could not be said to be illogical unless the distinction between pecuniary and physical damage either is *per se* irrelevant or cannot be accommodated within the technical concept of duty. But the difference between the various interests (the positive aspect of kinds of damage), between a man’s pocket and his person, his good name and his gear, is quite great enough to justify different rules; indeed even the same rule receives different applications when different interests are in question: compare *The Wagon Mound* with *Smith v. Leech Brain*. Further, it seems difficult to make the duty depend on the interest to be protected only because we use the elliptical phrase ‘duty to take reasonable care’; if the fuller form ‘duty to take reasonable care to

avoid damage' is used, then the duty can be made quite naturally to depend on the nature of the damage likely to result from its breach.

Nor could the law of damages as a whole be said to be illogical on this point, unless it is irrelevant whether a man is paid for his services or not. A peppercorn would do, of course, and it does seem silly that a peppercorn should make so much difference. But it is not a normal professional fee, and the usual service charges are a significant social reality. A free tip is relevantly distinguishable from a remunerated opinion, as social practice shows; the guest thanks the hostess, but the hostess chides the cook.

So the old law was consistent enough; what about the new law? Negligence had just reached a stage of remarkable coherence, thanks to the generalisation of the conditions of imposition of duty and the possibly superficial application of the same test of foreseeability to damage as well as fault. That unity has now gone; for even if the rule as to misstatements can eventually be generalised in terms of 'reasonableness', as submitted above, it cannot be described in terms of foreseeability. Compare the facts of the typical negligence suit – a traffic injury – with those of the present case. They could barely be more disparate, for the new law unites the weakest form of act with the weakest form of causation and the weakest form of damage. The same tort can accommodate both only at a most un-English level of abstraction; the rule of the road is not easily applied to the labyrinths of commerce.

Outside negligence, the tort of deceit is at a stroke eviscerated; for, quite apart from the requirement of 'guilty mind', the rule that the defendant must have intended reliance must have gone; now, in a suitable case, he need not even have foreseen reliance, if a reasonable man would have done so (that is, if the plaintiff's reliance was objectively reasonable). There will be a minor gain from the disappearance of the troublesome specialities hitherto attaching to vicarious liability for the misstatement of a servant; but what, one wonders, will be the position when a negligent misstatement induces others reasonably to rely on it to the plaintiff's detriment?

The decision has also gone far to destroy the distinction between breach of contract and tort (as might be expected of a tort where

responsibility can be said to be based on an undertaking). For example, that line of cases which held that the liability of the careless broker, architect, solicitor or similar professional sounds only in contract must have been silently overruled, unless, indeed, the accepted view has itself been set aside that the rules of tort, in so far as not contractually excluded, apply between contracting parties.

There are other effects in the realm of contract hitherto pure. For example, Lord Devlin would find the duty where the relationship of the parties is 'equivalent to contract'. The relationship most equivalent to contract is contract itself. Then unless this new liability is to be restricted to words (which in negligence would be very odd indeed), any unreasonable conduct of the defendant which causes loss to his contractor will be redressible in tort. Thus all breaches of contract which might with reasonable care have been avoided become torts overnight. There is a hint that might limit this effect to contracts which contemplate a service; but what is the criterion of a 'service'?

Nor is this the end. The next relationship to qualify as 'equivalent to contract' must surely be that of parties in the process of contracting. If so, then there must be a tort action whenever in the preliminaries one party either generally by unreasonable behaviour or specifically by making a statement which he ought to have known was false causes loss to the other, whether that loss takes place owing to the failure validly to contract or by means of the eventuating contract itself. Instant *culpa in contrahendo*, under the rubric of negligence; with it we have the subversion of the principle that a careless misrepresentation (hitherto called innocent) will not give rise to damages; equity has not prevailed here. One final point about the interrelationship of contract and tort requires notice. What the plaintiff here claimed was what he had lost by contract with a third party (including, incidentally, the profit he had hoped to make). He was attempting to turn his careless adviser into an unpaid and involuntary guarantor of a contractual debt; but for a collateral matter he would have succeeded. Now it has long been accepted law that negligent interference with contractual relations is not actionable; this decision makes the negligent

promotion of contractual relations into a tort, if the contract remains unfulfilled. These consequences may not take place, and it is to be hoped that they do not; but if they do, it will be very interesting to watch how a decision designed to strengthen the logic of the law can be prevented from having the opposite effect.

Negligence – duty of care – foreseeability

(1964) 22 Cambridge Law Journal 23

'No remedy, my lord, when walls are so wilful . . .'

(A Midsummer Night's Dream, 5.1.207)

A wall collapsed and injured the plaintiff, a builder employed by Z on a site belonging to A. Any expert would quickly have seen that the wall was dangerous, for it was neither tied or bonded at its ends nor supported by any retaining bank along its length. A's architect, X, had provided in his plans for the demolition of the wall by Y, the demolition contractors, but A had asked that the wall be left standing if possible, and X had agreed to this without any personal inspection of the wall or the site to confirm the opinion of Y and his inexpert foreman that this could be done. On subsequent visits to the site X had neither inspected the wall nor seen that the retaining bank had been removed by Y. A was dismissed from the action, and X, Y and Z were held liable to the plaintiff, their liability *inter se* being in the proportion of 42 to 38 to 20: *Clay v. A. J. Crump & Sons, Ltd.* [1963] 8 W.L.R. 866 (C.A.). The occupier of the site had presumably fulfilled his common duty of care by reasonably entrusting the work to experts in circumstances where there were no reasonable steps he could usefully take to ensure that the work had been properly done. The plaintiff then turned to those experts, but both the architect and the demolition contractors denied that they were under any duty to him; either *Donoghue v. Stevenson* did not apply at all, or, if it did, its very terms produced a conclusion of 'no duty' in view of the fact that, *esto* each was careless, there was a reasonable probability of intermediate inspection by the other as well as by the builders; alternatively they were not liable because,

esto they were in breach of their duty, the failure of the anticipated inspections causally insulated them from liability. ‘I am not liable,’ they said, ‘either because I could reasonably expect others to discover the danger or because they in fact did not when they should have.’

The Court of Appeal applied the broad foreseeability test of *Donoghue* so as to find both under a duty, and treated the matter of intermediate inspection as raising a question of causation which it was easy to answer in the plaintiff’s favour.

It is worth investigating the precise facts constitutive of the architect’s duty. Unlike the demolition contractors he did not, by operating directly on the face of nature, produce the dangerous situation; he did not build the wall, he did not dig away the earth which supported it; it was not from him, but from the occupier, that the suggestion came to leave the wall standing. All the architect did was to fail to forbid it and to fail to see that what was done was dangerous. But everyone in the world stood in the same negative relation to the danger. It could not be the simple failure to forbid what was done that was the source of the duty to forbid it or to remedy the situation created; if it were, the man who strolls past the drowning child would be liable too. Was it the contract between the architect and the owner which raised the former’s duty to the plaintiff? Of its own force it could not be. Then it must have been the undertaking of the work in circumstances where others would be relying on him to do that work properly. This finding of the trial judge is crucial: ‘. . . the demolition contractors and the architect were actually relied upon, and I hold that they must have known that they would be relied upon, to leave the site safe in respect to a wall like this.’ If undertaking and reliance are the key concepts, then we are not so far from *Hedley Byrne*; nor should we be; for with omissions as with words, foreseeability of damage alone is not enough.

The court spent rather more time on the question whether the probability of a subsequent inspection by Z should go to the existence of X’s duty or to the adequacy of his causation. In 1932 Lord Atkin indubitably made the absence of intermediate inspection a condition of the existence of the duty; that was perfectly

reasonable at a time when there was no contribution between tortfeasors liable in respect of the same damage. In these cases damage is only suffered if the anticipated inspection by Z has not materialised or has been unsuccessful, in cases, then, where Z, closer to the injury, has also been careless. If X and Z could not be made to share the loss, then there was good reason to make Z solely liable, and this could most conveniently be done by holding that X was under no duty at all. But now that contribution and third-party procedure are accepted, there is no point in absolving *ab initio* those whose earlier shortcomings have contributed to the injury complained of; and so we move from duty to the greater flexibility of the other co-ordinate, causation. Here Z's inaction is very unlikely to qualify as a *novus actus interveniens*; for it is consistent to say that although a subsequent inspection is probable, it is foreseeable that it will not take place or not be satisfactory.

What then remains of the duty concept in negligence? It is still needed for words and omissions, where liability may not exist though damage be foreseeable. It may still have a place where a typical injury is sustained by an undeserving person – a burglar climbing over this wall. It will be needed now to exclude the collateral claims of those who suffer financial loss from the damage done to the property of another. And, despite the parallel shift from the duty of *Bourhill* to the causation of *The Wagon Mound*, it may still be useful in cases of nervous shock.

The very detailed apportionment made by the judge and upheld by the Court of Appeal shows clearly the close interrelation (or identity?) of causation and blameworthiness: ‘. . . The architect should take the greater share of the blame,’ said Ormerod L.J., and Upjohn L.J. balanced that with, ‘The principal cause . . . was . . . the failure of the architect . . .’. It may seem slightly surprising, however, that the fault of the plaintiff's employer should rank so low; the workman's safety must have been more immediately in the mind of his employer than in that of the architect; and it is a nice (and unconsidered) question whether the public liability insurers of the demolition contractors should have had to bear a larger part of the loss than the employer's-liability insurers of the builders.

**Chaos or cosmos? *Rookes, Stratford*
and the economic torts**

(1964) 22 Cambridge Law Journal 225

Few of the decisions which attract so much public comment are as interesting to the informed lawyer as *Rookes v. Barnard* [1964] 2 W.L.R. 269, and *Stratford (J.T.) & Sons, Ltd. v. Lindley* [1964] 3 W.L.R. 541. B.O.A.C. lawfully dismissed Rookes in submission to his colleagues' threats that they would otherwise break their promise not to strike; the Stratford Co. complained when its customers could not return the barges they had hired because their employees had abandoned them in obedience to the defendant's instructions. For the full facts and their precise decisions, these two judgments for the plaintiff must be carefully read; this note is devoted to their implications. These are said to bring industrial law into chaos; be that as it may, they do undoubtedly suggest a principle of order for the private law of economic torts.

It was high time this house was put in order. The current textbooks list many different economic torts with separate specifications, wholly lacking in principle, and therefore difficult and unprofitable to master. If all that *Rookes* achieved was the christening of a new nutshell tort of 'intimidation,' then legal science would have no reason to be very grateful; but it may be seen to have authorised an explanatory and creative principle of great importance in this difficult area. The principle is that it is tortious intentionally to damage another by means of an act which the actor was not at liberty to commit. Not only does this principle explain and synthesise the torts of deceit, malicious falsehood, inducing breach of contract and intimidation, but it can be beneficially extended over the whole range of its logical application, if only certain fallacies are removed. The reasoning (but not the decision) of *Stratford* must be criticised for reverting to legal categories which *Rookes* had superseded.

The physical torts have long had their minimum principle (which also was obscured by nominate wrongs until revealed in *Wilkinson v. Downton* [1897] 2 Q.B. 57) that it is tortious intentionally to injure another without justification. Of course it is; social

life must not be a jungle. But economic life is bound to be a race, and a principle as broad as that cannot be applied to it; if it were, the winner in the race, who satisfies its requirements (he intends to worst the *proxime accessit*), could not keep the prize without being put to his defence. Even in a ratrace, however, shortcuts are forbidden. The law could (and should) have said that there must be 'fair play', but it has chosen instead the formalistic principle that intentional damage need be repaired only if it is inflicted by impermissible means, that is, by methods reprobated by the law of crime, tort and contract.

The problem of policy is difficult, so there are methodological difficulties too; they relate to the concepts of the plaintiff's damage and the defendant's act. In the economic torts, the damage (decreased profits, loss of employment) seems elusive because, unlike physical damage (a dent in a car) it is intangible and prospective. The plaintiff is complaining, not because he no longer has what he had, but because he has not got what he expected. There is, in reality, no difference here, since even physical damage is significant only because an expectation has been frustrated (the hope of keeping one's car undented). The judges, however, are clearly happier where the damage can be seen as a lesion to a present thing, and have consequently displayed a naive tendency to *reify* – to turn non-things into things – for example, to treat a cheque as six inches of paper subject to the law of conversion, and to talk of malicious falsehood as slander of *goods*. They have done the same thing in the tort of inducing breach of contract, for an expectation of future benefit begins to look rather like a present thing if there is a present contractual right to it. The judges could accordingly decide *Lumley v. Gye* (1853) 2 E. & B. 216 111 years before *Rookes v. Barnard*. But the later case clearly shows that it is the plaintiff's factual expectation rather than his contractual right which counts, and this is so even if *Stratford* has missed the point.

Rookes and *Stratford* both have the structure that the defendant gets X to hurt the plaintiff. This is not surprising. One can bloody one's neighbour's nose unaided, but to ruin him usually requires assistance; the defendant in the economic torts is commonly Iago, not Jehu.

But our classifications of wrongfulness deal in pairs only; two is legal company; the third man seems *de trop*. Hence the nineteenth-century ‘proximity’ fallacy, that a victim can look to only one defendant, and an actor to only one plaintiff. We seemed to have escaped it, but it is the same fallacy, in the guise of ‘privity,’ which has reappeared among the objections to *Rookes*. We shall discuss it later.

Let us now apply the principle to the case where there is a third party, X. The defendant may or may not operate through the mind of the intermediary. If he wants to get X to hurt the plaintiff, the only methods in fact by which he can do it are by promising something good if X does hurt the plaintiff, by promising something bad if he doesn’t (threat), and by misleading him. The law cannot object when the defendant uses the first method of persuasion, and it has chosen not to object when he raises the pressure by threatening to do something which he is at liberty to do; but if X is knowingly led to commit an actionable wrong against the plaintiff, then the defendant is liable for leading him to do it. If X is induced to commit a tort, the defendant is liable as a joint tortfeasor; if X is led to break his contract, the defendant is liable under *Lumley v. Gye*. The essence is the same; the defendant has, with the intention of hurting the plaintiff, persuaded X to do something which he knows (and X knows?) X is not at liberty to do. Here the wrongfulness lies between X and the plaintiff.

But the wrongfulness may equally well occur between the defendant and X. Suppose the defendant tells lies to X in order to lure him into hurting the plaintiff – for example, by a mala fide announcement that the plaintiff has gone out of business. It is positive law that the plaintiff recovers, and it is called ‘malicious falsehood’. Suppose the defendant says he will commit a tort or a crime against X unless X hurts the plaintiff; the plaintiff may recover if X does hurt him. It is the same (as *Rookes* decides) where the defendant says he will break his contract with X and for the same reason; the defendant is doing something which he knows he is not at liberty to do, and doing it with the intention of hurting the plaintiff. This time it is called ‘intimidation.’

But ‘malicious falsehood’ and ‘intimidation’ are the same tort of intentionally hurting another by impermissible means. We do not need two names, and especially not those two names. A threat has nothing a lie does not have. In particular, ‘threat’ must not be permitted to become a legal category, because as a category it is at once too broad and too narrow. It is too broad because ‘threat’ includes a threat to do an act which the threatener is at liberty to commit, and such a threat has no legal effect at all. It is too narrow because it does not include ‘lie’ which is legally equivalent.

The principle produces the same result when the defendant in his design of hurting the plaintiff operates against X rather than through him. Suppose that instead of threatening to commit a tort, the defendant actually commits one – Gye kidnaps the prima donna to prevent her expected appearance at Lumley’s theatre; Lumley will recover, whether or not he has a contract with the singer (there would on the facts be no breach of it anyway), for the reason that the defendant has intentionally damaged him by impermissible means. The same should be true where the defendant actually commits a breach of contract with X in order to hurt the plaintiff – the doctor’s chauffeur refuses to drive him to his enemy’s bedside. The chauffeur has done with the intention of hurting the patient an act which he knew he was not entitled to do.

Not only, then, is there nothing special about a threat, but the pretty paradox ‘how can it be a tort to threaten to break your contract when it is not a tort to break it?’ is not only confused by ellipse but is actually founded on a false premise. It *is* a tort intentionally to hurt the plaintiff by breaking your contract with X, just as it is a tort to get X to hurt him by threatening to break your contract with X. They are both torts, and they are both the same tort, the tort of intentionally damaging another by an impermissible act.

There is only one difference between the case where X is used as a cat’s-paw and the case where he is not; the difference relates solely to ease of proof. The plaintiff always has to show that the defendant was aiming at him. This may be difficult if the defendant has silently struck at X; but if he has written to X, saying, ‘sack the plaintiff or else’, the plaintiff can lead the letter in evidence and his task is done. This goes not to principle but to proof.

It must now be explained why none of this infringes the principle of privity of contract. Contracts are almost necessarily involved in economic torts, because people arrange their affairs that way; but a contract has many facets, and one must carefully distinguish those which are relevant to the economic torts from those which are not.

One effect of a contract is to establish a legal relationship between the parties to it; this is 'privity', and a person who is not a party to the contract cannot claim by reason of the contract to be in a legal relationship with a person who is a party to it. In tort, the equivalent of 'privity' is 'proximity', and proximity is established, as it was in both *Rookes* and *Stratford*, when it is shown that the defendant was aiming at the plaintiff. A second effect of contract is to give the creditor a right; this contractual right (like the right to the stipulated penalties in *Dunlop v. Selfridge* [1915] A.C. 847) is good against the debtor alone. In tort it is the plaintiff's expectations which are relevant; factual expectations of benefit often, but not always, go hand in hand with contractual rights (*Rookes* expected, but had no right to, continued employment; *Stratford* expected, and had a right to, the return of its barges). A third effect of contract is to sanction the promise of the debtor; the debtor, and only he, is liable if nothing more is proved than that the promise was not fulfilled. In tort, what is relevant is whether the defendant or his tool was at liberty to do the act complained of; in this regard, a contractual promise decreases the promisor's liberty of action in just the same way as the law of tort and crime and statute decrease it. Accordingly, in tort, contracts must be looked at from the passive side, from the side of the debtor, in order to discover, not what he must do (for only the creditor can rely on that), but what he is not at liberty to do; the active side of contract is relevant only as evidence of the plaintiff's expectations. A contract, in other words, does not extend the plaintiff's general rights, but does limit the general liberty of the debtor, whether he be X or the defendant. And this does not infringe the principle of privity of contract.

Two principal objections have been raised against including 'breach of contract' within the category of 'wrongful means'. One

is that it is a ‘comparatively accidental issue’ whether breaches of contract are involved in the defendant’s plan. Torts and crimes are antisocial acts stigmatised by a purposive judge or legislator, but breaches of contract may be quite trivial acts so characterised by the contingencies of private bargaining or drafting. The objection is sound, but the answer is not to emasculate the principle but to allow a defence. A civil suit is not at an end when the plaintiff has established a case, so we need not look for a principle which will rigorously exclude every unmeritorious plaintiff *ab initio*. As against the unmeritorious plaintiff, however, who creeps in on the coat-tails of those unjustly hurt, the defendant must be allowed to show that the plaintiff deserved what he got, that his own behaviour was justified.

The defence of justification exists in the intentional physical torts – it is unlawful to knock a man out, but the anaesthetist, the lifeguard and the victim of an assault can justify doing so. *A fortiori*, the defence must be allowed where the plaintiff’s interest is his pocket, not his life, and this is so even if the principle for establishing the plaintiff’s case is narrower. If the judges can measure whether a person has used unreasonable force against his assailant, they can surely measure whether a person has used excessively wrongful means against the plaintiff. One must, however, take care of the question-begging phrase, which enjoys authority, that, ‘you cannot justify a wrongful act’. That would kill the defence right away. The defendant may perfectly well be able to justify hurting the plaintiff by means of a wrongful act against X (the white lie, the trivial breach of contract).

Secondly, one may feel uneasy at classing breaches of contract with crimes and torts because breaches of contract may be morally innocent. Only acts can be morally negative, but there may be a breach of contract without any act at all. The hirers in *Stratford*, for example, were in breach of contract with the plaintiffs although they could do nothing at all to prevent the non-return of the barges. This objection has no real substance, for in these torts, as in all torts, one is concerned with acts, and not with situations. The question is whether the defendant or his creature has done an *act* which he was not at liberty to do; thus only deliberate and intentional breaches of contract come under consideration.

This is the crux in *Stratford*. The defendants persuaded X deliberately to break his contract of employment with Y, with the intended result that Y was unavoidably put in breach of his contract of hire with the plaintiff. Two contracts, two breaches, both intended; only one act – the abandonment of the barges by the hirer’s employees. It is important to choose the correct contract, both in order to save the principle of *Rookes*, and because the inducement of breaches of contracts of employment enjoys special privileges under the 1906 Act; the judges chose to found liability on the breach of the contract of hire, and it is submitted that this is wrong.

The plaintiff was complaining of loss arising when his barges were not returned. Why were the barges not returned? Certainly not because of the breach of the contract of hire; that was not a cause of their non-return, but one of its legal aspects. The reason they were not returned was because the hirer’s employees abandoned them. Was this wrongful, an act which they were not at liberty to do? Yes, it was a deliberate breach of contract, as the defendant, who told them to do it, perfectly well knew.

We can try another method of approach. Would the plaintiffs have had their action if they had had no contractual right to have their barges returned, but only a factual expectation that they would be returned? The answer must surely be ‘yes’, and this is suggested in the judgment of Lord Reid. The breach of the contract of hire is not essential. More than this, it is not even relevant, for the defendants would surely not have been liable for immobilising the barges could they have done so without either themselves doing an act they were not at liberty to do or persuading others to do such an act. The tort, in short, is not ‘inducing breach of contract’ but ‘persuading persons to break their contract’ and the contract need not be one to which the plaintiff is a party. In fact, it is not a separate tort at all, but a simple application of the principle in *Rookes*. *Stratford*’s decision would have been more soundly based if *Rookes* had been less sharply distinguished.

The principle should also apply where there is no third party at all. Suppose the defendant infringes a prohibitive statute with the intention and result of hurting the plaintiff. On proof of those

facts, the plaintiff should recover, quite apart from any question whether the statute imposed a ‘duty’ on the defendant *vis-à-vis* the plaintiff. Of course, as everyone knows, a ‘duty’ must always be found if the plaintiff cannot establish proximity by any other means, but where he can show that the defendant was aiming at him, the “duty” device has no function at all. *David v. Abdul Cader* [1963] 1 W.L.R. 834, is right for English law. Or suppose that the defendant commits a crime with the intention of hurting the plaintiff. Proximity would be established by that intention, wrongfulness by the law. Here is a method of deciding properly such cases as *Hargreaves v. Bretherton* [1959] 1 Q.B. 45, and *Chapman v. Honig* [1963] 2 Q.B. 502. Finally, suppose the defendant deliberately breaks his contract with the plaintiff in order to harm him. This must be a tort; it is still a grave heresy to say so, although only last year *Hedley, Byrne* less satisfactorily metamorphosed all *negligent* breaches of contracts into torts. In fact, the only significant consequence of our construction is to turn the contract-breaker and the inducer of the breach into joint tortfeasors, and this is a net benefit, since it permits contribution between them. It does not help one contractor suing another, since the plaintiff cannot get any more money by assuming the extra burden of proving intention and thus establishing the tort. This is because even in contract the deliberateness of the defendant’s breach, qualified as ‘fundamental,’ will certainly exclude any contractual exemption clause, and will arguably exclude even the implied limitation clause represented by *Hadley v. Baxendale*. It is true that in contract the plaintiff cannot claim punitive damages, but now he cannot claim them in tort either; for *Rookes v. Barnard* not only extended the range of the intentional torts but also limited their consequences.

It had hitherto been supposed that punitive damages could be granted in any intentional tort; their award is now limited to two cases – where a government servant has abused his position, and where the defendant would retain a net benefit from his tort after compensating the plaintiff.

Three objections can be interposed against this aspect of the decision. First, it was on the reasoning of a single Lord of Appeal, who spoke without having the written views of the Court of

Appeal, that this characteristic common-law institution, still very vital in the United States, was put to sleep. Secondly, the decision follows the unhappy fashion of withdrawing questions of damages from the jury. Thirdly, the law is not now clear; for it is said that aggravated damages may still be awarded in outrageous torts, and this must be based on the view either that the plaintiff in non-outrageous torts is not fully compensated, which is not the law, or that outrageous torts always cause more damage, which is not the fact.

However, the central message of *Rookes*, that it is a tort intentionally to hurt another by means of an impermissible act, is an extremely important and beneficial contribution to the development of the law. Since *Stratford* suggests that the message may not always be perfectly understood, it may be wiser not to malign *Rookes* by cavilling at the sting in its tail.

Tort, contract and bailment

(1965) 23 Cambridge Law Journal 186

A French jurist has foretold that the law of tort will die of hypertrophy; it will blow itself up, like Aesop's frog, in the self-important attempt to make everyone liable for everything. *Lee Cooper Ltd. v. C. H. Jeakins & Sons Ltd.* [1965] 8 W.L.R. 753 gives modest but significant support to this prophecy; it shows how Lord Atkin's snail can become an Unruly Horse, Progress lead to Disaster, and Tort, eventually, to Tax.

The plaintiff had ordered textiles from the United States, and asked B., forwarding agents, to have them delivered to a customer in Eire; this B. agreed to do, on terms limiting his liability. B. asked the defendant road-hauliers to collect the goods from the docks, and this the defendant agreed to do, also on terms limiting his liability. The defendant's driver picked up the goods at the docks and set off for B.'s warehouse, six miles away. *En route* he stopped at a café for fifty minutes, leaving the truck unlocked. Truck and goods were stolen, and half the goods were never recovered. When sued for their value, the defendant said that he owed the

plaintiff no duty, apart from contract, to look after the goods, and that, if there were a contract, it must be either on the terms agreed between himself and B., or on those agreed between B. and the plaintiff. Marshall J. found that the forwarding agents contracted as principals, and that therefore there was no contract between plaintiff and defendant; even if there had been, he said further, the defendant could not rely on any limitation clause, because the carelessness of his driver in the circumstances of the case involved him in a fundamental breach of contract. The report, which appears here a year late, is limited to the question whether the defendant owed the plaintiff any duty apart from contract; the learned judge held that he did.

The previous common law was that in a case of *theft* occasioned by carelessness, the possessor was liable to his bailor (owner or not), and that in a case of *damage* to goods, the person who carelessly caused it (possessor or not) was liable to their owner (or possessor). Here a possessor was made liable to the owner in respect of the theft of goods received from someone else. This may appear to be only a trivial extension of the law, and students may perhaps be surprised that the point had not been decided earlier; but if it had been decided earlier, it would certainly have been decided the other way. Why?

The action is in tort. In tort the plaintiff must show damage to himself, fault in the defendant, and the causal link between the two. In a case like the present, the plaintiff is complaining not of damage to goods – they may still be in perfect condition – but of financial loss, which is much weaker; loss of goods does not equal damage to them. Secondly, the plaintiff is charging the defendant with failing to do something, namely, look after the goods; normally the law of tort does not impose positive duties like that; if you want someone to do something for you, you pay him, and it becomes a matter of contract. Finally, the causation is very weak, because a felon's wilful act intervened after the carelessness of the defendant's servant. In past years, judges would willingly have treated these distinctions as relevant in order to absolve this defendant from liability to this plaintiff. Impractical conceptualism, or good sense buttressed by elegance?

The question, of course, is who should bear the loss arising through theft. The thief must do so, obviously, if he can be found; but he probably has no money, and will earn none in gaol. Owners of valuable goods know this, and insure themselves against such loss with a person whose business it is to accept such risks for a price which seems to him adequate. The owner can thus easily shift the risk of loss from theft by means of the insurance contract, and in practice he does so, unless he is a fool. Not insuring goods is like not wrapping them up. When a theft occurs, the insurer pays the owner. This seems a very satisfactory result; the person who has been paid to bear the loss does bear it. But the matter is not allowed to rest there, as it ought. The law says that the owner can still sue anyone the law says is liable, though he must reimburse the insurer; what normally happens is that the insurer sneaks into court disguised as the owner, matching the demerit of his claim with the dishonesty of the procedure. Why should the carrier not say to this two-faced plaintiff: 'In so far as you are the owner, you have suffered no loss because you have been indemnified by your insurer; in so far as you are the insurer, you have admittedly suffered a loss, but it proceeded from your own contract – I was paid to carry, and I tried to; you were paid to bear the loss, and you are trying not to?' The old law was that the carrier could not say that to his bailor; that is a pity, but it was decided before insurance became very common. The new law holds that he cannot say it to anyone; and that is even more of a pity, because the carrier's argument makes very good sense, and there is now no justification for rejecting it.

But, one might say, the carrier can insure against his liability; he can and does, the law being what it is. The case thus becomes a contest between property insurer and liability insurer. Even so, the loss should always stay with the property insurer, for the following reason. The premium charged for insurance depends on two factors (apart from administrative expenses and the profit element), namely, the likelihood that loss will occur and the extent of the loss if it does occur. Which of our two insurers knows these factors, or can more easily discover them? The property insurer. It is obviously much easier to tell how many thefts have occurred than

to guess how many of them have been facilitated by someone's carelessness; and the owner knows the value of the goods, while the carrier does not. On both counts, therefore, property insurance makes sense, and liability insurance, in this field, makes none.

Thus, where damage to insured property or its theft is in question, there should never be any recovery against a merely negligent defendant. This ease extends the previous liability, and is *pro tanto* regrettable.

But it is worse than that. Given that the carrier must insure, the only way he can do so sensibly is to insert in the contract of carriage a clause limiting his liability to a certain amount, and to insure against liability up to that amount. This is a good enough arrangement, and there is nothing in the least devious about it. The fundamental breach cases have already gone much too far in invalidating such clauses as between the parties to a bailment, but this case goes much, much further. It holds that, *even in the absence of a fundamental breach*, such a clause is utterly useless where the goods do not belong to the person who contracted for them to be carried. (*Memo*: always get a friend to take your shirts to the laundry.)

It follows that, if the carrier wants to avoid having his business plans upset by unpredictable claims in respect of his servants' negligence (and he cannot hope to avoid that in this world), he must now insure himself against liability in an unlimited amount. This extra insurance cover will increase the cost of carriage; liability insurance premiums will go up. Of course, the owner must continue to insure as well, since the goods may be stolen without any fault in the carrier, and, in any case, he will want his money quickly, without the law's delays. In the result, then, the same risk (the goods will only be stolen once) will be insured against twice. Ultimately the consumer pays both premiums. He pays them, it may be, to the same insurance company; more likely, to insurance companies in the same group, who show how much *they* think of the law by agreeing among themselves not to have recourse to it, except as against a competitor beyond the pale of the consortium.

These are the commercial implications of the decision. The social implications are interesting, too. Look at the facts. The owner parts with the goods and says that he will not claim their full value if

they are lost or stolen; the carrier accepts them and says he will not pay their value in such an event. The foreseen occurs. Yet the carrier has to pay the full value to the owner, and this sum very probably goes to an insurer who said he would bear the loss in the first place. No need to go to the theatre for the absurd. And the dangerously absurd. In this case one flick of Leviathan's tail smashes the sensible arrangements of several business men who knew very well what they were about. In legal terms, tort swallows contract; tort is the state, contract the citizen.

But it is not only a case of tort swallowing contract; it is also negligence dining out on the other torts, eating them up, and waxing dangerously fat. The standard remedy of a person who has been deprived of goods is conversion; and detinue is the standard remedy against a person who fails to return goods. It is under these rubrics that one finds the decisions which marked the limits of permissible recovery in such circumstances. Yet there is not a mention of them in the report, not the merest hint that they are relevant. One supposes, but one can hardly hope, that counsel did not cite them. Conversion requires a positive act in the defendant; there was none here. Detinue does allow an action against a person who has carelessly lost goods, but only to a plaintiff who has either delivered the goods to the defendant or demanded them from him. The plaintiff here had done neither. In both conversion and detinue it is an essential requirement that the plaintiff have a right to the immediate possession of the goods. The plaintiff here may not have been so qualified, by reason of the rights of the forwarding agent. Now these rules are not medieval ghosts come back to terrify the timid by clanking chains. They are rules with a sensible purpose and rather a good effect. Their best effect was to prevent a person suing in tort when the appropriate remedy (that is, the one which gave the right result) was in contract.

These rules make it perfectly clear that, in the opinion of past judges, a tort action should not be permitted against a lawful possessor in the case where the plaintiff had parted with the goods under a contract which continued to subsist. Why not? Because otherwise the plaintiff would be able to turn the flank of his own contract, an unmeritorious proceeding at best; and that is

precisely what our case proudly invites plaintiffs to do. Marshall J. says that its facts had not been considered before. Perhaps they had not as a matter of negligence; but as a matter of law they had. Surely *something* was left of the law after Lord Atkin spoke. *Vixere fortes ante Agamemnona Multi . . .*

The law is a delicate mechanism; one part is geared to another. Do violence in one place and you can expect trouble elsewhere. This decision does violence, and consequently raises a host of technical problems. Readers should perhaps be invited to submit answers to them, and to support their conclusions with legal reasoning of the kind that used to be the glory of our law reports.

(i) Who is entitled to the goods now? (ii) Who has the burden of proof of negligence *vel non*? (As between bailor and bailee, it is normally the bailee who must exculpate himself, but when there is an exception clause the bailor must prove a fundamental breach.) (iii) Was the liability in this case vicarious or personal to the defendant? (iv) Using the fashionable methods of extending tort liability, discover the ‘reliance’ by the plaintiff on the ‘undertaking’ of the defendant which was constituted by his taking possession of the goods. (v) Could the donee in Eire have sued ?

A suitable prize would be some shares in an insurance company.

It is not as if these absurdities and difficulties could not have been avoided. No authority compelled the learned puisne judge to decide as he did; no authority suggested that he ought to; many indications (and in particular the cases where courts had refused to imply into a contract a term that the defendant should guard the goods) suggested that he ought not. Yet, basing himself on *Donoghue v. Stevenson*, the learned judge explicitly extended the law. The two cases could barely be further apart on their facts or on their merits. The pursuer in 1932 would have had no action against anyone had her claim in reparation been denied. Here the plaintiff could, it is submitted, have required the forwarding agent to assign his claim against the defendant; there would have been no objection to such an assignment, and the claim would have been limited by the contract between the forwarding agent and the defendant; so it should be. There is, it is submitted, no justification whatever, and the judge really offered none, for giving a

direct action in tort to this plaintiff. What the judge said is this: 'The courts should not hesitate to produce a new duty where a set of facts hitherto unconsidered makes it right so to do.' That is perfectly obvious. But it should also be obvious, for it is not less important, that the courts should hesitate, and long, before concluding that it is right to do so in a case where their predecessors would without hesitation have concluded that it was not.

Discrimination in private law
(1966) 24 Cambridge Law Journal 165

*'Boys and girls, go out and play,
And gather ye nose-bags while ye may.'*

What is Big Brother to do when Kid Sister runs up in tears, crying that the boys in the street won't let her join their ball-game? Should he tell her to go knit, since that's the way the world is, or should he try to integrate the game by force? The Court of Appeal in *Nagle v. Feilden* [1966] 2 W.L.R. 1027 was prepared to adopt the latter, extremely dangerous, course, if (1) the game is being played for stakes, and (2) there is no other game going on in the area.

For many years the plaintiff had successfully been training horses for racing on the flat. All such racing was controlled by the Jockey Club through its Stewards; no horse could run at all unless its trainer had their licence. The Stewards had refused to grant the plaintiff a licence inscribed with her own name, just because, according to the plaintiff, she was a woman; her horses had still been able to run, however, because the Stewards had issued licences to her male nominees. Nevertheless she brought an action against the Stewards, claiming a declaration that their practice of discrimination was void [*sic*], an injunction restraining them from pursuing it, an injunction ordering them to grant her a licence or an injunction ordering them to consider a future application on its merits, and damages. Master Clayton ordered that the statement of claim be struck out. John Stevenson J. dismissed the plaintiff's appeal. On a further appeal the Court of Appeal ordered that the

action be tried. It has now been settled, as the defendants have granted the licence, and the plaintiff has accepted it as being granted in their absolute discretion (*The Times*, July 29, 1966, p. 9).

There was no contract between the parties. The plaintiff had offered to buy a licence and the Stewards had refused to sell her one. They could not be said to have offered even to give conscientious consideration to applications for licences, because no one, least of all the plaintiff, could have supposed them to be making any such offer. Instantly, two classes of case became irrelevant – those where the plaintiff is complaining of dismissal, and those involving covenants in restraint of trade. The dismissal cases were irrelevant on the facts as well as the law, because the plaintiff here was complaining, not of being thrown out, but of being kept out, which is a very different thing. The plaintiff, if one can take an analogy, was not in the position of a deserted wife, or even of a jilted fiancée, but in that of a girl whose boy won't propose. The law recognises the factual distinctions between these cases by means of the concepts of status, contract, and 'no duty'; the distinctions remain, however much we may be discontented with the concepts. The plaintiff fell clearly into the 'no duty' class. She had not been given what she wanted, but she had not been promised anything, and she was not deprived of anything she had. The restraint cases were equally irrelevant. A promise in restraint of trade is simply void; one is not liable at common law either for breaking it or for abiding by it. Yet plaintiff's counsel tried to invoke the restraint cases. He asked that the defendants' practice be declared 'void'. No court, even in these days, could make such a meaningless declaration, but Lord Denning M.R. was prepared to say that the practice was evidence of an unwritten rule, and that the unwritten rule might be declared void. So it might. But it does not follow that voluntarily to adhere to it constitutes a wrong, even if such adherence causes damage. The authority of the House of Lords is to the contrary (the *Mogul* case [1892] A.C. 25).

In any case, the plaintiff had probably not suffered any damage; she had trained her horses and they had run. This made her claim very weak as a matter of tort. She was complaining of nothing more than an affront. She was 'aggrieved', according to Lord

Denning, and Danckwerts L.J. described her situation as ‘mortifying’. The descriptions may be apt, though they are generous, but they are not sufficient to ground a complaint, even against a defendant whose behaviour is ‘nonsensical’. In general, a plaintiff who has suffered no damage cannot sue a defendant even if the defendant has committed a crime (public nuisance). Exceptionally, indeed, one can have a remedy in damages though one has not suffered; Lord Holt C.J. decided as much in the case where the votes of the burgesses of Aylesbury for the successful candidate were improperly rejected (*Ashby v. White* (1703) 2 Ld.Raym. 938; 92 E.R. 126). That decision, however, turned on the constitutional right of the plaintiffs to have their votes accepted. There is no fundamental right to a licence to train horses. Nor were the defendants under any statutory duty to grant one; so one cannot use *David v. Abdul Cader* [1963] 1 W.L.R. 834, where the Judicial Committee decided that in Ceylon a plaintiff who had suffered damage might sue a public officer who had maliciously refused to consider his application for a licence to run a cinema.

The question of damage aside, the case, seen as one of tort, suggests the wrong of refusing to contract. Such a tort exists. By the ‘custom of the realm’ (a phrase which appeared prominently and inappropriately in the statement of claim) the common inn-keeper and the common carrier were liable for damage caused by capriciously refusing guests and goods. This was a necessary requirement in a kingdom of mud patrolled by brigands. But it is one thing to facilitate commerce on the highways; it is quite another to require that the private race-courses of England be open to the horses of all, and the-common law does not so require. The general freedom to refuse to contract has been infringed by recent statutes. Under the Race Relations Act, 1965, a person conducting a place of public resort commits an offence (but is not liable in damages) if he refuses facilities to another on the grounds of his colour, race or nationality (but not sex); and the Resale Prices Act, 1964, makes a supplier of goods liable in damages if he discontinues supplies to a retailer who has failed to observe the recommended resale price. Now the freedom *not* to contract is basic and essential; without it, freedom to contract is meaningless.

(Until the Suicide Act, 1961, life was not a right but a duty.) Freedom to contract has been sorely struck at in the past few years; but even so a Lord Justice of Appeal has said: 'A person who has a right under a contract . . . is entitled to exercise it . . . for a good reason or a bad reason or no reason at all' (*Chapman v. Honig* [1968] 2 Q.B. 502, 520, *per* Pearson L.J.). That was a case of a grave social scandal, and the courts refused redress. The present case fell laughably short of being a scandal, yet the Court of Appeal infringed the much more basic liberty to decline to contract for a bad reason. If this liberty is to be infringed, statute must do it.

Contract and tort determine whether an award of damages is competent; other relief may be available outside their scope. Thus, if one wants to compel a person to perform his duty, e.g., to consider applications for licences, one thinks of the prerogative order of mandamus. Suggestively, this order lies only against public officials. The Stewards were not public; they were powerful, but that is not the same thing. A court may grant injunctions, too. Prohibitory injunctions have issued to restrain a person who threatens to damage the property of another, even though it is doubtful whether the damage, if done, would be compensable in tort. Here, of course, there was no damage. But the plaintiff was not content with demanding a prohibitory injunction to stop the defendants from discriminating against her; she demanded in addition a mandatory injunction ordering them to give her what she wanted, and the Court of Appeal was prepared to consider her claim. The prospect is appalling.

The mandatory injunction, with its attendant sanction of imprisonment for contempt (not to mention its convertibility into damages), is the thunderbolt in the judicial quiver. There are few authorities for its use – and that means that the light is amber, not green. If the defendant is under a precise statutory duty, like the company which must satisfy the request of a shareholder for the addresses of the others, then he may be ordered to fulfil it. If the defendant has made a precise contractual promise, he may be ordered to implement that. If the defendant has committed a positive wrong, for which damages would be no compensation to the plaintiff, the defendant may be told to undo it. But there was not a

Title to sue in negligence for property damage

vestige of authority (and there should be none now) for the issuance of a mandatory injunction against private persons occupying no position known to statute, ordering them to confer some novel benefit on a person with whom they had no relationship and whom they had not wronged in any way known to the law of tort.

Why should the Stewards grant a licence? What is the source of their duty even to consider applications? There is none, unless *pouvoir oblige* is become a principle of law, or we subscribe to the view, 'You can, therefore you must.' Are absolute discretions banished from the land, and is every private decision now to be subject to the scrutiny of Her Majesty's judges? To what doors, then, may they not mutter their new-found spell, in order to enter and check that we inside are acting as pleases them?

The truth is that every time a judge issues a mandatory injunction, he risks exchanging his wig for a helmet. Here the Court of Appeal considered saying to the Stewards: 'Open up, in the name of the law.' That is the policeman's line. If a judge uses it, he is supposed to give the name of the law which justifies his decision. That the Court of Appeal did not do, since they could not. Their judgments make us reflect on the role of the judge. He is *arbiter legis*, not *arbiter morum*. It is the law in which he is qualified. It is not his function to charge into sectors hitherto private on the horse of public policy. That unruly mount has thrown the Court of Appeal in the present case in a manner which should unsettle us all. It won't, of course.

Title to sue in negligence for property damage

(1968) 26 Cambridge Law Journal 18

Giant American cockroaches made hay, so to speak, of copra on board the defendant's ship from the Far East to Hamburg. The holds of the ship should have been fumigated before loading; fumigation would have deterred the bugs; so it was clear that the defendant's carelessness damaged the coconut meat. It was not so clear, however, that the defendant was liable to the plaintiff, who

did not own the cargo at the time but who had paid the full price for the part of it which he bought afloat under a c.i.f. contract. Roskill J. in a twenty-page extempore judgment held that the defendant was not liable to the plaintiff: *Margarine Union v. Cambay Prince Steamship Co.* [1967] 3 W.L.R. 1569. This note will respectfully approve that decision and will also consider the further question whether the defendant was liable to anyone.

A person who carelessly damages goods bailed to him commonly commits both a breach of contract and a tort. The only person who may sue for the breach of contract is the other party to the contract; where the bailment is for carriage, that person is normally the consignor or, if the consignor is acting as his agent, the consignee. The obvious person to sue for the tort is the owner; after all, the goods are his. If the contractor is the owner there are no problems; if he is not, there are, since there are two causes of action in respect of one piece of property. Not only may there be two plaintiffs; there may also be two defendants. The shipowner who is doing the actual carrying may not be party to the contract of carriage with the consignor; he may be performing, under charterparty, the contract between the charterer and the consignor. The shipowner will then be liable only in tort, except to the charterer. Now since carriage is frequently used to take goods from seller to buyer and since ownership in goods passes when the parties to the contract of sale intend, it may well be that ownership passes when the goods are in transit. If so, the buyer will be able to sue the carrier in tort for damage done to the goods after he becomes owner, but for damage done before that time he cannot sue, unless the consignor acted as his agent. However, where the carriage is by sea, delivery of a bill of lading by the seller to the buyer not only transfers the ownership of the goods by mercantile custom but also, by the Act of 1855, transfers to the buyer all rights and liabilities arising under the contract evidenced by the bill of lading. Normally, therefore, the purchaser of goods afloat has a right of action against the carrier for damage done to them before or after he buys them (and one may suppose that that is desirable or the merchants would not have started the practice, the courts would not have endorsed it and the legislature would not have reinforced it).

Title to sue in negligence for property damage

In the present case, however, the plaintiff was not in this happy position, for two reasons. The first was that he did not demand the bill of lading to which his contract of sale entitled him – probably because he was buying only a part of a large cargo of copra and the existing bills of lading were in the larger amount; instead he accepted delivery orders – instructions from the owner of the copra to the ship to release to the plaintiff the goods he had bought. Such a delivery order does not transfer the ownership of the goods to which it refers; much less does it make the buyer a party to any contract of carriage. But secondly, even the transfer of a bill of lading would not have aided the plaintiff in his suit against the shipowner, since the bill of lading had been signed by someone else, namely a company which had sub-chartered the ship from the defendant's charterers. The plaintiff could not sue the defendant in contract since the contract of carriage was between two other people.

Now the plaintiff was a purchaser complaining that the goods were not what they should have been. Why did he not sue the vendor for breach of warranty of quality? One does not know for sure, but it was more or less agreed that the risk of damage to the goods passed from the vendor when the purchaser accepted the delivery notes, although title did not pass until much later when the goods were actually delivered to him in port. Thus between acceptance of the delivery orders and delivery of the goods the copra was owned by the vendor but at the risk of the purchaser.

The main question was whether the purchaser could sue the shipowner in tort. The defendant's carelessness had damaged the cargo in exactly the way one would expect. The person hurt by this was not the owner, who collected the full price, but the plaintiff who paid it. There was nothing in the least unforeseeable about this. The difficulty was that in all the books there was no case where a person who carelessly damaged property was held liable to anyone other than its then owner or possessor, and the plaintiff was neither owner nor possessor at the relevant time.

The leading case is *Simpson v. Thompson* (1877) 3 App. Cas. 279. There the House of Lords conclusively held that the insurer who has had to pay because the insured property is damaged has no

independent right to sue the person who carelessly damaged it. That decision was really fatal to the plaintiff in the present case, for his position was very like that of the insurer – being at risk without owning. Just as the insurer has to pay *if* the goods are damaged, the buyer had to pay *though* they were damaged; the buyer suffered, as the insurer does, because of an existing contract passing the risk from the owner; both lose money because the defendant had carelessly made their good bargain bad. The only difference between the insurer and the plaintiff here was that the plaintiff was about to become owner of the goods. But in that respect he was like the unsuccessful cattle auctioneer in *Weller & Co. v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569 who would have made a profit out of selling other people's cattle had not the defendant's careless handling of virus caused them to be immobilised or slaughtered.

Since the only respect in which the plaintiff differed from the insurer was a quality which he shared with the auctioneer, it is difficult to see how the plaintiff could win. Yet because of our language his case looked rather plausible. Given that the plaintiff can show, as he could, that the shipowner was careless and that that carelessness caused foreseeable property damage, the only answer that can be made to his negligence suit is that the defendant owed him no duty to take care. Roskill J. said just that. Yet there is something very odd in saying that where only one person in the whole world stands to lose by the shipowner's carelessness, the ship-owner owes him no duty to take care. It would be much easier to deal with the matter in terms of title to sue rather than of duty to take care. That is the technique we use in other property torts – trespass and conversion. We would not naturally say that a trespasser is in breach of duty only towards the possessor or that the duty not to convert is owed only to those who have possession or can call for it. Right and duty may be perfect correlatives in the alpine analysis of Hohfeld but the choice to use one term rather than the other tends to lead to differences of conclusion. So perhaps the best way to put it is this, that the plaintiff had no title to sue in respect of the property damage and that the defendant owed him no duty to take care to avoid causing him merely financial harm.

The decision that the plaintiff could not sue in tort is plainly right. The carrier must not be subjected to suit by all those who foreseeably suffer loss, and in particular the extent of his liability must not be increased beyond the value of the goods or such lower limit as is fixed in any contract of carriage he may be performing. Since there is some fear that the nasty principle of *Midland Silicones*, that a non-contractor can never rely on an exception or limitation clause contained in a contract to which the plaintiff is a party, may be extended so as to hold that a contractor cannot rely on such a clause as against a stranger (the *Morris v. C. W. Martin & Sons* situation [1966] 1 Q.B. 716), it is better to deny the stranger any right to sue at all. But if the result of denying the plaintiff's suit in tort is that the shipowner does not have to pay anyone for the damage done to the copra by his carelessness, the result is odd. Whether such a result follows depends on whether the vendor could have sued the shipowner in respect of damage done to goods belonging to him but at the risk of another. This question was not raised in the instant case, but it must be answered in order to justify, in reason if not in authority, the decision arrived at.

The immediate temptation is to say that the vendor, though owner of the goods at the relevant time, could not recover anything from the shipowner because he had suffered no loss; the purchaser had paid him the full price. Authority can be found in *Chargeurs Reunis v. English and American Shipping Co.* (1921) 9 Ll.L.R. 90, where the Court of Appeal, in a very thin judgment by Bankes L.J., held that a shipowner who has continued to receive hire from a charterer cannot claim anything for loss of use of his ship from the person who carelessly damaged it. If the owner who has been paid by a *hirer* cannot recover from a tortfeasor, it would seem that the owner who has been paid by a *purchaser* cannot recover either. Yet the owner who has been paid by an *insurer* clearly can do so (*Yates v. White* (1838) 4 Bing. N.C. 283), and it seems odd to say that the owner who has been paid by his insurer can still recover from the tortfeasor (holding the excess in trust for the insurer, since the insured must not profit from the insurance), but that an owner who has been paid by his purchaser cannot do so, especially as the purchaser at risk and the insurer are so alike that the denial of a

personal claim to the insurer entails a similar denial to the purchaser. It might, nevertheless, be the law that losses do not cease to be losses when covered by insurance, but do cease to be items of recoverable damage if obligatorily made good from other sources; recent cases on damages in personal injury claims suggest this (see Jolowicz [1967] C.L.J. 163).

Yet it is not uniformly true in the property torts that a person can never recover more than his loss. Anyone with title to sue in conversion can recover the full value of the goods, irrespective of his loss (except from another person with an interest in the goods). This has been extended from conversion to negligence by the Court of Appeal, with the result that a bailee can recover the full value of the goods carelessly destroyed by the defendant, even although he himself suffered no loss (*The Winkfield* [1902] P. 42). The owner, however, cannot always sue in conversion or trespass; if he is barred from immediate possession, his only remedy is negligence and the measure of his recovery is not the value of the goods but his loss. Here again is an oddity – that in a negligence suit the owner cannot recover more than his loss but the bailee can. The excess recovered by the bailee is held on trust for the owner or bailor, just as the insured owner who recovers from the tortfeasor holds the excess in trust for the insurer. In each case the person with title to sue recovers more than his loss and holds the excess for the person at risk, even if that person has no title to sue.

If one agrees with the result of the instant case that no one may sue in respect of damage to property except the owner or possessor, and if one also feels that the careless shipowner ought not to go free, then one must allow the vendor to recover the diminution in value of the goods from the shipowner and the purchaser to compel him to do so. The first result can be procured by saying that a loss made good by receipt of the price remains as much a loss as a loss made good by the receipt of insurance proceeds, or alternatively by saying that the owner, like the bailee, can recover from a tortfeasor the cost of replacing or repairing the goods, even though he himself has not borne it. The second result can be achieved by implying a term in the contract of sale that the

vendor will assign any rights he has with respect to the goods (tort claims may be assigned to the transferee of the property they relate to) or by making the same statement in equitable language, that the vendor is trustee for the purchaser of his right of action against the tortfeasor. Equity can do what it did in *Beswick v. Beswick* [1967] 3 W.L.R. 932, namely amalgamate title to sue and interest in suit.

This may sound like the musings of a Law Commissioner, but in fact there is some authority for it. In *R. & W. Paul Ltd. v. National Steamship Co.* (1937) 43 Com.Cas. 68 the vendor transferred a bill of lading relating to goods afloat but was to remain liable for defects and shortfall. Thus between the transfer of the document and delivery of the goods the cargo was owned by the purchaser and at the risk of the vendor – the exact converse of our case. After being indemnified by the vendor for defects in the goods caused by the carelessness of the carrier, the purchaser sued the carrier and Goddard J. allowed him to recover substantial damages, it being agreed that he would hold them in trust for the vendor. If this is correct – and it surely is – the only scruple one might have felt at the principal decision disappears, and it remains only to say that Roskill J. deserves an accolade for the virtuosity of his extempore delivery.

Police power to seize suspicious goods

(1968) 26 Cambridge Law Journal 193

A search warrant has to be specifically justified or it gives no authority to enter premises or take away goods. So held Lord Camden. A Good Thing. The policeman may, however, seize any suspicious goods he finds. So holds our Court of Appeal. A Bad Thing. Lord Denning M.R. explains that there are more wicked people about now; more innocent people, consequently, must suffer without redress. Diplock L.J. refuses to follow the liberal reasoning of *Entick v. Carrington* on the ground that our police forces are better today; might they not become better still if they had to pay for their mistakes? Salmon L.J. said that the warrant could

have been drawn so as to protect the police; his decision means that they needn't bother: *Chic Fashions (West Wales) Ltd. v. Jones* [1968] 2 W.L.R. 201.

It was a simple (everyday?) case of cool gear being taken for hot. The police obtained a warrant to search the plaintiff's shop for clothes stolen from X. Not a garment did they find which they believed to have been stolen from X, but they found some which they believed, reasonably enough, to have been stolen from Y and Z, so they took them away instead. In fact the clothes had not been stolen at all; the plaintiffs had bought them according to a well established practice of the rag trade.

The case, then, is about stolen goods. Stolen goods are of interest because they have two quite separate legal characteristics. First, they hardly ever belong to the person in possession of them; secondly, they are evidence of a crime. Accordingly, there are twin grounds of justification for the seizure of stolen goods – the purpose of restitution and the purpose of prosecution. It was for this reason, no doubt, that the common law allowed entry on premises to search for stolen goods only and not chattels evidencing other crimes. But in the present case the Court of Appeal seems to justify the seizure on the ground of prosecution only. If so, it is the law today that a policeman who enters private premises pursuant to a search warrant (or otherwise lawfully) may take away any thing (or paper) which looks like evidence of a crime committed by the occupier. This is bad enough if the occupier is guilty (and even things illegally obtained may be used to prove his guilt); it is absolutely intolerable if he is not guilty. Parliament would not, one hopes, have passed such a law; the Court of Appeal, one feels, should not have made it.

Great though the constitutional issues are, the plaintiff in raising them was not simply doing his Hampden. He had been hurt (since seizures stop sales) and he wanted compensation. Now the Briton who is injured by an agent of the state may sue the agent as if he were a private person. Dicey thought this a good thing, and so it was, because under the old law of trespass a person who seized goods had to justify himself, and it was no justification to say that it was all a mistake anyone might have made. But tort law

has altered since then. It has altered, and altered for the worse, largely through the exertions of Lord Denning and Diplock L.J. The great new text is that just as one is responsible for the damage one unreasonably causes so one is not responsible for the damage one reasonably causes – a simple text, like the mottoes done in poker work over tiny fireplaces or graven on seaside mementoes. And it is no more suitable than they for the resolution of complex matters. Under this formulation Slug’s Law can easily become Scroggs’ Law, as it did in the present case; for there are two ways of causing harm reasonably: one may think that one’s act is not harmful or one may know that one’s act is harmful but think it lawful. To allow the first mistake to operate as an excuse is tolerable; to allow the second is not. The second mistake will almost always be made by officials of one kind or another (since the state generally reserves to its own the right to hurt people, and only those with some right to hurt people can reasonably mistake its extent); and the Rule of Law, which is supposed to curb the zeal of officials, is valuable precisely because it stops them doing whatever they may deem reasonable at any particular juncture, like confiscating tendentious pamphlets or seizing modish goods offered at bargain prices. Even a private person should have to pay for harm he meant to cause if he was wrong in thinking himself entitled to cause it; that the state should pay in such circumstances seems self-evident. In the present case no individual was going to have to pay any damages awarded, since the plaintiff very decently sued the chief constable rather than the policemen, and damages awarded against him are by statute to be paid from the police fund, i.e., Parliament has said that the community should compensate the victim. Here the police were wrong, admittedly; they did damage, obviously; but the Court of Appeal will forgive us our trespasses (if we are policemen) and Chic Fashions (West Wales) Ltd. they will send empty away.

Not just empty, either, and not just away to a superior tribunal. For the Court of Appeal awarded costs against the plaintiff and refused him leave to appeal. The award of costs was harsh, since the chief constable had a right to be indemnified by the police fund anyway. And surely an intermediate court which decides

such an important matter in a way which it must know to be questionable should not refuse leave to appeal. Diplock L.J. emphasised, for some reason, that he was laying down the law for today; tomorrow, we must hope, the House of Lords (who have granted leave to appeal) will give us back the better law of yesterday and the day before.

***Nec tamen consumebatur . . . – frustration
and limitation clauses***

(1970) 28 Cambridge Law Journal 189

You don't need hard cases to make bad laws these days. There was nothing hard about *Harbutt's 'Plasticine' Ltd. v. Wayne Tank & Pump Co. Ltd.* [1970] 1 Q.B. 447, but the judgment of the Court of Appeal is a major addition to the bad law it has recently produced.

The defendants were paid to instal in the plaintiff's factory a novel system for piping hot stearine from storage tanks to mixing machines. The material they chose for the pipes was unsuitable, and their supervision of the installation was careless. A fire foreseeably resulted and destroyed the plaintiff's factory. The defendants were thus liable in principle not only for breach of warranty but also for negligence leading to property damage. They had, however, inserted in the contract a clause which, on one reading, provided that they were not to pay more than the contract price towards the harm caused even by such a negligent breach of contract. The Court of Appeal held that the defendants were liable in full, because their breach of contract was fundamental and had frustrated the contract which contained the limitation clause.

During the last fifteen years or so the Court of Appeal had elaborated the doctrine that if a person was in 'fundamental breach of contract' he could not rely on an exemption or limitation clause otherwise apt to protect him. In *Suisse Atlantique* [1967] 1 A.C. 361 the House of Lords rejected this doctrine and held that it was simply a question of construction whether the clause was designed to cover the events which ensued, although if the breach was such as to entitle the innocent party to refuse further performance and he

did so, different considerations might apply. What those considerations might be was not relevant in *Suisse Atlantique* where the ship-owner had elected not to sail away from the dilatory charterer.

In *Harbutt* it was not clear that the breach was sufficient to justify the plaintiffs in refusing the work; the defect could have been put right. Even if the plaintiffs might have been justified in rejecting the work, it was clear that they had not done so. Therefore at least one of the conditions required by *Suisse Atlantique* for the non-application of a limitation clause was unfulfilled. In order to justify his decision, Lord Denning M.R. resorted to the doctrine of frustration, and said that if the breach frustrates the contract, the contract has gone; if the 'contract has gone, then so has the limitation clause; therefore the defendant has nothing to rely on to limit his liability.

The cases principally adduced by Lord Denning were *Hong Kong Fir* [1962] 2 Q.B. 26, on the question when a person can withhold performance on the ground of the other party's breach, and *Taylor v. Caldwell* (1863) 3 B. & S. 826; 122 E.R. 309, on the question when a person is not liable for not doing as he said he would. We shall take the latter case first. Caldwell had promised to let Taylor have the use of his music hall, but could not do so because the hall accidentally burnt down before the due date; Caldwell was held not liable. Now if a person is held not liable for not doing as he seemed to say he would, the obvious ground for so holding is that he really did not break his promise at all. Caldwell didn't promise that the hall wouldn't burn down; he really promised only to take care of the hall meanwhile and let Taylor have it on the appointed day if it was then still standing. To put it another way, Taylor was not to have the building come Hell or High Water; he was to have it absent fire and flood. Caldwell's express promise was implicitly conditional. Note that it was his *promise* that was conditional, not the whole *contract*. Naturally Taylor's promise to pay the fee was also conditional; it was conditioned on at least the hall's being provided, perhaps also on its being useful for a specified or understood purpose (like a coronation). So when the hall accidentally burnt down, this had an effect on the *promises* of both parties. But the *contract* need not somehow get consumed in the flames. It can

survive, quite uncharred, in its own metaphysical world, and continue thence to regulate the rights and liabilities of the parties of which it is the source. Such, at any rate, would be a reasonable explanation – not too little and not too much. Instead of that, we have in English law the doctrine that *force majeure* makes the whole contract vanish like a Fifoot and Cheshire cat, with possibly an arbitration clause (but apparently not a limitation clause) remaining like its grin. This doctrine is the result of a characteristically sloppy English ellipse. It arises in this way. We know that Caldwell is not to pay damages; we know also that Taylor is not to pay the fee. There are different reasons for these two consequences – for the first, that Caldwell has not broken any promise; for the second, that Taylor did not get what he promised to pay for. But it seems economical to give a single reason for both, and we can do so if we say that the contract, the only relevant source of the parties' rights and liabilities, has ceased to exist. So we say it. Unfortunately, our saying it leads to other results. Bad results. One result, for example, is that Caldwell need not tell Taylor that the hall has burnt down so as to save Taylor the expense of bringing his troupe from London – for where can the duty to telephone come from if the contract has gone? Another result is *Harbutt*.

This unhappy doctrine was not necessary. Ask a German lawyer about supervening impossibility and he will tell you about the garage-man who cannot return your car on Tuesday as promised, because of a weekend fire in the garage. Common lawyers, who treat the typical as the exceptional, are rather surprised at this example, since we analyse the bailment contract differently. We do not say that the bailee's promise is absolute subject to frustration and that he is not freed unless the contract has disappeared. We admit that the bailee's duty is only to take care of the goods. He is not liable for not returning them if he can show that it is no fault of his that they are not capable of being returned. If the goods are accidentally destroyed, the promise is not broken. But neither is the contract destroyed. Of course not. So that, if in the bailment contract there is an exemption clause which is apt to cover the behaviour of the bailee, we do not say – we cannot say – we have not said – (but will we say?) – that the destruction of the

goods had destroyed the contract and that therefore the exemption clause has gone with the goods. But if the bailment contract survives the goods, why is the contract for the hiring of a hall reduced to ashes? Is the difference so great between promising a man the use of a thing which is yours and promising him the possession of a thing which is his?

The present doctrine of frustration being unsatisfactory, it is a pity that Lord Denning has invoked it in connection with limitation clauses. But its invocation is not only regrettable with regard to limitation clauses; it is wrong with regard to frustration. If the limitation clause, properly construed, covers the events which occur, then the doctrine of frustration *cannot* apply, since frustration occurs only when the parties have not regulated the legal consequences of the catastrophe. In *Harbutt* the defendant, with the plaintiff's agreement, had said, in effect: 'If the factory burns down as a result of my breach of contract, I shall pay you no more than £2,300.' The doctrine of frustration is not applicable, even if it were relevant, because the parties have provided for the consequences of the fire.

Of course it is consistent for Lord Denning, if not for the law, to ignore this. For him *égalité* comes first and *liberté* comes last; so he is bound to be at odds with much of the English law of contract which prefers freedom to fairness, letting the parties be the judge of that. Two manifestations of this preference of the common law were the rule that courts would not frustrate a contract if the parties had made their own provision and the rule, lately reasserted, that a limitation clause would be given its intended effect notwithstanding a fundamental breach. Lord Denning has trumped both rules, and it must have been a double gratification for him to subvert *Suisse Atlantique* by perverting the doctrine of frustration. Masterly indeed.

There is another reason why the doctrine of frustration does not apply to the facts of *Harbutt*, namely, that the fire was caused not by accident but by the defendant's breach. No one, after all, where the defendant was at fault, would invoke the Law Reform (Frustrated Contracts) Act 1943. To explain why we have started to talk of frustration in such a case we must turn to *Hong Kong Fir*,

where Diplock L.J. held that breach by one party did not release the other from his duty to perform unless the consequences of the breach were such as to frustrate the contract. Now it may not have been wise of Diplock L.J. so to hold, but it was certainly unfortunate that he used the word *frustrate*. His doing so made it possible for Lord Denning to say that because a disaster is necessary to release a contractor, a disaster is sufficient to discharge a limitation clause. That is to reach an absurd result for a bad reason. The result is absurd because the very function of limitation clauses, valid in principle, is to guard against liability for disasters. The reason is bad because there is no sensible connection between the right to withhold performance and the right to claim unlimited damages. There is a real difference between the right to stop doing what you said you would (perform) and the right to make the defendant do what he said he wouldn't (pay full damages). The right to discontinue benefits must be able to exist without the right to demand indemnities, and *vice versa*.

How did these different things come to seem connected? Through ellipsis, once again, or the desire to be economical in explanation, even at the cost of suppressing differences which ought to be maintained and therefore have to be stated. When a breach of contract has occurred, there are three separate questions which may fall to be answered, although in a particular case only one is normally in issue. (1) May the innocent party claim full damages? (2) Must he soldier on regardless? (3) May he have his money back? Now these three questions are different. Not just because they sound different, but because different consequences in fact are in issue for both parties. It is extremely unlikely that they can properly be answered in the same terms, and not probable that the right answer to all three questions on the same set of facts will be the same. Nevertheless, just as in the law of negligence the courts are striving for a simplicity of formulation which is bound to delude and likely to mislead, so here they are eager for a uniformity of terminology which is factitious and dangerous. Especially since they actually use the terms and tests of the doctrine of frustration which answers, inelegantly enough, question (4) When is non-performance not a breach at all?

The interfusion, to put it no higher, is nearly complete. *Hong Kong* says that you can resile only if the other party's breach has frustrated the contract. *Suisse Atlantique* says that you can avoid a limitation clause only if you have resiled. *Harbutt* now says that you can avoid a limitation clause if the breach frustrated the contract. The last seems but a tiny step, but it is a disastrous leap. It is a leap because *Suisse Atlantique* did not say that if you resiled from a contract you could claim unlimited damages for harm *already* caused to your existing interests; it said that you could recover full loss of profits by reason of the other party's non-performance *thereafter*. That distinction seems to have been elided. The leap is disastrous, because it has now become impossible to exclude strict liability, that is, liability without fault. If, when a contract is frustrated, the limitation clause goes, then it must go every time a contract is frustrated. Even minor breaches can frustrate contracts in the new sense, since contracts were frustrated in the old sense without any breach at all. Accordingly, if the fire in *Harbutt* had happened only because the apparently suitable piping installed by the defendant had an undiscoverable defect attributable to the reputable manufacturer from whom the defendant had bought it, the contract would be frustrated just the same, and the limitation clause must have gone just the same. So the result of the new doctrine is to go further, in one direction, than the old law of fundamental breach which was supposed to have been abolished, and we now have a general restriction on freedom of contract which no Western legal system has achieved or sought to achieve. The policy grounds for so limiting sensible business arrangements are not obvious or obviously sound; the legal reasoning which leads to it is confused and fallacious; and only three years ago only the House of Lords said it should not be done.

**Local authority vs critical ratepayer –
a suit in defamation**

(1972) 30 Cambridge Law Journal 238

It's a free country, is it? A man says that his local council is behaving in a dictatorial and undemocratic manner. He is tried for it,

fined £32,000 and threatened with imprisonment if he ever says such a thing again. It couldn't happen? It did happen, in England, in 1972. Or very nearly. *Bognor Regis U.D.C. v. Champion* [1972] 2 W.L.R. 983 was a private suit in defamation, so it wasn't a prosecution (or there would have been a jury), and it wasn't a fine exactly (or Mr. Champion, who could not give security for costs, would have been able to appeal), and instead of being convicted he will just be bankrupted for damages of £2,000 and costs of perhaps £30,000. Terms and technicalities apart, however, the matter is as stated. In effect it is a gross invasion of civil liberties and in method it is a serious reproach to English law. It may be instructive to consider first the legal result and secondly the factual background; this will be at somewhat greater length than is usual in a casenote, for there is not often such a bad case.

The narrow legal question – the only point on which the long judgment of Browne J. is reported – was whether a local council can sue 'in defamation.' A Divisional Court of the Queen's Bench in 1891 held that it could not, unless the libel reflected on its property (*Manchester Corpn. v. Williams* [1891] 1 Q.B. 94) but three years later the Court of Appeal held that a trading company could sue without proving any loss (*South Hetton Coal Co. v. North-Eastern News Association* [1894] 1 Q.B. 133) and the same has since been held of trade unions (*Willis v. Brooks* [1947] 1 All E.R. 191). Browne J. took the later decisions to have eclipsed the earlier one. This is unfortunate because the Court of Appeal was wrong to hold that a trading company could sue 'in defamation'; it was also unnecessary because local authorities are significantly different from trading companies. We shall take these points in order.

But we must first be clear what we are asking when we put the question 'Can this body sue "in defamation"?' We are not asking whether that body can obtain compensation for any *loss* it can prove to have resulted from a *false* statement *improperly* made by the defendant. Certainly it may, under the rubric of malicious falsehood or injurious falsehood or whatever one chooses to call it. We are asking a very different question, namely whether an *institution* should enjoy the benefit of all the legal rules offered to the *human being* as a protection for his esteem in his own eyes and others.

What are these rules? They are very exceptional in the law of tort. The individual need not prove that any loss resulted from the libellous publication; nor need he prove that it was false; all he has to prove is that the defendant criticised him. The defendant, who is liable not only for intentional implications but also for unforeseen and unforeseeable inferences, cannot defend on the ground of 'reasonable belief' or 'good faith'; for statements of fact he has the complete defence of 'truth' and the normally rebuttable defence of 'privilege'; for statements of opinion he has the further defence of 'fair comment', if the matter is one of public interest, provided that he can prove that the underlying facts were as he implied or as others might infer. If not right, one is rude at one's peril. Only flattery is safe. *Nil nisi bonum*, except *de mortuis*.

These rules make for a quite remarkable restriction of the freedom to speak and write. How did it come about, and is it now justifiable? In the eighteenth century there were still men of honour, proud of their self-esteem; they would call out the man who spoke out; since a suit was better than a duel, a strong remedy had to be provided, and was. To nineteenth century man, more afraid of public embarrassment than private shame, what others thought was more important than what he felt; indeed, the former dominated the latter; respectability, the supreme Victorian bourgeois good, had to be well protected, and was. Now that lace curtains have yielded to open-plan, respectability must give way to self-expression; nor will the absence of ready law-suits do any harm now, for the cut and thrust will be that of public debate, to the general good. So many of the old rules must go.

There is still some justification, however, for the rule that the human plaintiff need not prove any harm. If the statement is defamatory, he will feel bad and others will think badly of him; the first need not be proved and the second cannot be. Indeed, this duality of harm can be presumed precisely because it is required: you get damages only if the defendant has been rude *about you to* someone else. Thus it was not wholly absurd, though it was certainly generous, of the jury to give £15,000 as compensation to Captain Broome, though his pension was not diminished

nor his expenditures increased as a result of his being libelled ([1972] 1 All E.R. 801).

On the other hand, it *was* wholly absurd for the jury to give £100,000 to Rubber Improvements Ltd., of whom (or, rather, of which – astonishing how anthropomorphic about companies lawyers are) the *Daily Mail* had said, when the Fraud Squad was probing that firm, ‘Fraud Squad Probes Firm’ ([1964] A.C. 234). It was absurd because Rubber Improvements Ltd. had no feelings which might have been hurt and no social relations which might have been impaired. The two kinds of presumptive harm could not be presumed because they could not have occurred. The only kind of harm that Rubber Improvements Ltd. could have suffered was harm to its commercial relations, because that was all it had; harm of that sort, had it occurred, could be proved, and therefore should be proved. But Rubber Improvements Ltd. offered no proof of loss, because Lord Esher M.R. in the *South Hetton Coal Co.* case had said ‘the law of libel is one and the same as to all plaintiffs.’ This is quite wrong, because the reasons for which we absolve the human plaintiff from the usual requirement of proving loss cannot and do not apply to the inhuman plaintiff. So an inhuman plaintiff should not be permitted to sue for words unless it establishes that they caused it harm. Furthermore, if a trading company should not be given damages unless it proves loss, *a fortiori* it should not benefit from the other, less supportable special rules of the tort of defamation, and for the same reason: it does not have those interests of the individual which alone might justify the severe restriction of free speech which those rules procure. To prefer the interest in maintaining the corporate image to the right of the citizen to say what he reasonably believes to be true is a grim perversion of values. Accordingly, the decision in the *South Hetton Coal Co.* case should be reversed, although the libel bar will be displeased at losing their lovable corporate clients like Broadway Approvals Ltd. ([1965] 1 W.L.R. 805), the more so since human plaintiffs cannot obtain legal aid for their expensive services.

Browne J. was of course bound by the decision of the Court of Appeal that a trading company could sue ‘in defamation’ just like a human being. But if he could have found a significant difference

between the Bognor Regis Urban District Council and trading companies or trade unions, he could well have followed the decision of the Divisional Court which held that Manchester Corporation could not sue. Now it is true that the Bognor Regis Urban District Council is a non-trading corporation, but that is not its leading characteristic; its leading characteristic is that it is a unit of government. In other words, it is not just that the Bognor Regis Urban District Council doesn't make private profits; it is that the Bognor Regis Urban District Council performs public functions. To put it another way, this was not a mere tort suit but a constitutional law case. We have seen one false step already – the analogy between the trading company and the individual; now we see another – the analogy between the company and the government.

In other systems of law a fundamental distinction is drawn between public law and private law. One part deals with the relations between government and citizen while the other deals with the relations between citizens, be they real or artificial. The distinction is justified because quite different considerations determine what those respective relations should be. English law, despite Lord Bacon, does not like that distinction. Indeed, the Crown Proceedings Act of 1947 expressly assimilates the liability of the Crown to that of a private person (s. 2 (1)). Now this is quite all right so far as it goes, or, more accurately, provided that it does not go too far. The theory that Jack in office is the same as Jack out of office is splendid in so far as it means that Jack in office should have no special *immunities*. But in so far as it suggests that Jack in office should have no special *liabilities* and in so far as it suggests that Jack in office should have all the *rights* he would have outside it, the theory is pernicious. Our case, indeed, goes very much further, and holds that *the office itself* has all the rights Jack would have outside it: *quod absurdum est*. Government can properly be put under special liabilities because much is expected of it: government should behave exceptionally well, and be an example to the flock &c. Nor need governments have all the rights of individuals; there are two reasons for this: the first is that governments are not individuals, and the second is that there are some things they, as governments, should have to put up with. One of the things a

government should have to put up with is criticism. The only criticism which government may properly repress is criticism which is harmful to the state or to public order, and the only proper method for such repression is the criminal law. The exclusive use of the criminal law in such cases is safer for the citizen and the citizenry because its use attracts attention by showing that the relations of state and citizen are in issue, and its processes contain, for that very reason, many safeguards not found in private law. For example, had Mr. Campion been openly prosecuted instead of being sued in such a sneaky manner, he would have had a jury, legal aid and the possibility of appeal – furthermore, he would not have been fined £32,000 and, who knows, the Attorney-General might have intervened to stop the whole nonsense. In brief, the government should not be allowed to bring a private suit ‘in defamation’.

But, one may object, the plaintiff here was not the government; the government is in London, not in Bognor Regis. Here we run up against yet another peculiarity of English legal thinking. Exactly as, to our minds, tribunals are not courts just because their members wear no wig, so local councils are not government because they lack the pomp. But if they lack the pomp of government they have its powers – legislation (by-laws), taxation (rates) and eminent domain (compulsory purchase); functionally speaking, the Bognor Regis Urban District Council is government, though doubtless of a very low order. Would one allow a defamation suit brought by the Department of the Environment? If not, and one hopes not, then a local authority must not be permitted to sue. The next question is why this local authority did.

In the last eighty years many local authorities must have been subjected to unjustifiable criticism, yet no suit in defamation has been brought by a local authority since Manchester tried and failed in 1891. Was the Bognor Regis Urban District Council unusually sensitive or was Mr. Campion quite extraordinarily bothersome? Both, it appears.

If public exposure makes for sensitivity, the Bognor Regis Urban District Council might well be sensitive. On no less than ninety days between 1964 and 1967 did its affairs figure in *The Times*; twice they were the subject of leading comment. There was

comment in the courts too. Salmon L.J., at first instance, in holding that one of the Council's compulsory purchase orders was invalid as being ultra vires, said: 'It was an abuse of power and a flagrant invasion of private rights which the council has tried to cover up by means which do them no credit. I confess that I find it most disturbing that a public authority can behave in such a fashion.' Danckwerts L.J., on unsuccessful appeal, felt it fairer to ascribe the Council's errors to arrogance and ineptitude rather than bad faith. Not a good press, especially since judges, though immune to actions of libel, are trained to self-restraint. More trouble was to come. Shortly afterwards the Council dismissed its new Clerk who evidently disapproved of the way things were being done. A public inquiry was set up by the Minister of Housing at the Council's request and public expense. The anodyne report of J. Ramsay Willis, Q.C. (as he then was), gave the Council an acquittal which carries small conviction, and ended with the hope that the 'unhappy domestic quarrel' should be allowed to be forgotten as soon as possible.

But Mr. Champion had no intention of allowing the Council's misdeeds and misdoings, as he saw them, to be forgotten. He continued to attack on every front – sewage disposal, coastal protection works, use of open spaces, slum clearance, the development of Butlin's camp, the low rent charged to Butlin's and others, the undeclared interests of the councillors in matters under debate, the dismissal of the Clerk and the uncooperativeness of the new one. All these are matters of public interest – every aspect of local government is – even if Mr. Champion was the only member of the public interested in them all. On some matters he was right, on many he was wrong, on all he was extreme. His means of attack varied. He wrote letters in enormous numbers and very disobliging terms to the Clerk, to the councillors, to the Council, to other councils, and to the press, local and national; he appeared on television to broadcast his criticisms; he distributed leaflets of his own composition to visitors and residents; he promoted investigations through the Director of Public Prosecutions; himself he laid an information against the Clerk; he objected time and time and time again at the annual audit – a right which ratepayers have

not yet lost through non-use. Mr. Champion was tireless. And tire-some. Unquestionably he was a very great nuisance. How can government operate if every time they do anything wrong they are pounced on and pilloried with persiflage? How can they do anything at all if, whatever they do, it will be said to be wrong? Nerves were fraying in the Town Hall, on whose steps Mr. Champion once left his dustbins. The war of attrition was telling.

So much so that just before Christmas 1968 a councillor, with the immediate approval of nearly all his colleagues, made a long statement inveighing against Mr. Champion's activities. This statement (along with an advertisement for Bognor's largest Do-it-Yourself centre) filled the front page of the next issue of the *Bognor Regis Post*, under the nineteen-millimetre headline 'Horri-fying, Disturbing and Almost Evil'. The very next month Mr. Champion used the very same words in a leaflet he distributed at a ratepayers' meeting. It was because of that publication that the Council sued.

Or, rather, it was not *because* of that publication that the Council sued. The publication was not the reason but the ground. The publication gave the Council an opportunity of suing Mr. Champion because he was a nuisance, though being a nuisance was not, in the circumstances, tortious by itself. They wanted to muzzle him because he barked too much. He was a most vexatious ratepayer and he had to be stopped. It is understandable, people being what they are, that the Council took the opportunity. They were wrong to do so, however; and it was very wrong that they were permitted to do so with effect. The idea of suing for defamation must have come readily to the Council, as advised, because the Clerk had just collected £2,250 in damages from Mr. Champion for saying that he had suppressed a letter which the clerk had simply not put forward. Now if the Clerk had been so successful on such tenuous grounds, why did not all the councillors personally follow with suits? Well, you see, they were not members of N.A.L.G.O., so they couldn't get support from their union; and, though there was a policy, paid for from the rates, which protected them if a defamation suit were brought *against* them, that policy wouldn't pay for the costs of an action brought

by them; and they couldn't get legal aid because no one can get legal aid for defamation cases. On the other hand, if it was the Council that sued (not on their behalf admittedly – that isn't allowed – but certainly, if successful, to their benefit) the costs could come from the rate-box; in other words, the other ratepayers would pay for the suit against Mr. Champion. Very nice: a lawyer's dream, the citizen's nightmare. But we have not yet exhausted the horrifying and disturbing aspects of this lamentable affair. For that we must return to Her Majesty's courts.

We can leave aside the qualified interlocutory injunction granted by Fisher J., and proceed to the question as to the mode of trial. Either party to a defamation suit may demand trial by jury. He has a right to it, unless 'the trial requires . . . prolonged examination of documents . . . which cannot conveniently be made with a jury' (R.S.C., Ord. 33, r. 5), in which case the judge has a discretion. The plaintiff asked for trial by judge alone, but Master Ritchie, on the defendant's asking for trial by jury, ordered that trial be with a jury. Very shortly before the case was to be tried the Council, now represented by silk as well as stuff, moved before Milmo J. that the trial be by judge alone, since there were some letters to be looked at. Mr. Champion, speaking for himself as he did throughout, again demanded trial by jury, but Milmo J. ordered trial by judge alone. This decision is the worst aspect of a very bad case. In interlocutory proceedings especial care should be taken to protect the rights of an unrepresented party; in constitutional cases, at any rate where the government is attempting to punish and prevent criticism, there should be a jury. That was what Fox's Libel Act was about in 1792, when what the critics wrote was really strong meat and not the pap which the plaintiff Council was too weak to stomach. Milmo J. should have been more evidently aware of the implications of the case before him for persons other than those, like himself, very conversant with the hieratic mysteries of the tort of defamation, as developed. It is not clear that he really had a discretion in the circumstances; and it is quite clear that, if he did, he should not have exercised it as he did. We are truly in Kafka-country when we find Browne J. saying in his judgment: 'The Village Hampden is nearly always a popular figure with the public and I am sure that the

Courts will always go out of their way to protect his rights.' No one else, on the evidence, will be so sure. Would the Court of Appeal, if appealed to, have overturned Milmo J.? One hopes so, though that court has quite gratuitously tried to dissuade parties to defamation suits from insisting on their rights (*Richards v. Naum* [1967] 1 Q.B. 620). Nevertheless it would be a difficult thing to uphold a decision which actually deprived an unrepresented defendant of such a right in such a case on such a ground.

About the trial and the judgment on the merits numerous questions raise themselves which cannot be laid here. How can the libel that the Council 'conducted its affairs in a dictatorial and undemocratic fashion' possibly be held to be a statement of fact rather than a statement of opinion? Was it not evident, there and then in the court, that Mr. Champion was justified in saying that the Council was trying to repress free speech? If 'The Council were entitled to take the view (rightly or wrongly) [*sic*] . . . ' why was Mr. Champion not entitled to take the wrong view, which had commended itself to Salmon L.J.? Why damages of £2,000, no more and no less? But this last question is perhaps unfair: if one lets a plaintiff sue although he cannot have suffered any damage, whatever sum one gives him is bound to be infinitely too great; still, the South Hetton Coal Co. got only £25 for a charge of inhumanity, so perhaps this case should have been tried by a jury after all? Not that the amount of damages matters very much when the plaintiffs have submitted a bill for costs, exclusive of witnesses' expenses, amounting to £34,445.24. One reason for not going into these matters is that the full judgment is not available, but what readers can do is to go to the reports and see what Mr. Champion actually wrote; it is not worth £36,445.24, which is what it may cost him.

The story is a dismal one. Mr. Champion was perhaps wrong to go on as he did; the Council was probably wrong to sue him; Browne J. was wrong to let them do so; and Milmo J. was very wrong to let them do so without a jury. And how will things end? Mr. Champion will be bankrupted by his local authority, piously collecting money to reduce the rates (and why not? After all, it was Mr. Champion that the judge found, obiter, to be malicious); the

Bognor Regis Urban District Council will disappear – after its fluctuations it will be merged; and we shall be left with an authority in the books which is fundamentally wrong – wrong in the method and horribly wrong in the result. This decision gives to units of government the right, at your expense, to put their critics to the private cost of justifying themselves; much worse, it gives them the power to threaten to do so unless the critics shut up sharpish. Eternal vigilance is not required to prevent such a thing; all that is required is to wake up for half a minute.

Doing good by mistake – restitution and remedies

(1973) 32 Cambridge Law Journal 23

Bennett had a Jaguar car worth over £400, and wanted to sell it. He asked Searle to make it more saleable by doing work on it which was to cost £85. Searle took the car on a joy-ride and had a bad accident. He dishonestly sold the wreck to Harper who in good faith paid £75 for it. Harper then put the car in good order again at a cost of no less than £226. A finance company bought it from him for £450 and let it to Prattle on hire-purchase. The police, investigating Searle at Bennett's instigation, took the car from Prattle and, not knowing to whom to return it after Searle's conviction, started inter-pleader proceedings in the county court. The judge ordered the police to return the car to Bennett; they did so, and Bennett sold it for £400. Harper appealed from the denial of his claim for relief in respect of the repairs he had done.

Question: What are the rights of a bona fide purchaser, now out of possession, who improved a chattel to which he had no title? Before we turn to *Greenwood v. Bennett* [1972] 3 W.L.R. 691 (C.A.) where the appeal was allowed, let us try to answer the question ourselves, in stages, namely:

- I. What are the rights of a bona fide purchaser?
- II. What are the rights of a repairman?
- III. What are the rights of a bona fide purchaser-repairman
 - (a) in possession, and (b) out of possession?

I. *Rogue steals Toff's car and sells it to Simple*

The view of English law is clear. Toff still owns the car. There is an exception if Simple bought it in market overt (Sale of Goods Act 1893, s. 22), and the Law Reform Committee has proposed that Simple should own it if he bought it at any retail trade premises (Twelfth Report, para. 33). That apart, however, Toff still owns the car. The answer in Roman law was the same, and we use a Latin tag to describe the reason: *nemo dat quod non habet*.

II. *Rogue steals Toff's car and takes it to Spanner for repair*

According to the present English law, Toff can have his car back from Spanner without paying anything. If Spanner could hold on to it until paid, we would say he had a lien. But a lien arises only if the repairs were done at the instance of a person in possession of the chattel with the owner's consent, and not always then: *Tappenden v. Artus* [1964] 2 Q.B. 185 (C.A.). The argument seems to go like this: Simple, the purchaser, obtains no title from Rogue – *nemo dat*; a lien is a right *in rem*, and Rogue had no such right; therefore Spanner obtains no lien. The argument is false because Spanner earns his own lien and does not obtain it, as he would have to obtain title, from Rogue. And the conclusion is unsatisfactory. It is one thing to say that an owner can get *his* goods back without paying for them; it is quite another to say that he can get *better* goods back without paying for their improvement. Simple does not improve the goods by buying them, but Spanner does improve them by putting them in order again. If Toff gets a better car back free, then he is being unjustly enriched and, what is more, it is the courts which are unjustly enriching him. So, contrary to the present English law, Spanner should have a lien on the improved car, that is, a right to hold on to it; and the amount he is entitled to be paid is not the price agreed with Rogue but the benefit accruing to Toff. Nor is a lien on stolen goods a juristic monstrosity: the inn-keeper has one in England even now: *Marsh v. Commissioner of Police* [1944] W.N. 204.

III (a). *Rogue steals Toff's car and sells it to Smiles who repairs it*

The correct, and now authoritative, answer is that Smiles may hold on to the car until paid the amount by which he has improved it. As purchaser he acquires no rights, but as repairman he obtains a lien. This was the result in Roman law. The bona fide possessor was given an *exceptio doli* which he could effectively oppose to the owner's claim. It was regarded as inequitable that the owner should claim back a better thing without paying for the improvements, and such an abuse of his right of ownership the law would not tolerate. In English law the prevention of such abuses is a traditional function of equity. The present Master of the Rolls, for example, has developed the law of abuse of contractual rights in such cases as *High Trees* [1947] K.B. 130 and *Solle v. Butcher* [1950] 1 K.B. 671, as well as in his dissent in *Chapman v. Honig* [1963] 2 Q.B. 502. So it is not surprising that in *Greenwood v. Bennett*, our own case, the Court of Appeal held that the bona fide possessor could resist the owner's claim for the thing until paid for the improvements.

But can such a holding be reconciled with the existing rule that Spanner has no lien? Is there any difference between Smiles who repairs a thing he thinks he owns and Spanner who repairs a thing he thinks Rogue owns? The only difference (apart from the immaterial one that Smiles is liable in conversion for buying the car whereas Spanner is not liable for repairing it) is that, whereas Smiles no doubt intended to benefit, one way or another, from the repairs he executed, Spanner actually contracted, with Rogue, to be paid for them, so that Spanner can sue Rogue for the cost of the repairs whereas Smiles has no one to look to for reimbursement. On the face of it, Spanner has a legal remedy already, though a worthless one, whereas Smiles has none, unless given a lien. However, the positive law is that Smiles also can look to Rogue for reimbursement, since a purchaser who repairs an article may well claim the cost of those repairs from a vendor without title or authority to sell (*Mason v. Burningham* [1949] 2 K.B. 545). Thus both Smiles and Spanner have contracted with Rogue, though the contracts are of different types, and those contracts give each of them a claim against him for the repairs. Accordingly,

it is difficult to reconcile *Greenwood v. Bennett* with *Tappenden v. Artus*, and no attempt was made in *Greenwood* to do it.

III (b). *Rogue steals Toff's car and sells it to Smiles who repairs it and sells it to Simple*

These are effectively the facts of *Greenwood v. Bennett*. Smiles is now out of possession; when possession terminates, so does a lien; a lien, therefore, will do Smiles no good now. In Rome this did not matter, since, not being in possession, Smiles would not be liable to Toff at all. But in England Smiles, no longer liable in detinue, is still liable in damages for conversion, and he is now guilty of a double conversion, having sold as well as bought.

Traditionally the measure of damages in conversion is the value of the goods at the time, but the view has been growing that a plaintiff with a limited interest should recover only a sum equivalent to his interest (*Wickham Holdings v. Brooke House Motors* [1967] 1 W.L.R. 295 (C.A.)) and it is consistent with this to require Toff to make an allowance for the improvement to the car. We can admit that to allow Smiles a set-off for his improvements when there is a money claim against him is much the same as allowing him a lien on the goods themselves; to do otherwise would be to permit Toff to abuse his right of ownership, and to abuse it through the courts. So if Toff sues Smiles, Smiles will keep (out of the price he received from Simple) a sum equivalent to the improvements he made to the car.

But Toff may sue Simple, and Simple's position under the existing law has already been described. He is liable to give up the car or pay its value as at the time he bought it. It can hardly make any difference to his position that the car was repaired before he bought it, and it seems that he has no equity to resist a claim by Toff. This has an effect on Smiles because at present Simple, once Smiles's lack of title is shown, has an action against him for all his money back (*Rowland v. Divall* [1923] 2 K.B. 500 (C.A.)), and that money contains an element in respect of the repairs.

The Court of Appeal and the Law Reform Committee have different ways round this problem; and, since Toff may claim

either his car back or its value, there are two aspects of the problem to get round.

The Court of Appeal would deny the claim for the car itself unless Toff paid Smiles; the Law Reform Committee would deny it unless he paid Simple (Eighteenth Report, para. 89). Formally speaking, the Committee's solution seems preferable: an order that a person must give up the car only on payment to him is preferable to an order that he must give it up only on payment to someone else.

Only Lord Denning M.R. addressed himself to the case where Toff claims damages from Simple. He says that because Simple would have to pay the full value of the car to Toff and would then be able to claim all his money back from Smiles, justice requires that Smiles be given an action against Toff. The Law Reform Committee, true to the principle of indemnity and no more, would allow neither Toff nor Simple to recover more than he had lost; thus Simple would pay Toff only the unimproved value, and that is all that Simple would obtain from Smiles (Twelfth Report, para. 36; Eighteenth Report, para. 89). Here also the solution of the Committee, who had longer to think about it, seems preferable to that of Lord Denning. In particular, it would be unwise to allow the improver to have an action against the owner in respect of his improvements.

Now it may seem irrational to allow the improver a lien and a set-off yet deny him an action. But there are many situations in the law where a man is given a defence to protect an interest which he cannot actively vindicate; not every shield-bearer has a sword. *High Trees* itself is such a case, and only Lord Denning in *Greenwood* would allow such a claim; Cairns L.J., in denying it, is in tune with Roman law. There is no inconsistency in refusing to allow actions at law to produce an injustice and refusing to redress such an injustice if produced by actions in fact. There is nothing improper in the view that only he who seeks law need do equity; and it is not yet the rule that everyone who acts inequitably is liable at law.

There is a psychological justification for this, too. Only one aim of the law is to procure objective justice; another is to avoid the subjective sense of injustice. You would be outraged to be made to

pay the owner for repairs you yourself had made to his chattel, and you would be hardly less put out if you had to give up possession of that chattel without any payment. But once you have given up possession of the chattel, as to a purchaser, it will seem simply bad luck if you do not have an action, even if your purchaser can claim his money back from you, which is also bad luck. And are the equities of the case so indisputably clear? Toff's car, after all, was in perfectly good condition when it was stolen. The car he gets back is no better, since what Smiles repaired was the damage done by Rogue. Toff may have to pay something to get his car back, but if he gets it back without paying, is he then to be subject to an action based on unjust enrichment when he would deny, and with some force, that he has been enriched at all? Will it not then be he who is outraged, and outraged at what the law is doing to him?

And suppose that we do decide to give Smiles an action? On what principle will it be based, and how do we limit its application? Is this simply another tiny separate quasi-contract, benefiting only the person whose mistake is that he owns the thing, or will it benefit all those, including Spanner, whose mistake leads them to confer unsought benefits on others? Such a wide liability would conflict with twenty dicta which reflect distinctive and negative English attitudes towards people who interfere, however reasonably, in the business or property of others; and those attitudes have been maintained by the Law Reform Committee who would retain the strict liability of conversion (Eighteenth Report, para. 13). On balance it is sufficient, at first, to give the improver a lien, opposable to a claim for the thing, and a set-off, opposable to a claim for damages. That is more or less the result of *Greenwood v. Bennett*, in which it was *held*, unanimously, that the owner may not reclaim the chattel unless he pays the improver, *said* (by Lord Denning and Cairns L.J.) that in an action for damages against the improver, the owner must give credit for the value of the improvements, and *suggested* (by Lord Denning, Cairns L.J. dissenting) that the improver had an action against the owner.

It will be clear that the facts of this case lie at a clover-leaf, where the motorways of law and equity, property and obligation, become a maze. It is a pity, therefore, that, as so often in personal

property cases, the Court of Appeal gave short unreserved judgments. The disposition of the case was quite satisfactory, but the law can hardly be said to have been greatly clarified or ordered. *Question:* What are the rights of a bona fide purchaser who improves a chattel to which he has no title?

Subrogation and Indemnity

Privately published case note (1973); to be published
by the CLJ in 2012

A Ford employee named Roberts carelessly drove a forklift truck into Morris, a person employed by Ford's cleaning contractor, Cameron. Morris sued Ford. Ford admitted vicarious liability for Roberts' negligence, and claimed against Cameron under a clause in the cleaning contract whereby Cameron had agreed to indemnify Ford against any loss or liability arising out of the cleaning operation. Cameron conceded liability to Ford under this clause and now sought an indemnity from Roberts, the careless employee of Ford: *Morris v. Ford Motor Co.* [1973] 2 W.L.R. 843. The trial judge upheld Cameron's claim, but the Court of Appeal (Stamp L.J. dissenting) allowed Roberts' appeal on the ground that an implied term in the indemnity clause (or, *per* Lord Denning M.R., equitable considerations) excluded Cameron's normal right, as indemnitor, to be subrogated to Ford's right of recourse against Roberts, their careless employee, this right of recourse having been held by the House of Lords in *Lister v. Romford Ice & Cold Storage Co.* [1957] A.C. 555 to enure even to the insured employer. Cameron has been granted leave to appeal, so the House of Lords has a good opportunity to reconsider *Lister*. While, at the technical level, *Morris* turns on the implications of a contract of indemnity and *Lister* deals with the implications in a contract of employment, the situation underlying both cases raises basic questions about the interaction of tort and that most familiar of indemnity contracts, insurance.

It is for a double reason that tort and insurance inevitably interact: to a plaintiff, insurance is an alternative device to tort for

procuring compensation for harm, and, to a defendant, insurance is a device for avoiding the harm of having to pay for his torts.

If the plaintiff is insured against harm tortiously caused, we have the problem of cumulation of remedies. If the harm is to his body, he can keep the proceeds of both claims: a leg being inestimable, no one can say that he has been overpaid though he has been paid twice. But if the harm is to property, which can be evaluated, he would be profiting from a double recovery, and his enrichment would be unjust since he is entitled to compensation only, whether from tortfeasor or insurer. To avoid such enrichment (and exclusively for this purpose) the insurer who pays the victim is subrogated to (i.e. is entitled to use) his rights against the tortfeasor. The result is that the plaintiff's insurance does not diminish the incidence or extent of tort liability.

Defendants' insurance, on the other hand, does affect the incidence and extent of tort liability, by increasing it. 'We assume that the defendant in an action of tort is insured unless the contrary appears' said Lord Denning M.R. recently (*Post Office v. Norwich Union Fire Ins. Society* [1967] 2 Q.B. 363, 375). This affects tort law because it is much easier to award damages to the victim if one assumes that the defendant is not going to have to pay them out of his own pocket. Hence decisions that behaviour not in fact reprehensible is in law tortious, or that an exemption clause, perfectly well understood, does not bar the plaintiff's claim. But the reason behind such decisions does not limit their effect: such decisions lay down a rule of law which makes a defendant liable whether he is insured or not. If the defendant is not insured, the situation is fairly bad – the law is then transferring a loss from a person who suffered it to a person not better able to bear it; if the person suing is himself insured, the situation becomes unjust – because the plaintiff can be more easily indemnified elsewhere; if the plaintiff is in fact the victim's insurer, the injustice is compounded – for the plaintiff at interest has, after all, been paid to bear the loss in question.

Let us give an instance from that great source of litigation, the highway. The driver of a car incurs tort liability very easily. This is perfectly justifiable if he runs over a pedestrian: the driver is bound to be insured, and the pedestrian is almost certainly not

insured, and, even if he is, he can cumulate the proceeds. Thus trivial carelessness in a driver is enough to make him liable. If liable to an injured pedestrian, he will be equally liable to the owner of a car with which he collides. This is not so good, for here the driver is not bound to be insured and the owner is quite likely to be insured. It consequently happens quite often that uninsured drivers, not in any real sense to blame, have to pay for damaging property although its owner, being insured, has not suffered any loss at all. In fact, the person they pay is not the owner, but the owner's insurance company exercising its right of subrogation. Indeed insurance companies exercise their right of subrogation *only* against uninsured drivers, since if the driver is insured the 'knock-for-knock' agreement between insurers comes into play.

It was stated earlier that the sole function of the subrogation device is to avoid the unjust enrichment of a victim who has concurrent claims against his insurer and the tortfeasor. Such concurrent claims may exist also in tort law, thanks to the rule that each of several tortfeasors is liable in full, but here double recovery is excluded by the rule (which would be suitable in insurance cases also) that a tortfeasor is released by what another tortfeasor pays. Even so unjust enrichment may still arise, since the tortfeasor so released may be said thereby to have been unjustly enriched at the expense of the tortfeasor who pays. This unjust enrichment cannot be avoided by subrogating the paying tortfeasor to the rights of the victim against the other tortfeasor, since any such rights have gone. Instead there is an analogous device: the person liable *with* others is given an independent right of contribution, and the person liable *for* others is given a right of indemnity against those he releases by his payment to the victim. This right is provided (though there may be a concomitant claim for a common law indemnity or a better action for damages for breach of contract or even for tort) by the 1935 Act, under which the measure of recovery is what is just and equitable, as one would expect of a remedy based on the principle of unjust enrichment.

Now contribution, as a device, is open to the same criticisms as subrogation: its creation has led to an extension of tort liability and to unfair results. Just as the courts hold against defendants

because they are probably insured, so they hold against a defendant, not materially at fault, because he will have a claim against the person mainly to blame (see, e.g., *Dutton v. Bognor Regis U.D.C.* [1972] 1 Q.B. 373, 398, per Lord Denning M.R.). Furthermore, claims for contribution or indemnity, like subrogation claims, tend to be brought by a person well able to bear the loss against persons able to bear it less well, or, at any rate, not better. This is obvious for subrogation claims, since the subrogee is almost invariably an insurance company. It is true of contribution claims also for the reason that such claims can be brought only by those who have paid the victim on demand, and the people from whom victims demand compensation are those who are best able to pay or those who are most obviously liable, these two categories being nearly identical because those most exposed to liability tend to take out insurance against it.

Let us give an instance from that other great source of litigation, the factory. A person injured by a workman at work naturally sues the workman's employer; it is he (more usually, it) who has the money. Because the employer is likely to be sued, he takes out insurance. He takes out insurance against liability to his own workmen because he is bound to, and he takes out insurance against liability to others because, the premium being an allowable expense, he would be a fool if he didn't (unless he (it) is enormously rich). But of course it is the workman who is at fault, and our law gives the employer, because his hands are clean, a right of indemnity against him. Now if there is one class of persons who are unlikely to carry insurance, it is the working class, and it is they who are especially likely to be guilty of torts, since liability attaches to people who do things badly and only people who do things at all can do them badly. So the right of indemnity (based, let it be remembered, on the principle of unjust enrichment) operates, as is its wont, to shift the loss from a person well able to bear it to a person not well able to bear it. That an uninsured employer should have a right of indemnity from his workman seems odd enough, but perhaps he is unlikely to use it. That the employer's insurer should, by subrogation, be able to exercise that right against the wish and interest of the employer seems monstrous, which is no

doubt why those who insure employers against liability to their workmen have undertaken, under duress, not to do so. Our case fell outside the agreement, since Cameron was not an insurer and Morris was not a Ford employee, so it forces us to ask whether the law should not be formally changed.

One could oppose any change in the law by saying that the root principle of the law of tort is that the person at fault should pay and that the devices of subrogation and contribution tend to this result and are therefore good. But we must remember two things. The first is that fault need not nowadays be serious to entail liability, and that, furthermore, we often, as between master and servant, ignore it. If we do not reduce the servant's claim against the master on the ground that the servant's careless error contributed to his own injury (*Hawkins v. Ian Ross (Castings) Ltd.* [1970] 1 All E.R. 180), why should we make the servant fully liable to the master he has exposed to liability for harm caused to others? The latter seems an *a fortiori* case. Secondly, the devices of subrogation and contribution are not part of the law of tort at all, whose role is exhausted once the primary victim is paid. This can, and must, be made very clear.

The insurer who claims subrogation and the tortfeasor who claims indemnity have one thing in common: their claim is in respect of financial loss only. Now the law of tort gives no claim to the person who suffers purely financial loss as the result of another's carelessness, unless there be a special relationship. This rule is not the result of an oversight – it was consciously enacted in the German Civil Code in 1896; nor is it a medieval skeleton – it has just, thank goodness, been kept in life by the Court of Appeal. It is the result of a deliberate and wholly justifiable decision to the effect that whereas one must conduct oneself with consideration for the person and property of others, one need not bother about their pocket unless one is very close to them indeed. Accordingly it must be emphasised that the fact that the victim's insurer suffers loss as a result of the tortfeasor's conduct is not sufficient, according to the basic value-judgements of our legal system, to give the insurer a claim in his own right against the tortfeasor: this has been decided in terms by the House of Lords (*Simpson v. Thomson*

(1877) 3 App. Cas. 279). Similarly the tortfeasor who pays a victim has no claim in tort against another tortfeasor liable in respect of the same damage. The effect of the devices of subrogation and contribution is to procure that the *only* persons who have a claim in respect of the financial loss caused to them by the carelessness of strangers are those who have been paid to take the risk of that loss and those who, by their torts, have matured the risk of that loss – strange bedfellows to put in the best room while those who have suffered financial loss they have neither undertaken nor caused are put in an outhouse. If, therefore, we cut down the right of subrogation and contribution we are not invading a basic precept of the law of tort, we are, on the contrary, upholding it. The *only* reason an insurer is granted the right of subrogation is to prevent the insured's being enriched by a double recovery, and the *only* reason that a tortfeasor is given a claim to contribution or indemnity is to prevent the unjust enrichment of another tortfeasor. If this be true, then when we are presented with a claim by an insurer to be subrogated to his insured's right to indemnity from another tortfeasor we can surely ask the direct question whether the refusal of such a claim to the insurer would unjustly enrich the defendant. Is Roberts unjustly enriched *vis-à-vis* Cameron when Cameron, pursuant to contract, paid Ford who had paid Morris? The answer is obvious enough. Roberts is not enriched in fact, since Morris would never have sued him, and neither would Ford. And if Roberts is in law enriched, in law that enrichment is not unjust, since for the impoverishment of Cameron there is a cause, namely the clause in the contract with Ford pursuant to which their liability arose.

Another objection, and a very English one, would be that no one should benefit from the insurance taken out and paid for by another, whether victim or fellow-tortfeasor. Do we not have a doctrine that third parties cannot benefit from contracts? We do indeed. It means, or ought to mean, that A cannot sue on a promise made by B to C. It does not at all follow from such a doctrine that when C is suing A, C's rights against B need to be ignored, as happens now when an insured victim sues a tortfeasor. Much less does it entail that B should have a suit against A just by reason of

B's having a contract with C, as happens now when an insurer is subrogated to his insured's right to claim tort damages. But in any case the insurance contract (the only great contract unknown to the Romans, who also believed in privity) is a very sociable sort of contract: it has lots of parties. The bailee's policy can benefit the bailor; the exporter's policy on cargo can benefit a later purchaser; the policy of the man who sells a house can benefit the man who buys it; the car owner's policy characteristically and effectively protects those who drive it with his permission; the householder's policy protects his household; and, most of all, every liability policy protects the victim who has successfully sued the insured. This being the law, it hardly seems inconsistent with principle or practice to hold that a tortfeasor, such as he now commonly is, may benefit from the fact that his victim or his fellow-tortfeasor is insured. The grounds would be exactly those on which a tortfeasor benefits, if that be the word, from the fact that his victim is old or unemployed, namely that the loss he causes is in fact less than it might otherwise have been, except possibly to others who have no independent claim against him.

It is clear enough what should be done; but how can it be done? The House of Lords can certainly reverse *Lister* and hold that an insured employer cannot claim an indemnity from a careless workman. Indeed there should be no difficulty in procuring by judicial act that the workman be liable to his employer, insured or not, only if he is gravely careless; this has been done in both France and Germany, codes notwithstanding.

That would be enough to allow the House of Lords to uphold the decision of the Court of Appeal in the present case, but it would deal only with indemnity and not also with subrogation. Subrogation cannot be dealt with so easily. In particular one cannot uphold the ground of decision of Lord Denning M.R. that subrogation, as a creature of equity, arises only where its operation is in effect equitable: in *Castellain v. Preston* (1883) 11 Q.B.D. 380, the *locus classicus* of subrogation, its effect was as inequitable as one can imagine – the purchaser of a house destroyed by fire between contract and completion was held bound to pay the vendor's insurer, and Lord Denning himself went out of his way

in *Harbutt's Plasticine* [1970] 1 Q.B. 447 to invalidate a limitation clause so as to make the defendant pay his contractor's fire insurer. Nor is the method of James L.J. any better: he held that it was an implied term in the indemnity clause between Cameron and Ford that Cameron be not subrogated to Ford's rights against its workmen. No such implication is possible on the facts or in justice. Ford was not even represented in the Court of Appeal and, if it had been, it could not with even residual decency have suggested the implied term in question. For if there was one party in the whole affair who was at fault it was Ford. Ford was not bound to require its cleaners to accept a contract which put on the cleaners a liability which the law put on Ford and which Ford was well able to bear, nor was Ford bound to make any claim under that contract in a case where it was their own servant who was at fault. Having made such a contract, maximising their rights under the law, and having claimed under that contract in a like spirit, it very ill became Ford to object to Cameron's claiming its full rights under the law on the mere ground that Ford would thereby be put to some trouble. If Ford is put to any trouble, it is Ford's own fault and Ford's own fault alone. Perhaps if the factory is closed for the duration Ford's ever-so-clever legal department may learn that abuse of power over contractors may lead to the same results as abuse of power over employees, for precisely the same reason.

It is to be hoped, these last considerations notwithstanding, that the House of Lords will dismiss Cameron's appeal by reversing *Lister* and, in so doing, use forceful terms to call the attention of the Law Commission, whose role it is to propose fundamental and needed changes in the law, to the desirability of putting forward quite a simple little Act – less glamorous, no doubt, than a code of contract law, but not beyond their capacities and calculated to do good without attendant harm – to the effect that insurers should no longer be able to sue, whether by subrogation or assignment, persons liable to their insured save, perhaps, to the extent that those persons are themselves insured against liability. The best way to achieve this result would no doubt be to take the bull by the horns and provide that a person who is entitled and able to recover in respect of any loss or liability from an insurer or other indemni-

tor should to that extent be unable to recover from any other person, unless, perhaps, that other person is himself entitled and able to recover from an indemnity insurer. It need hardly be said that there is not the slightest chance of this being done.

**Contract – the buyer’s right to
reject defective goods**

(1976) 35 Cambridge Law Journal 33

One might have thought that a case concerned with the buyer’s right to reject defective goods would be controlled by the Sale of Goods Act 1893; in *Cehave N.V. v. Bremer Handelsgesellschaft mbH* [1975] 3 W.L.R. 739, the Court of Appeal preferred to apply the general law of contract, and their opinions are consequently of interest not only to students of that branch of the law but also to all those amused by the interaction of legislation and judicial decision.

Pellets of citrus pulp delivered pursuant to a contract of sale were found on arrival to be quite badly burnt. The buyers, who had paid in advance, refused to accept them on the ground that they had not been ‘shipped in good condition’ as the contract expressly required. The sellers denied this, and refused to refund the price. While this dispute was brewing, the pellets themselves were sold by judicial order in Rotterdam; they were purchased for a fraction of the contract price by the buyers, who then put them to the use originally envisaged, namely adding bulk to cattle food.

The arbitrators found as a fact that the pellets were not ‘shipped in good condition’; they also held that they were not ‘merchantable’ under section 14 (2) of the Sale of Goods Act 1893; the sellers were consequently ordered to refund the price. This award was upheld by Mocatta J., but the sellers’ appeal was unanimously allowed by the Court of Appeal, who remitted the matter so that the arbitrators could quantify the damages to which the buyers were entitled: the finding that the pellets were unmerchantable was reversed and the breach of the express term that they were

shipped in good condition was held not to justify the buyers in rejecting the goods.

If the finding that the pellets were unmerchantable had been allowed to stand, the appeal would probably have been dismissed: not only does it stand to reason that one can't have to accept goods which are no good, but the Act lays down that the buyer is liable only if (condition) the goods are merchantable. The fact that the finding was reversed is not very interesting of itself, but it is worth noting that the pellets were really not as they should have been: Roskill L.J. said that they were 'far from perfect', as must indeed have been the case, since he expected the damages for the defect to amount to about a quarter of the value of sound goods. One very interesting question is raised by this: if the buyer must accept goods with serious defects because they are nevertheless usable and merchantable, on what basis can he claim damages for their shortcomings, as surely he must be able to? The Act itself provides that no warranty of quality is implied other than those stated in sections 14 and 15. It follows that if the courts too readily hold defective goods to be merchantable, the buyer may be placed in an unfair difficulty. This particular problem did not arise in *Cehave* since the contract contained an express term that the goods be 'shipped in good condition' and the sellers finally admitted that they were in breach of it.

The contest was whether this breach justified the buyers in rejecting the goods. The Court of Appeal unanimously held that it did not: this was not a term such that any breach of it entitled the buyer to reject; rejection was permissible only if the breach robbed the buyer of virtually the whole benefit of the transaction, and the arbitrators had made no such finding. In other words, this term as to quality in a contract for the sale of goods was not a 'condition' like the terms as to quality implied by the Act, nor yet a warranty like other terms legislatively implied, but was an innominate term of the common law kind made prominent in *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26, in relation to the shipowner's obligation as to the seaworthiness of a vessel let on time-charter. The doctrine of the *Hong Kong* case was wholly novel, indeed revolutionary, and it was welcomed

widely and enthusiastically. This is not surprising since it is perfectly in tune with the spirit of the times: designed to repress sharp practice, it operates to reward incompetence and promote inefficiency. This requires a moment’s attention.

Repressing sharp practice. It is a fact that contractors who find that their bargain is less good than they expected tend to look around for some excuse to renege or resile. Unless there has been some providential disaster redolent of frustration, the only plausible pretext for resiling is the other party’s breach. It follows that many people put forward their contractor’s breach as a ground of release when they actually want to quit for wholly different, and legally inadequate, reasons, such as a movement in market or exchange rate, or a change in their own requirements or resources. This may be Good Business, but it seems a Poor Show, which must be discountenanced and put an end to by all right-thinking professionals. Now there is only one case where one can be fairly sure that a person trying to get out of a contract is not using the other party’s breach as a mere pretext, and that is when the consequences of that breach are so extreme that no one in his right mind would carry on: if only a fool would soldier on, the man who runs away is probably not a knave. This is the reason for the severity of the *Hong Kong* doctrine that you cannot resile on the ground of the other party’s breach unless its consequences are so grave that you would have been released had they occurred *without any breach at all*. It is hardly an exaggeration to state that at common law nowadays a contractor is never discharged from his obligations by the other party’s *breach*, unless there is a clear stipulation to the contrary, but only, if at all, by the doctrine of frustration. Contracts must be honoured in the breach, since breach sounds only in damages.

Rewarding incompetence. If you diminish the rights of one party to a contract, you automatically increase the rights of the other party, and before you do the first, you should ask if you want to do the second. Now it is not surprising that in penalising wickedness the *Hong Kong* rule rewards incompetence; like much other moralism, it operates unfairly. This happened in *Cehave* itself. The seller had made what turned out to be a very good bargain, since the

market fell rapidly after the contract was made. Instead of performing his contract scrupulously as he ought, he shipped goods which not only were not perfect but could not even be described as being in good condition. Should he be able to keep the whole of the profit which was agreed for sound goods? Surely not! But the Court of Appeal, horrified lest the buyer get the spoilt cargo for less than its true value, ended up by making the buyer pay not only the true value of the spoilt cargo but the seller's whole profit as well. It is not to the point to object that the seller must pay damages, for the damages cover only the difference between the value (not the price) of the sound goods which were promised and the spoilt goods which were sent; the seller will obtain by his action for the price, or will retain out of the price already paid, every penny of his envisaged profit. 'The guilty party is to get all that he bargained for unless the innocent party gets no part of what he bargained for.' Does this sound like a fair rule? It is the rule of the *Hong Kong* case.

Promoting inefficiency. It is of the first importance that the law be such that commercial men may take quick and sure advice about the legal consequences of the practical options open to them when something goes wrong with their transactions. Under the old dispensation, when the right to reject depended on the nature of the term in the contract which was broken, the innocent party simply had to go to the filing-cabinet, consult the contractual document and then decide whether the term broken was a very serious one or not; this final step admittedly called for judgment, and there could often be two views, but at any rate the requisite data were immediately and presently available. Now that the right to resile turns on the gravity of the consequences of the breach, the necessary data are not words but events, they may be in the China Sea rather than in the head office where decisions are taken, and one will probably have to wait for them, since consequences tend to occur after their causes; nor has the difficulty of assessment been alleviated, rather the reverse. There has therefore been an undeniable loss of speed and sureness of decision-making, and the Court of Appeal is responsible for it. This is a matter for regret not only for commercial men but also for London as a whole,

since merchants with guilders and marks are not bound to hie them to London for arbitration or adjudication, and they may well stop doing so if the law goes soft on them.

There is, then, something to be said against any extension of the *Hong Kong* doctrine, but even if one preferred the moralism of the new view to the expediency of the old, one might regret the stresses which English law is now suffering because the shift in judicial attitude is unaccompanied by any change in the more formal rules of law. The situation must have been much the same when the Old Testament with its Ten Commandments was overtaken by the One Principle of the New Testament: it was not so hard to deal with the prophets (our nineteenth-century judges), since they prophesied so much that one could always find something useful in Jeremiah or even Nahum, but the Ten Commandments (or Sale of Goods Act) presented more of a problem. ‘The Sabbath was made for man, and not man for the Sabbath’ goes some way beyond conventional construction of the Fourth Commandment.

The more Messianic of our judges are adherents of the One Principle – Behave Reasonably – and would like it to be the rule that a contractor can withdraw from his contract only if this is reasonable in all the circumstances of the case, including the other party’s breach and his consequent liability to pay damages. No such rule is to be found in the Sale of Goods Act 1893 or even in the Supply of Goods (Implied Terms) Act 1973. On the contrary: ‘Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them . . .’ (s. 30); so, too, where an excess is delivered ‘the buyer . . . may reject the whole . . .’ His right to reject may be subject to contrary trade usage (and we can expect to find some of these quite shortly), but there is nothing to make the validity of its exercise depend on its reasonableness. The situation with regard to title, description and quality (ss. 12–15) is not quite so unambiguous, but on a normal reading of the Act, if the seller is in breach of a term described in the Act as a ‘condition’ the buyer may reject without any further questions asked, save whether he has waived his right to do so.

Now if the legislature has been perverse enough to create rights which private citizens may exercise in an unreasonable manner,

what are the judges to do about it? They could have adopted an extrinsic rule to the effect that all rights must be exercised in a reasonable manner, but fortunately or unfortunately the existence of any such rule has been quite recently denied by a majority both of the House of Lords (*White and Carter (Councils) v. McGregor* [1962] A.C. 413) and of the Court of Appeal (*Chapman v. Honig* [1963] 2 Q.B. 502). The judges must therefore operate inside the rights themselves, by redefining them so that they are incapable of abuse. This is what the *Hong Kong* case did with the common law right to resale, and this is what *Cehave* actually does with the statutory right to reject for unmerchantability, for it virtually asserts that goods are unmerchantable only if it would be reasonable to reject them, even although, as has been mentioned above, this method of denying the breach in order to prevent rejection has the drawback of preventing a claim for damages as well. With regard to the term 'shipped in good condition', the Court of Appeal could not deny the breach, since the sellers admitted it, so they had to deny the remedy on the basis of *Hong Kong*, even at the expense of introducing into contracts for the sale of goods terms of a kind not envisaged by the controlling statute or, indeed, dreamt of at the time of its enactment.

This Mocatta J. had refused to do, and one can understand his being unswayed by the arguments which commended themselves to the Court of Appeal. The first was that the legislature could not have meant in a codifying measure to overturn the earlier cases in which the *Hong Kong* doctrine was lurking. This is using the prophets, probably to their dismay, to overturn the law. Secondly, it was said that the Act preserved compatible common law anyway (s. 61 (2)). So it does, but if the common law says that more or less the right quantity will do, this is not compatible with the statute which says that it must be the right quantity and neither more nor less. Thirdly, it was said that there was no reason why the rules relating to contracts for the sale of goods should differ from the general law of contract. This is extremely disturbing. Different transactions call for different rules, even if they are all contracts, just as lockjaw and goitre call for different prescriptions though both are diseases. All civilised legal systems have a special régime for the

sale of goods. Even English law does: it is called the Sale of Goods Act. The fact that the legislature passes enactments related to particular types of transaction not only shows that their rules may differ, but actually makes them differ, from the 'general law of contract.' *Assumpsit* was doubtless a single action at law, but there is more than one kind of transaction in fact, and it is not a merit of the common law to fail to distinguish what a child can tell apart, who knows better than to offer 'rent' to the bus-conductor or a 'premium' to his barber. This failure has resulted, among other things, in the English law of contracts already having a General Part which is much too big. It will not seem so, of course, to adherents of the One Principle, for if there is One Principle, all distinctions must be as dross, save only the Ying and Yang of Reasonable and Unreasonable, Fair and Unfair or What I Like and What I Don't.

**Suit by first contractor for damage to
second contractor's goods**

(1977) 36 Cambridge Law Journal 24

A cargo of oil is lost at sea, and the underwriters pay its value to the owners. Apart from pitying the plumage of the dying birds, what could be more satisfactory? Goods are at the risk of their owner, but he may prevail on an insurer to accept the risk, and if he does so, the matter should be closed once the insurer indemnifies the owner, for the owner will be satisfied and the insurer will have performed the function for which he was paid. It is true that the insurer will not be best pleased, for although he has not lost any goods he is badly out of pocket on the transaction. The insurer's loss being merely financial, the common law does not allow him to sue in his own name even if the goods have been destroyed by the fault of a third party (*Simpson v. Thomson* (1877) 3 App. Cas 279), but the insured owner, who is not out of pocket although he has lost his goods, may still recover their value from any party liable for their loss (*Yates v. Whyte* (1838) 132 E.R. 793). If the owner chooses to sue, equity makes him hold the proceeds for the insurer;

if he does not, equity allows the insurer to sue in the owner's name. This is one aspect of the doctrine of subrogation: a nominal plaintiff whose rights have been infringed may recover full damages although he is not out of pocket, but must hold such damages for the contractor who actually bore the loss.

The same formal structure underlay *The Albazero* [1976] 3 W.L.R. 419 (H.L.), but at a second remove. Instead of suing in the name of the purchaser company which owned the oil at the time of its loss, the insurer brought action in the name of the vendor, the company which had chartered the defendants' tanker, on the ground that the oil was destroyed as a result of the presumed breach by the defendants of their obligations under the charterparty. It was true that the plaintiff charterer had suffered no loss, but the insurers claimed that the charterer could nevertheless recover the full value of the oil so as to hold it for his purchaser, the owner, who would hold it for the insurers themselves. This argument succeeded before Brandon J. and the Court of Appeal, but their decision was unanimously reversed in the House of Lords, where the only substantial speech was delivered by Lord Diplock.

In suing in the name of the wrong plaintiff the insurers made a costly mistake, but it was an understandable one. The policy under which they made payment was one which covered the property of a whole group of companies, including both the charterer/vendor and the consignee/purchaser, and it was far from clear that ownership in the oil had passed from the former to the latter before it was lost. The mistake was admittedly irremediable, since the consignee's personal claim on the bill of lading became time-barred under the Hague Rules shortly after proceedings *in rem* were started, and it could easily have been avoided if the insurers had sued in their own name after taking an assignment from all interested parties of any rights they might have had. The mistake must have seemed venial enough, however, since there was an old rule, emanating from the House of Lords itself, to the effect that a consignor of goods for carriage could claim their full value from the carrier notwithstanding that all interest in the goods had passed to someone else before their loss. It was the scope of this rule which led to an exactly equal division of judicial opinion.

It comes as no great surprise that the plaintiff was unable to obtain substantial damages for breach of contract when he himself had suffered no loss, but those who approve of the doctrine of subrogation must find something displeasing in a decision which allows a defendant who is admittedly responsible for destroying the goods to escape liability on the mere ground that the wrong nominal plaintiff is suing him, especially when any damages he might have been made to pay would have gone to the very person, the insurer, who would have received them if suit had been brought in the right name. Nor, in this case, could the defendant complain that he was not sued in time: it was simply that the correct nominal plaintiff had not sued him in time. There is thus some force in the remark of Ormrod L.J. that 'If the defendants succeed in this appeal they will escape liability on what on the facts of this case is the merest technicality.' Even so, it is submitted that the House of Lords was right to allow the appeal.

Lord Diplock did not deny that there might well be cases where a party to a contract might recover damages for breach although he himself had suffered no loss. He observed that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.

This is, however, a pretty restrictive formulation, even for an anomaly. Is such a suit *pro alio* to be available (a) only in the commercial sphere, (b) only in connection with contracts concerning goods and (c) only where the third party has acquired an interest in them before both the breach and the loss? The first two of these restrictions render this device inapt to solve the unanswered question in *Beswick v. Beswick* [1968] A.C. 58 (viz., could

the administratrix have obtained substantial damages instead of an order for specific performance of the nephew's promise to the intestate to pay his widow?), and the third restriction prevents the consignor/vendor from suing on behalf of the consignee on facts like those of the *Margarine Union* case [1969] 1 Q.B. 219, where the consignee himself was unable to sue because the damage to the cargo was done before he acquired title to it by taking delivery.

In *The Albazero* itself, however, the charterer's claim satisfied all these restrictive conditions. It foundered on another point, which constitutes the crux of the decision and the seed for further development. Lord Diplock went on to hold that the charterer could never sue the carrier on behalf of a party with whom the carrier had entered into a separate contract of carriage. In practical terms this means that the device can hardly ever be of use where goods are carried by sea, since endorsement of the bill of lading, the standard method of transferring title in floating cargoes, normally puts the transferee in contractual relations with the carrier under the Bills of Lading Act 1855. But it is the theory behind this rule which is most interesting.

A simple way of putting Lord Diplock's point is to say that you cannot sue on behalf of someone else if he could have sued on his own behalf. In order to see its full force and significance, however, one must consider the matter from the point of view of the defendant rather than the plaintiff. So considered, it suggests that a person who deals with goods under a particular contract is entitled to have his liability in respect of those goods determined by reference to that contract to the exclusion of other heads of liability. Such a principle is not only tidy but also just. In *The Albazero* the person who was trying to bypass the defendant's particular contract was a prior contractor whose claim was weak because he himself had suffered no loss, but the principle should apply with equal force when a stranger to the principal contract is founding on some other cause of action, such as tortious negligence causing damage to his property. Suppose, for example, that goods have been stored in a warehouse under a contract which gives some special protection to the warehouseman, and I then buy them

from the bailor; the warehouseman should continue to enjoy his protection even if damage is done to the goods after they have become mine (*obiter dictum* in *Britain & Overseas Trading (Bristles) Ltd. v. Brooks Wharf & Bull Wharf* [1967] 2 Lloyd's Rep. 51). Similarly, if my bailee lawfully sub-bails my goods on special terms, the sub-bailee should be able to rely on those terms against me (*contra*, *Lee Cooper v. Jeakins* [1967] 2 Q.B. 1 and the majority of the Court of Appeal in *Morris v. Martin* [1966] 1 Q.B. 716).

Lord Diplock had already shown in earlier cases a delicate sense of the importance of determining a defendant's liability with reference to the transaction under which he was operating (*Bagot v. Stevens Scanlan* [1966] 1 Q.B. 197). It would be very satisfactory if *The Albazero*, which in other respects is more interesting than important, were taken to confirm that approach.

The wages of the dead

(1981) 40 Cambridge Law Journal 20

A person who earns money may save it, or he may spend it, on himself or on others, relatives or not. The earning and the spending cease if he dies, and if he dies because of a tort, one must determine what the tortfeasor must pay. At common law the tortfeasor did not have to pay a penny to anyone, but Parliament has intervened twice. The Fatal Accidents Act 1846 (now 1976) made the tortfeasor pay surviving relatives what the victim would have spent on them, had he not been killed – a sensible enactment, which in principle gives people (though not all) only what they have lost (though not all). The Law Reform Act 1934 was passed mainly to let the living sue the dead rather than vice versa, but it did render the tortfeasor liable to his victim's estate: it is the will, the rules on intestacy, or the Inheritance (Provision for Family and Dependents) Act 1975 which determine who benefits from any payment he has to make.

The two principal enactments could coexist quite amiably – the tortfeasor pays the victim's estate for the harm due to the injury, and for the harm due to the death pays the relatives who suffer it

– but their relationship has been severely jolted by *Gammell v. Wilson* [1980] 3 W.L.R. 591. There the Court of Appeal held that the victim's estate may claim, less personal expenditure now rendered unnecessary, all that the victim would have earned in his normal life. This sum can never be less, and will often be much more, than the relatives could claim under the Fatal Accidents Act; and if it goes to others, as it may, the tortfeasor may have to pay the relatives as well. How have we come to a position where if a young executive on the brink of matrimony is killed intestate, his parents can obtain all he would have spent on the wife and kids he never had?

The trouble comes from clever advocates and well-meaning judges. When an earner is killed, the loss of time and money is manifestly due to the death, whether the death is quick or slow, whether it has happened or is yet to occur. Clever advocates, however, have dressed up these post-mortem losses as losses prior to death: time to be lost is treated as an expectation already frustrated, and earnings to be lost are treated as an invasion of the present interest in providing for others, the loss now of the power to spend later. Both these fictitious constructions have been accepted by the House of Lords, the first in *Rose v. Ford* [1937] A.C. 826, the second in *Pickett v. British Rail Engineering* [1980] A.C. 136, and they were accepted because each helps to cure a defect in the Fatal Accidents Act, as constructed. First, that Act gives nothing for emotional harm, the only harm which results from the death of a child. A modest sum can be procured for the grieving parents, however, if the infant's estate can sue under the Law Reform Act; but since the estate can sue only if suit could have been brought by the infant himself, we have to pretend that the real complaint is not that the infant is dead but that, prior to dying, he was about to die.

Pickett meets the second defect, that a Fatal Accidents Act claim is lost if the victim lives long enough to see his own claim satisfied or time-barred; in order not to deprive the dependants he is now allowed to claim the earnings which he will lose through his impending death and would have used to support them. Of course it is only while the victim is still in life that it helps his dependants

to give him such a claim: if he is dead, they have a claim of their own. Conversely, it is only when the infant is dead that we want to give the parents anything. That is why the House of Lords in *Rose* reversed the Court of Appeal's decision that one could not, once life had ended, complain that it had been about to end, but they thereby made it almost impossible for the Court of Appeal in *Gammell* to deny that the claim in *Pickett* transmitted to the victim's estate, though such transmission, as we have seen, is not only useless but pernicious as well.

In his valiant dissent Megaw L.J. was able to dismiss the claim for lost earnings by an elegant construction of the provision that claims by a victim's estate 'be calculated without reference to any loss . . . to his estate consequent on his death' (s.1(2)(c)). Theretofore it had been supposed that a loss to the victim in his lifetime was not a 'loss to his estate'; but whereas it is true that we normally employ the word 'estate' to refer to a person's net wealth only when he is dead, it is the very hypothesis of the 1934 Act that the death has taken place, so 'estate' there may well mean 'the wealth of the man now dead.' If this is so, the loss of earnings – which is indisputably 'consequent on death' even if, by prolepsis, it can be sued for beforehand – is a loss to the estate and is excluded by the Act. Illicit though it be to glance at *Hansard*, there is no doubt whatever that this is what was intended by the promoters of the legislation: one aged peer complained that 'if [the victim] goes under this measure he gets nothing for the loss of prospective income,' and was suppressed because he was critical, not because he was wrong. Indeed, the estate was, quite rightly, to have no claim for the victim's pain and suffering before death: in words now paradoxical, the Committee said ' . . . damages must be limited to the loss to the estate.'

If the House of Lords adopts this view, this anomaly resulting from the decision in *Pickett* can be avoided. Otherwise there must be legislation. It could properly follow the Damages (Scotland) Act 1976, and allocate claims as follows: pre-death emotional harm – the victim; pre-death economic harm – the victim or his estate; post-death economic harm – the victim or his relatives; post-death emotional harm – the relatives.

Wrongful life – nipped in the bud

(1982) 41 Cambridge Law Journal 225

It is a fact of life that if a woman in the first months of pregnancy contracts German measles, the child is apt to be born deformed. Laboratory tests can determine whether the woman has indeed been infected, and injections may prevent further harm to the foetus. Harm already done cannot, however, be reversed.

In 1975 Mrs. McKay knew she was pregnant and suspected, correctly, that she had contracted the disease. She went to her doctor and he took a blood sample, but owing to various alleged acts of negligence by him and the hospital testing service, he erroneously concluded that she had not been infected and did nothing. In the event she gave birth to a deformed child. Mother and child both sued (*McKay v. Essex Area Health Authority* [1982] 2 W.L.R. 890 (C.A.)).

The mother's complaint, which was not in issue, was effectively this: 'As the predictable result of your negligence I am lumbered with the expense and distress of having to bring up a deformed child whom I would have had aborted if you had done your duty.' This seems a perfectly good claim in tort. Its only unusual feature is that, if we treat having an abortion as physically equivalent to giving birth, the damage in question involves no physical lesion, but is purely financial and emotional. This should present no difficulties, especially after *Junior Books* [1982] 3 W.L.R. 477 and *McLoughlin v. O'Brian* [1982] 2 W.L.R. 982.

The child's first complaint, against the doctor, was as follows: 'Because of your negligent failure to inject my mother, my deformities are worse than they would otherwise have been.' It will not be easy for the plaintiff to establish that any of the deformities were due to the preventable sequelae of the disease rather than to its initial ravages, though some help may be provided by two rather suspect cases (*Bonnington Castings v. Wardlaw* [1956] A.C. 613; *McGhee v. National Coal Board* [1973] 1 W.L.R. 1). Problems of proof apart, however, this claim seems unobjectionable at common law. It is true that the common law has now been abolished in such cases by the Congenital Disabilities (Civil Liability) Act 1976, but a claim such as this will succeed under the Act since it is

a claim in respect of ‘disabilities which would not otherwise have been present.’ The child’s second complaint, however, was not that the disabilities would not have been present, but that she herself would not have been present, so it will not lie under the Act, the sole source of liability in the future. The question was whether it stated a cause of action under common law rules which the statute has now replaced.

The child’s second complaint, against doctor and hospital, was effectively this: ‘Owing to your carelessness I have the misery of a wretched life which I would have been spared if you had done as you ought.’ All three members of the Court of Appeal held that this claim must fail (though Griffiths L.J. held that it should nevertheless go to trial, thereby showing a lofty indifference to the waste of public funds on idle advocacy).

Three points were beyond dispute. First, the carelessness. This was not a case of a doctor deciding, perhaps wrongly, not to tell the mother, but of a doctor losing the blood-sample or misreading the laboratory report, which is wrong beyond question. Secondly, causation. Not every mother, on being told the truth, would have had an abortion, but Mrs. McKay would have done so, so the child’s birth was causally due to the defendants’ carelessness. Thirdly, foreseeability. So far from there being anything surprising about it, the outcome was exactly the thing the defendants were there to guard against.

Negligence, causation and foreseeability being thus plain, the only grounds on which the claim could be dismissed were ‘no duty,’ ‘no damage’ and ‘public policy.’ All three grounds figure in the judgments. They are not co-ordinate grounds, however: ‘no damage’ is a neutral conclusion from an analysis of the facts, while ‘no duty’ calls for a value-judgment quite as much as ‘public policy’ does, though less obviously.

In the present case ‘no duty’ is perhaps the weakest of these grounds. To assert that one cannot owe a duty to a foetus to kill it is plausible enough, but the plausibility fades a bit when one has to admit that a duty to kill the foetus may well be owed to the mother: if the duty can be owed to one of the affected parties, why not to the other?

‘Against public policy’ is a judicial utterance which, being interpreted, means ‘We feel that this would be a bad thing, and we hope that others would feel the same, though we have no means of knowing.’ Now normally cases should be decided *normally*, that is, by the application of an ascertained norm or rule. Sometimes, however, there are marginal or freaky cases where the straightforward application of the general rule gives a result repugnant to sense or feeling. In such cases ‘against public policy’ is a perfectly proper noise to make. To deny this is to be guilty of what used to be called conceptualism. One would not think of Lord Scarman as a conceptualist, yet shortly after *McKay* was decided he said ‘. . . if principle inexorably requires a decision which entails a degree of policy risk, the court’s function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament’ (*McLoughlin v. O’Brian* [1982] 2 W.L.R. 982, 997). Lord Edmund-Davies (at p. 993) was quite right to castigate this view (which Lord Bridge shared), none the less so because the ‘principle’ in question, that one must pay for the foreseeable consequences of one’s wrongdoing, ‘inexorably’ leads, unless curtailed, to judgment for the plaintiff, and would have done so in the present case.

Unless, of course, there was ‘no damage’. This is perhaps the best ground on which to dismiss the claim. One must be clear, however, just why there was no damage. It is not because the defendants did not cause the deformities as such, for while that is true, they certainly caused the deformities to be suffered, and despite *West v. Shephard* [1964] A.C. 326, the law is right to be concerned not so much with the objective existence of deformities as with the subjective fact of their being suffered. But this does not show that there was *damage*. The child would not have been *better* if the defendants had done their duty: she would not have been *at all*. To damage is to make worse, not to make *simpliciter*. The child was deformed *ab initio*, just like Mr. Anns’s house. And just as the Merton Borough Council did not damage Mr. Anns’s house (though they damaged him, financially), so the defendants did not damage the child here (though they damaged the mother, both financially and emotionally).

The answer to Anns?

Instead of taking the point that the damage was non-existent, their Lordships tended to say that it was unsusceptible of measurement. This is not quite accurate. For forty years the courts have been awarding damages for ‘loss of expectation of life’, i.e., for being killed. It is true that it was silly of them to do so and that Parliament is about to stop them, but since it is the fact that they have done it, they can hardly deny that it is possible. If one can give damages for the onset of permanent unconsciousness (death) one can equally give damages for the onset of temporary consciousness (life): the factors in the equation are identical.

Life and death was what this case was about – the ends and end of life, to be or not to have been, *l'être et le néant*. The juxtaposition of two quotations may tell us something about (a) the level of legal discourse, and (b) the quality of our society. Sophocles: ‘Much the best is never to have been; a quick return to non-existence is a poor second’ (Oedipus at Colonus 1224–1227 (407 B.C.)). Ackner L.J.: ‘This case . . . raises no point of general public importance’ ([1982] 2 W.L.R. 890, 908).

The answer to Anns?

(1985) 44 *Cambridge Law Journal* 26

Wizard as he usually was, Lord Denning sometimes played the Sorcerer’s Apprentice and, in his efforts to clean up a local mess, unleashed forces apt to engulf us all in a flood of liability until the utterance from above of some countervailing spell. *Dutton v. Bognor Regis U.D.C.* [1972] 1 Q.B. 373 is the outstanding instance. For the £2,000 or so that Mrs. Dutton needed to repair her house, which a careless building inspector had allowed to be built on inadequate foundations, Lord Denning imposed liability on the local authority as well as the builder. As the harm due to the authority was purely economic, although Lord Denning said it was physical, this is a decision that a governmental unit may be liable to a person in no very close relationship to it for failing to save her money. Any proposition on which such a decision can be rested is unacceptably wide.

Yet *Dutton* was endorsed by the House of Lords five years later in *Anns v. Merton London Borough* [1978] A.C. 728. Despite its importance, *Anns* somehow fails to reach the status of a decision of principle, perhaps because Lord Wilberforce was so interested in distinguishing the operational and discretionary aspects of a local authority's activities that he was rather casual and equivocal about the elements of the civil liability to which the former might give rise. Health and safety were mentioned, but once again the harm in issue was characterised as physical or material, although only repair costs were in issue.

Since 1977 the lower courts have been extending the reach of *Anns* and the House of Lords has been trying to curtail its effects. In *O'Reilly v. Mackman* [1983] 2 A.C. 237 they took dramatic steps to stem the tide of governmental liability in tort to which *Anns* had so significantly contributed. In *Pirelli* [1983] 2 A.C. 1 they sought to limit the period of time during which tortfeasors remain liable for defects in buildings, and have been roundly blamed for doing so. Now, in a decision most warmly to be welcomed, they have held that, because the purpose of Building Regulations and like rules is to safeguard the health and safety of the citizen rather than his pocket, a local authority can only be liable if the building is dangerous as well as defective in consequence of their carelessness in exercising their powers under them: *Peabody Trust v. Sir Lindsay Parkinson* [1984] 3 W.L.R. 953.

The plaintiffs were having 245 houses built on a site in Lambeth. The plans approved by the local authority called for flexible joints in the drainage system but the plaintiff's architect used fixed joints instead and the drains failed before the houses were completed. The replacement work cost £118,000 and the three years' delay cost the plaintiffs a great deal more in extra expense and lost rental income. The plaintiffs sued on the basis that the local authority, which knew what they were doing, should have stopped them deviating so disastrously from the approved plans. The trial judge gave judgment for the plaintiffs, but the Court of Appeal reversed [1983] 3 W.L.R. 754, and the House of Lords dismissed Peabody's appeal.

Lord Keith's speech, with which his brethren all agreed, warns against taking literally those resonant pronouncements about duty

in negligence by which so many law students and judges have been enraptured and misled, and emphasises that in determining the scope of any alleged duty to take care one must pay heed to the question whether it would be just and reasonable to impose such a duty. This is a much needed antidote to the pernicious view, recently expressed in *McLoughlin* [1983] 1 A.C. 410 and applied in *JuniorBooks* [1983] 1 A.C. 520, that if a case falls within the terms of Lord Atkin's incantation, liability must follow even if there are no good policy reasons for imposing it.

Lord Keith then scrutinised Lord Wilberforce's speech in *Anns* and found it less than watertight. He concluded that the scope of the local authority's duty in exercising its statutory powers is limited by the purpose for which those powers were granted to it by Parliament. Since in enacting Building Regulations and similar provisions Parliament had the health and safety of the public in mind rather than the financial interests of developers, liability could exist only when health and safety were endangered. This is not to say that actual harm to life, limb or other property is now required: if a person to whom a duty is owed is endangered, he can recover the cost of alleviating that danger, but not, apparently, much else in the way of mere financial loss. Thus, according to Lord Keith, it must be taken to have been an essential fact in *Anns* that the plaintiffs were owner-occupiers of the affected flats; *Dennis v. Charnwood B.C.* [1983] Q.B. 409, where a local authority was held liable to the person who was having the house built, must be read in the light of the fact that that person was having it built for his own residence; and *Acrecrest v. Hattrell* [1983] Q.B. 260, where the Court of Appeal held a local authority liable for not sufficiently correcting the mistakes of the developer's own architect (!), is overruled. In effect, therefore, the *Anns* liability will exist only in relation to dwellings.

Will *Peabody* be popular? That depends on one's view of *Anns* and *Dutton*, especially as extended from personal to corporate plaintiffs. In fact Mrs. Dutton's £2,000 has cost ratepayers dear, though lawyers and architects' insurers have done very nicely, for *Dutton* and *Anns* have damaged the fabric of the law, constipated the practice of building and perverted the financing of housing.

We need only look at the Defective Premises Act 1972, read in Parliament before Lord Denning gave Mrs. Dutton her £2,000, to see how entirely unnecessary this judicial extravaganza was. The Act was directed to the very problem posed in *Dutton*, namely how to protect the purchaser of a badly built house. The solution was to impose liability on the builder and the developer, not on the local authority: for private sector housing, liability was to remain in the private sector, as is only right. Furthermore, the statutory liability applies only to dwellings (clearer than the position now achieved by *Peabody*) and lasts for six years from the time of the completion of the building (rather than the more debatable time when the damage ‘occurs’ under *Pirelli*). In short, Parliament wrought much better than the courts. But in fact a house-purchaser will hardly ever invoke the statutory liability under s.1, because it is excluded by s.2 if the house purchaser is protected by an approved scheme of contract and insurance. Such protection comes with virtually every new house nowadays. A very good idea. Leave the law of tort out of it. Save litigation. Avoid transfer costs. But does it work? No, it doesn’t, because the common law of tort sneaks in the window though the door be barred. Remember that the ‘equitable’ device of subrogation allows the indemnity-insurer of a tort victim to exercise any tort claims the insured may have in respect of the subject-matter. It will not be long before an insurer is suing a local authority in respect of a dangerously defective dwelling and doing so in the name of the owner-occupier. *Ann’s* will provide the basis of the claim, and *Peabody*, alas, will not prevent it, unless we say that although the occupier was endangered, he did not suffer any loss because the repairs were paid for by the insurer. This argument does not work in cases of physical damage, but it has more force where the damage is admittedly economic only. Alternatively, the Minister should disapprove any scheme which does not exclude subrogation rights.

Another problem remains. Hitherto when both the builder/developer and a local authority have been liable for a loss suffered by an owner-occupier, the courts have made both defendants contribute, often in the proportions 3:1. Although the House of Lords in *Peabody* had held that a local authority is not liable *in tort* to the

developer (since a development company can hardly be endangered), yet if both the developer and the local authority are liable to the human occupier, then a contribution relationship, though not a tort relationship, will exist between them and the result will be that the local authority which need not contribute to other economic losses suffered by the developer will have to contribute towards the sums the developer has to pay to the occupant. Some method must be found of stopping such a nonsense, because if it is not just and reasonable that the local authority should have to pay damages to the developer, it can hardly be just and reasonable that it should have to pay contribution.

It would, therefore, have been better to overrule *Anns* altogether, and hold that a local authority is liable only if the building which is defective through its carelessness causes actual physical harm to person or other property. That would have been better not only for the reasons given above, but also because puisne judges will surely be unhappy to hold that while the personal occupier of a dangerously defective house can claim the cost of making it safe for himself and his family, the corporate occupier of an office block cannot claim the cost of making it safe for its staff. *Peabody* may thus be a small mercy.

Impoverished developers will of course continue to try to plunder public funds. *Anns*, it is true, will not help them. But do they need *Anns*? Not really. Developers, after all, are in a much closer relationship with the local authority than the eventual purchasers for whom *Anns* was designed: developers have dealings, communications, negotiations and so on with the local authority, rely on what it says and are directly affected by what it does. Accordingly they can invoke *Hedley Byrne* and *Junior Books*, and will win whenever some misrepresentation or misfeasance can be imputed to the local authority. Despite *Peabody*, therefore, a local authority may still be liable to a developer if it helps to cause a financial loss rather than merely fails to avert one. The line of distinction is fine, and one can be sure that every effort will be made to blur it and to treat any condonation of deviation from an approved plan as an encouragement to deviate from it, as happened in *Cynat Products v. Landbuild* [1984] 3 All E.R. 513.

**Liability for knowingly facilitating
mass breaches of copyright**

(1988) 47 Cambridge Law Journal 348

Copyright has often seemed a law unto itself. Perhaps it should be. Yet just as cheerfulness kept breaking in on Dr. Johnson's friend Edwards when he tried to be philosophical, so questions of general law keep cropping up in copyright cases. When is a director liable for his company's tort? (*Evans (C.) & Son v. Spritebrand* [1985] 1 W.L.R. 317). Is it a derogation from grant (or abuse of right?) for a manufacturer to insist on his copyright against the producer of replica spare parts? (*British Leyland Motor Corp. v. Armstrong Patents* [1986] A.C. 577). Does a printer owe a duty to a possible owner of copyright in material tendered by a customer? (*Paterson Zochonis & Co. v. Merfarken Packaging* (1982) [1986] 3 All E.R. 522). So it was in *CBS Songs Ltd. v. Amstrad plc* [1988] 2 W.L.R. 1191, where the owners of copyright in recorded music unsuccessfully sought to restrain the sale and advertisement of cassette-players with a facility for high-speed dubbing, it being assumed that 'most . . . consoles are used for the purpose of home copying in breach of copyright' and even that '. . . if the use of fifty million blank tapes could be prevented, there would [be] a sale of roughly thirty million more records.'

This was a squabble between two major contributors to ambient noise over the profits to be made from such atmospheric pollution. Lord Templeman, who gave the sole speech in the House of Lords, was appropriately sardonic. He tells us that a record of 'a group without a voice singing a song without a tune' may become 'a permanent reminder of a temporary attraction', he is acerbic about Amstrad's advertising ('deplorable' and 'cynical') and he evinces disapproval of other recent claims in tort for mere money losses due to the act of third parties.

As to copyright, the statutory bases of liability – reproducing and authorising reproduction – were not made out. 'By selling the recorder Amstrad may facilitate copying in breach of copyright but do not authorise it' and Amstrad's advertising did not suggest that 'Amstrad possessed or purported to possess the authority to

grant any required permission for a record to be copied': 'Amstrad conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy.' A wider notion of 'authorising' had been embraced by Whitford J. at first instance, by the High Court of Australia and by textbook writers; this narrowing is very welcome, especially as the concept remains in the new Act.

Apart from incitement to crime (no crime committed), the common law torts alleged were incitement to tort and (of course) negligence. Now it is clear that it is *ipso facto* a tort to *get* someone to commit a tort ('Bite him, Fido!'), whereas to *let* someone do so is tortious only if there is a duty to try to stop him. Between getting and letting, however, there might be a middle area of *helping*: Amstrad, after all, had supplied people with a device for committing torts well knowing that many of them would so use it. Lord Templeman ignored the luminous discussion by Robert Goff L.J. in *Paterson Zochonis v. Merfarken Packaging* [1986] 3 All E.R. 522, 539–542, and merely indicated that procurement or incitement will not normally be tortious unless it is directed at a particular individual, not, as here, to the general public. This is consistent with inducing breach of contract, and reminiscent of negligent misrepresentation.

If liability for facilitating the commission of a tort depends on there being a duty to take care not to, we are in the realm of negligence. Here Lord Templeman was astringent: 'Since *Anns* . . . put the floodgates on the jar, a fashionable plaintiff alleges negligence.' The allegation in this case was smartly dismissed. 'The rights of BPI are to be found in the 1956 Act and nowhere else. Under and by virtue of that Act Amstrad owed a duty not to infringe copyright and not to authorise an infringement of copyright. They did not owe a duty to prevent or discourage or warn against infringement.' The holding that there was no duty is consistent with modern negligence law: the plaintiffs were complaining of merely economic harm, and there was no special relationship between the parties. It is also consistent with another fizzy-drink case from Scotland: in *Leitch & Co. v. Leydon* [1931] A.C. 90 the House of Lords held that a retailer of soda-water was perfectly free to fill any bottles tendered by customers, though he

knew that many such bottles were being tendered in breach of the pursuers' property rights in them. As to breach, it is worth noting that by denying that Amstrad owed any duty to the copyright holders, the courts spared themselves the undelightful task of deciding whether what Amstrad did was reasonable or not. In a comparable context Fry L.J. had said that 'To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts' (*Mogul S.S. Co. v. McGregor, Gow* (1889) 23 Q.B.D. 598, 625).

One may, however, ponder the reason offered for holding that Amstrad owed the plaintiffs no duty at common law, namely that the plaintiff's statutory rights enjoyed only such protection as the statute itself afforded. If so, the discussion of incitement short of 'authorising' was a waste of time, and Lord Templeman should have embraced the view of Glidewell L.J. that there was no tort of procuring breach of copyright analogous to that of inducing breach of contract. But in fact the common law does frequently afforce rights of statutory origin, quite apart from actions for breach of statutory duty which are often a purely common law construct. Have we not been reading recently about common law liability for putting another in actionable involuntary breach of statutory duty (*Barretts & Baird v. IPCS* [1987] I.C.L.R. 3)? And may D not be liable, even after *Lonrho v. Shell* [1982] A.C. 173, for conspiring with X that X commit a breach of X's statutory duty towards P? Yet for the Copyright Act Lord Templeman's reason may hold: the presence of liability for 'authorising' may indicate a legislative intention that no other accessory should be civilly liable to the copyright holder. Perhaps copyright is a law unto itself. Perhaps it should be.

Rebuilding defective building law

(1989) 48 Cambridge Law Journal 12

One might have expected that after *Anns* and *Junior Books* the plaintiff would win if (1) he had spent money replacing in his apartment plaster dangerously apt to fall off because the defendant builder

had applied it badly, or (2) he had lost money when work on a building he was having built was delayed when the defendant subcontractor's incompetence on site damaged the restaurant next door. Yet the plaintiff lost in *D. & F. Estates Ltd. v. Church Commissioners* [1988] 3 W.L.R. 368 (H.L.) and *Greater Nottingham Co-op. v. Cementation Ltd.* [1988] 3 W.L.R. 396 (C.A.). *Anns* and *Junior Books* have evidently been further restricted.

Anns was a suit against a local authority. In deference to the quite reasonable argument that the local authority should not be made liable for carelessly letting a builder build a bad house in breach of regulations unless the builder himself were to be liable for building it badly, the builder's liability to an eventual purchaser was approached obliquely and summarily accepted. If, as was suggested, the builder's liability could be based on *his* breach of regulations, it could rationally be subjected to the same limitations as now attach to the authority's liability, namely that only an occupier can sue, and then only when he is endangered: when a statute or statutory instrument is in the case, anything is possible.

But what of the liability of the builder at common law, as to which anything said in *Anns* is now to be treated as *obiter*? Surely it should track the liability of the manufacturer of a chattel. While we have not yet, in Britain, had a claim for the cost of making a defective product safe, the indications are that the manufacturer is not liable to a non-contractor except for actual physical harm (*Muirhead, Simaan*). In the absence of a very special relationship sufficient to satisfy *Hedley Byrne* and its supposititious affiliate *Junior Books*, tort liability for negligence at common law lies for actual property damage, not for causing either mere expense or a mere risk of harm, one or other of which must underlie any liability for the cost of making a defective product safe. This, at any rate, is the message we receive from *D. & F. Estates*, which held that a negligent builder is not liable in tort at common law for the cost of replacing defective work, and doubted whether he is liable for the cost of rendering it harmless.

But if the builder is not bound to repair defects, he is certainly bound to repair physical damage. We must therefore learn to distinguish the defective from the damaged thing. This was discussed

in *D. & F. Estates* though in that case the defective plaster did not damage anything. Can the purchaser of a house complete with walls, floors, attic and foundations rationally say ‘Your foundations broke my walls’ or ‘Your insufficiently reinforced steel joist broke my attic’? The problem arises whenever the defendant has supplied a component and the plaintiff has acquired the composite. Lloyd L.J. put it well in *Aswan Engineering* [1987] 1 W.L.R. 1, 21: ‘Aswan were buying Lupguard in pails. They were not buying Lupguard *and* pails’, though he inclined to the view that the Lupguard was damaged by the pails. But surely, since it is the nature of the damage which is in issue, and since damage is what happens to a plaintiff, we should view the matter from the plaintiff’s side, even if he would rather we didn’t. The Consumer Protection Act 1987 is right to exclude strict liability in respect of damage to any product supplied with and comprising the defendant’s defective product (s.5(1)).

If *Anns* has had a rough ride in subsequent decisions, *Junior Books* has been positively unhorsed. Indeed, Dillon L.J. has doubted the utility of ever trying to reseal it. In *Junior Books* the plaintiff site-owner and defendant subcontractor had both contracted with the main contractor, not with each other, but ‘the relationship between the parties was as close as it could be short of actual privity of contract.’ This was one of the eight features instanced by Lord Roskill (speaking for a bare majority) as justifying the imposition of liability for loss consisting of and consequent on the replacement of work which was imperfect but safe. In *Greater Nottingham Co-op*, where there was no defective product, only incompetent conduct, all seven other features were present, and the relationship was even closer, namely actual privity of contract, for the defendant had expressly undertaken, in return for certain concessions by the plaintiff, that the design would be proper, the materials suitable, and the work expedited. Nothing was said as to the care with which the defendant was to execute the contractual design with the contractual materials. Hardly necessary, you might think. Fatal, as it proved. For the Court held that in view of the general antipathy towards any extension of *Junior Books* it would be wrong to find the requisite ‘voluntary assumption of responsibility’ *vis-à-vis* the plain-

tiff in a case where the defendant had an actual contract with him in which such assumption might have figured but did not. The House of Lords refused the plaintiff leave to appeal.

Twenty-five years ago the fact that conduct was a breach of contract neither rendered it tortious nor prevented its being so (though the terms of the contract might provide a defence). Tort and contract were independent and concurrent. This presented no real problem since liability in tortious negligence existed only if the conduct was dangerous and did physical harm: liability for unintended economic harm called for a contract, characterised by consideration and privity. But then *Hedley Byrne* rendered consideration inessential and *Junior Books* did likewise for privity. As this was called a liability in 'tort' rather than 'pseudo-contract', the area of overlap expanded so as to become nearly universal, for every breach of contract became a tort against the contractor if it was negligent and did him any harm at all. The substantive conditions of the defendant's liability towards his contractor have not been affected, despite plaintiffs' importunings, but his exposure to suit has been quite unjustifiably prolonged, inasmuch as in tort time starts to run from damage not breach. Those who were 'really' guilty only of a breach of contract were accordingly sued as tortfeasors, and the disorder in the law of obligations was seen to be acute. What can be done about it? Since it is not practical to abandon *Hedley Byrne* we must jettison our practice of concurrence, at least in cases of pure economic loss. The *Greater Nottingham* decision poses rather than solves the problem: but surely if, as it holds, there is no liability in tort for negligence where it is not a breach of the contract between the parties, then there would be no tort liability even if the negligent conduct did constitute a breach: it would be only a breach, and not a tort as well. We shall have to wait and see.

It is clear that the courts now wish *Anns* and *Junior Books* were out of the way. We sympathise with them in their self-induced frustration. Those two decisions have led to what Lord Donaldson has called 'authoritative chaos'. Since they are irreconcilable with principle and incapable of logical containment, they must, if not overruled, be contained illogically, *Anns* being taken to apply only

to liabilities associated with legislation and *Junior Books* applying only to the relation between site-owner and sub-contractor and only when there is no contract between them, as nowadays there usually is.

It is a sorry tale, which fully justifies the view of Lord Bridge that ‘it is . . . a dangerous course for the common law to embark upon the adoption of novel policies which it sees as instruments of social justice but to which, unlike the legislature, it is unable to set carefully defined limitations’ ([1988] 3 W.L.R. 368, 389).

Statutory auditor not liable to purchaser of shares

(1990) 49 Cambridge Law Journal 212

You buy shares in a company in reliance on its auditor’s statutory report, and lose on the deal because the company’s affairs were not as the auditor had represented them to be. Even if the auditor was negligent, you have no claim against him. This is true even if you were already a shareholder in the company and a copy of the report was sent to you personally, as required by law. The House of Lords so held in *Caparo Industries p.l.c. v. Dickman* [1990] 2 W.L.R. 358, the Court of Appeal having held, by a majority, that an existing shareholder could sue, though an outside investor could not [1989] 2 W.L.R. 316 (noted with approval by Tettenborn, [1989] C.L.J. 177).

It is not only to accountants that this decision comes as a great relief. There had been grounds for fearing that liability was back on the rampage. In *Smith v. Eric S. Bush* [1989] 2 W.L.R. 790 the House of Lords had held that a mortgagee’s surveyor/valuer who negligently overestimated the condition or value of a dwelling was liable to its purchaser in the absence of a valid disclaimer, and the Court of Appeal in *Caparo* had, in one respect, gone even further, as was shown by Millett J. in *Al Saudi Banque v. Clarke Pixley* [1990] 2 W.L.R. 344, where he quite rightly held that a careless auditor was not liable to the banks he knew to be currently financing the company under audit.

Like *Donoghue v. Stevenson* itself, *Caparo* contains general observations about the tort of negligence as well as a specific holding. In

Donoghue Lord Atkin had said that ‘. . . in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances’, but now ‘it has to be recognised’, according to Lord Oliver, ‘that to search for any single formula which will serve as a general test of liability is to pursue a will-o’-the-wisp’ and Lord Bridge says that ‘While recognising . . . the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.’

So we must not seek a magic phrase, charm or spell to get us out of the cave of obscurity, nor try to dream up a hermeneutic concept to light our path when it comes to the turning ‘Duty’ or ‘No Duty’. ‘Foreseeability’, like patriotism, is not enough. ‘Proximity’ is just the teeniest bit vague. ‘Just and reasonable’ goes to liability rather than to duty (but so, really, does the whole discussion). In each case it is an ‘intensely pragmatic’ question of evaluating the significant factors, of typifying them, of putting them into proper categories. The categories of negligence may not be closed, but they are discrete, not reducible to examples of a statable principle. Cases in the individual categories have common factors, but the categories themselves have no common denominator.

Cases of misrepresentation causing economic loss are now, in derogation from a suggestion of the High Court of Australia, to form a distinct category. Here the focus has often been on the *relationship of the parties* – was there a ‘special relationship’, a relationship ‘equivalent to contract’, was the plaintiff in the forefront, not just in the suburbs, of the defendant’s mind? Did the defendant hand the document to the plaintiff or know that it was to be handed to him? Or one has concentrated on the *attitude of the defendant* – did he ‘voluntarily assume responsibility’? This phrase, once used to defuse *Junior Books* and then reprobated by Lord Griffiths in *Smith v. Eric S. Bush*, is certain to re-emerge next time we have a case of delusive silence rather than speech. Again, it has

been a factor whether the defendant *benefited* in any way from his activity or whether the plaintiff indirectly *paid* for the advice or information. Now two cognate factors take on new prominence. One is the *purpose of the representation*, including the purpose of Parliament in requiring it; the second is the *nature of the transaction* in issue, the precise form of the reliance, not just whether the actual reliance was reasonable or not. This was explicit in the dissenting judgment of Lord Denning in *Candler*, now raised to the level of holy writ: 'I have confined the duty to cases where the accountant prepares his account and makes his report for the guidance of the very person in the very transaction in question.'

It was not in order to facilitate investment that Parliament required the auditor's report to be sent to shareholders, but to facilitate their control of the directors' management of the company: after all, the distinguishing characteristic of the shareholder is not that he has access to the auditor's report, but that he can (normally) vote at the annual meeting, not that he can buy shares but that he has shares to sell. The emphasis of the House of Lords was on the transaction undertaken, not, as in the Court of Appeal, on the relationship between the parties. This is not to say that in other cases the relationship may not be important: accounts prepared specifically for a particular investor will doubtless lead to liability to that person, not to anyone else who invests, just as a valuation or survey may be invoked, if relied on, by the first purchaser of a house, not his successor, and as a certificate of freedom from dry-rot may avail the purchaser of the flat in question, not of the flat above.

Finally a word must be said about the merits of Caparo's claim. Investors are of different kinds. On the one hand are the little people, such as those who invested in Barlow Clowes and to whom our government – doubtless in the hope of gaining votes, since it denies liability – is affording a subvention with money raised from cannier investors. Perhaps Yuen Kun-Yeu fell in the same category, though the sums deposited in that case were 'substantial'. These were actual people, real individuals. Not so the government itself, which was taken for a very expensive ride by de Lorean and is now claiming some \$260m. from the auditors under a United States statute.

Fixing the foundations

But at any rate all these – individuals or not – were investors. Caparo, on the other hand, was not. It was not investing in Fidelity p.l.c., it was buying it, taking it over. Caparo was a predator. Nor was Caparo exactly wet behind the ears. With a turnover of over £150m. it is among the top 500 manufacturing companies in Britain. Its chairman, Mr. Swarj Paul, chairs over twenty other companies. Allegedly the directors of Fidelity were fraudulent. Greed foiled by fraud is not quite maiden virtue rudely strumpeted, but it is hurtful all the same, and none the less so when the fraud is facilitated by negligence. But if Caparo were conned out of their booty, let them go against the vendors for fraud or breach of contract. Let not the predator turn and rend those who failed to catch the fraudster who succeeded in catching him. *Caveat prae-datoris* a sound and moral rule. Mr. Paul was not, like that other useful contributor to the Law Reports, Tiny Rowland of Lonrho, a fox that didn't get the grapes that looked so sweet. He was a fox that got the grapes and found them sour. And very sour they were. Fidelity has ceased to trade; the firm it merged with is not doing too well, either. Caparo's claim was apparently for £13m. They can sue Fidelity's previous directors, but all they can do to their auditors is sack them. Quite right too.

Fixing the foundations

(1991) 50 Cambridge Law Journal 24

Murphy v. Brentwood D.C. [1990] 3 W.L.R. 414 (H.L.) adds nothing to the law. It simply removes something which should never have been there, namely *Anns v. Merton London Borough* [1978] A.C. 728. According to *Anns*, if an unsafe building were put up in consequence of a local authority's failure to make proper use of its statutory powers of control, the local authority was liable for the cost of making it safe. Now it is not. We are back to basics: the authorities have fixed the foundations, and deserve great credit for it.

Like *Anns*, and because of it, *Murphy* speaks in terms of 'duty'. The common law's concept of duty, unknown in some other legal

systems, has its uses. If you don't want to make a person pay for the foreseeable harm he may unreasonably have caused, you can always say that he owed the victim 'no duty' to behave reasonably, and then you don't even have to inquire whether in fact his conduct was unreasonable or not. Those who believe that people should invariably have to pay for any foreseeable harm they unreasonably cause will find the very concept repugnant. Others may seek more suitable devices for containing liability within proper limits – more suitable, since the question is not really whether, as the duty device suggests, the defendant should be careful but whether he should pay for having been careless; for this they may prefer the notion of 'public policy', with all its false candour and participatory glitz. But the duty device probably answers well enough, provided we remember that the bottom line is not whether the defendant was actually under a 'duty' (which can never be anything other than a mere notion) but whether in the circumstances he should be held liable, i.e. laid by the heels and made to cough up.

Both *Anns* and *Donoghue* discuss the general principle according to which a duty to take care should be held to arise, as well as its special application to the (hypothetical) facts. In his speech on 'neighbours' Lord Atkin indicated that if people are close enough to be harmed by what you are doing ('next door is only a footstep away') you owe them a duty to take proper care. Lord Wilberforce's 'two-stage' test in *Anns*, though not all that different in its actual terms, was taken to mean that if any harm to another is foreseeable as a result of one's conduct a duty of care is owed unless there are contraindications of policy. So far as this general proposition went beyond that of Lord Atkin, it has been trashed by subsequent decisions: 'proximity' is now the key word, though it doesn't unlock many doors.

But statements are coloured by their context. If the principles enunciated in the two cases were much of a muchness, the (presumed) facts were quite different. Stevenson made the noxious ginger beer, Merton didn't build the defective house. Mrs. Donoghue was poisoned, not a hair on Anns's head was hurt. Stevenson himself positively caused physical harm; Merton simply failed by inertia

or inadvertence to prevent a third party causing harm which was purely economic. On the facts of *Anns* the decision didn't fit and because it didn't fit it didn't work: the system unsurprisingly rejected the implant.

The reason *Anns* didn't fit was that it imposed liability for simply failing to guard a stranger against merely economic harm. Now the general law of the land, as opposed to statute or that very special relationship known as contract, does not lightly impose *positive* duties, and it did not do so in *Donoghue* (and though it is true that in *Dorset Yacht* [1970] A.C. 1004 the warders were in principle held liable to strangers in the vicinity for not keeping the boys in, the damage done was physical, and as voices are now noting, the warders were not simply inactive: they had brought the boys to the island in the first place – and there are precedents for making a person liable if he collects something and then carelessly lets it escape).

Furthermore, the harm in *Anns*, despite appearances, was purely *economic*: the house might be collapsing, but the collapse *constituted* the harm, the only harm it *caused* was the expense of paying another builder to fix it or the loss apt to be suffered on resale. Economic loss like that is compensated only where there is a 'special relationship' between the parties, where the plaintiff is entitled to special treatment. If the relationship between manufacturer and consumer is insufficiently special for this purpose, as *Muirhead* [1986] Q.B. 507 authoritatively tells us, the relationship between local authority and eventual occupier is *a fortiori* inadequate.

These decisions – between doing and not doing, and between physical damage and financial loss – are manifestly not *irrational*. Some thinkers have, however, sought to argue that they should be *irrelevant* to the question of liability. Yet surely the person who adds a danger to life is more culpable than one who merely fails to prevent or defuse one: gassing people really is worse than not sending surplus food to starving millions. And the distinction between physical harm and other forms of loss is significant enough even to laymen, for it is implicit in the not very technical word *danger* and the quite sensible slogan '*safety* first!': the Hillsborough disaster, with its death, suffocation, pain, fear, shock and grief, was

really worse than the (merely metaphorical) collapse of the stock market, which doubtless affected more people overall. The words to treasure are those of Lord Oliver: ‘The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not’ ([1990] 3 W.L.R. 414, 446).

Anns went too far too fast. The zeal, though misplaced, was not inexplicable, because if anyone is to get money from a stranger, the person who needs it in order to make his home safe has a pretty strong claim (compare *Smith v. Eric S. Bush* [1990] 1 A.C. 831). But the question is who he is to get it from, and that question had been answered by the legislator in the Defective Premises Act 1972.

In the result, then, *Murphy* is wholly satisfactory. If the speeches are not entirely convincing, this is primarily because they are couched in terms of duty. The principal points are as follows:

- (1) The local authority cannot be liable if the builder is not.
- (2) The builder cannot be liable if the manufacturer is not.
- (3) The manufacturer cannot be liable once the defect has been discovered.
- (4) *Anns* was irrational because although the claim was for the economic loss due to the defect, the claim lay only if the defect rendered the structure dangerous.

Yet as to (1) it may be asked if the warders would have been exempt from liability if the borstal boys had been mad as well as bad; as to (2) one can note that buildings are not always subject to the same régime as goods: the rules of liability at common law were different before as well as after *Dutton* [1972] 1 Q.B. 373, which started all the trouble by purporting to approximate them, and statutes have made them more different still. As to (3) one should remember that it was a known defect which rendered the manufacturer liable in *Lambert v. Lewis* [1982] A.C. 225, and while it may be unobjectionable to deny liability at common law in the case of known defects now that we have the Consumer Protection Act 1987, yet as to (4) a product is defective under that Act only if the defect renders it dangerous.

Physician – kill thyself!

(1991) 50 Cambridge Law Journal 397

Is an employer entitled to make its employee ill through overwork provided for in the contract of employment? This was the intriguing question raised in *Johnstone v. Bloomsbury Health Authority* [1991] 2 W.L.R. 1362.

The plaintiff's contract of employment as hospital obstetrician provided that he was to be on call for an average of up to 48 hours per week over and above his normal 40 hours of work. He sought a declaration that he could not lawfully be required to work the full agreed overtime if this would foreseeably injure his health. Leggatt L.J. would have struck out this claim as unarguable, but his brethren let it go to trial. The plaintiff further argued that if the overtime clause did restrict the duty of his employer to take care of his health and safety (as Leggatt L.J. held), it would be void under the Unfair Contract Terms Act 1977, s. 2(1). This argument the Court unanimously permitted to proceed, but it struck out the final argument that such a clause was void at common law as being contrary to public policy. The House of Lords has refused leave to appeal.

According to Leggatt L.J., in dissent, the employer's duty to take reasonable care for the employee's health and safety, being an implied term, could not be used to cut down the rights expressly granted to it by the contract: subject to the Unfair Contract Terms Act, the employer would be within its rights in insisting on full overtime, even if this was clearly prejudicial to the employee's health.

Stuart-Smith L.J. was of a different view. He held that the rule whereby implied terms are ousted by apparently incompatible express terms does not apply to terms implied by law, so that the provision as to overtime did not abridge the employer's duty: the employer's duty could only be neutralised (subject to the Unfair Contract Terms Act) by an express term indicating (unlike this overtime clause) that the employee was *volens* as to the injury.

Browne-Wilkinson V.-C. agreed with Leggatt L.J. that if the contract imposed an absolute obligation on the employee to work the stipulated overtime, the employee could not argue that in

insisting on such overtime the employer was in breach of its implied duty of care for the employee's health, but agreed with Stuart-Smith L.J. in the result, on the ground that although the employee was under an absolute obligation to work the contractual overtime if called upon, the employer, in calling upon him to do so, was exercising a discretion, a discretion which must be exercised subject to the ordinary duty not unreasonably to injure the employee. This reflects the reasoning recently deployed in decisions regarding mobility clauses, *i.e.* agreements to work *wherever* (rather than *whenever*) the boss chooses. The distinction between substituted locations and principal place of work is, however, easier to accept than the Vice-Chancellor's distinction between the 48 hours overtime, as to which the employer had only a discretion, subject to consideration of the workman's health, and the basic 40 hours to which it had an absolute right, not so subject.

Let us see. Take the basic working week. Suppose that at the thirty-ninth hour the employee is taken ill, and further work would make him worse. Can the employer really force him to work the fortieth hour? Surely not. The employer has no right to the work if the employee is prevented by sickness from doing it, and it can hardly be free to make him sick by making him work. One reason for this conclusion could be repugnance to the whole purpose of the employment contract, namely to get the work done.

But do we have to stay within the confines of contract doctrine such as applies to mobility clauses? After all, it is one thing to be pushed around like a pawn, but it is another and worse thing to be a helot worked to death. The slogan 'Tort cannot trump contract', cited by Leggatt L.J., may be all very well in cases where nothing but money is at stake, such as *Tai Hing Cotton Mill* ([1986] A.C. 413) and *White & Carter (Councils)* ([1962] A.C. 413) in which Lord Reid said 'It might be, but it never has been, the law that a person is only entitled to enforce his contractual rights in a reasonable way and that a court will not support an attempt to enforce them in an unreasonable way.' In money-only cases the impact of tort is both recent and marginal: to transpose the slogan to cases involving health and safety, the very central concern of tort law, is certainly not necessary, and may not be right.

The polluter must pay – regardless

It may be said that there is no longer any need for the common law to intervene now that the duty to take care not to cause personal injury or death is reinforced by the 1977 Act in that it invalidates terms which purport to restrict that duty. But here the doctor was allegedly so overworked as to be endangering the patients as well as himself. The common law must surely have something to say on the question whether A can insist on B's performing his promise when to do so would threaten injury to C. *Kores v. Kolok* [1959] Ch. 108 (on 'public policy') could be invoked.

But the solution may lie elsewhere. The employer's duty is not to avoid all foreseeable harm to the employee. It is a duty not to endanger him needlessly, in view of all the circumstances. Those circumstances include what the employee has undertaken to do. Were it not so, we would never get the asbestos out of old buildings, or oil from under the sea. It has been held reasonable, in the interest of helping third parties, to expose an employee to quite foreseeable harm (*Watt v. Herts. C.C.* [1954] 1 W.L.R. 835). But that does not mean that the law permits people to bind themselves to work night and day until they drop, any more than the law allows a creditor to bind its debtor hand and foot (*Horwood* [1917] 1 K.B. 305). It is surely arguable, contrary to what the Court of Appeal held on this point, that the common law should, on grounds of policy, uphold the doctor's right to health against exploitation by the health authority.

The polluter must pay – regardless

(1993) 52 Cambridge Law Journal 17

Cambridge Water Co. v. Eastern Counties Leather Pl.c. (Court of Appeal, 19 Nov. 1992 (see *The Independent*, 27 Jan. 1993)) is of much more than merely local interest. It lays down that if anything ever dropped by the defendant on his land eventually renders subterranean water less suitable for whatever purpose other landowners may wish to use it for, the defendant is liable even if his use of his land was perfectly normal, even if he was not in any way negligent and even if no harm at all was foreseeable at the time. The

decision is not only unjust in its consequences and quite out of line with the development of the common law in this area. It also demonstrates how dangerous it is for a judge spontaneously to espouse an authority which counsel have ignored, for in the absence of debate and research, he may misread it, as the Court of Appeal did in this case.

The case which our Court of Appeal treated as ‘determinate’ is *Ballard v. Tomlinson* (1885) 29 Ch.D. 115, 54 L.J.Ch. 454, where the defendant had deliberately connected the outflow of his water-closet to his well not a hundred yards from the well belonging to the plaintiff’s brewery next door. The trial judge had held for the defendant on the sole ground (subconsciously pre-echoing *The Aliakmon* [1986] A.C. 785?) that the water was not yet the plaintiff’s property at the time the defendant’s sewage fouled it. His decision was abruptly reversed by a very strong court, including Brett M.R. and Lindley L.J., who held uncontroversially that a landowner’s ‘natural right’ to ground-water gives him title to sue for its contamination. In the *Cambridge Water Co.* case the issue was quite different – not title to sue but conditions of liability. The facts were very different, too. Like every other tanner in the business, the defendant, long established in Sawston, used large quantities of chemical to degrease the raw skins, and a good deal of it got spilt, at any rate until 1976 when a new system was installed. At the time – now 16 years ago – no one could or would have supposed that this could do any harm at all. Even the plaintiffs did not suppose that any harm had been done, for before buying the well in question, over a mile from the defendant’s premises where spillage had already ceased, they tested the water and found it perfectly wholesome. Perfectly wholesome though the water was, in 1985 it became unlawful to supply it: a Directive from Brussels, even sillier and stupider than most, laid down novel standards of purity which the water in the plaintiffs’ well, owing to the presence of chemicals from the defendant’s works, failed to meet. The plaintiffs sought to get rid of the ‘pollution’ by pumping it into the Cam (!), but finally closed the well and opened another elsewhere, at a cost of about £1m., which they now claimed from the defendants. Ian Kennedy J. held the defendants not liable under *Rylands*

v. Fletcher because their use of the land was not ‘non-natural’, Sawston being an industrial village. Nor was there liability in negligence or nuisance because the harm was not foreseeable, as required by *The Wagon Mound (No. 2)*. In reversing this admirable judgment, the Court of Appeal not only cast doubt on the well-established view that ‘natural user’ is a defence to a claim under *Rylands v. Fletcher*, but categorically held that in a claim for nuisance by water pollution ‘natural user’ is entirely irrelevant, as is absence of foreseeability. ‘The actor acts at his peril . . . The owner’s right is to have . . . water come to him in an uncontaminated condition.’

This is quite out of line with recent developments, for whereas the law as to water has remained old-fashioned in certain aspects – one is entitled to do foreseeable damage to one’s neighbour by draining one’s land or repelling gravitating water (but see *Home Brewery Co. v. William Davis & Co. (Leicester) Ltd.* [1987] Q.B. 339) – such small pockets of strict liability and immunity in the tort of nuisance have been progressively dismantled by considerations emanating from the law of negligence. Thus whereas liability for invasive tree-roots used to be strict, foreseeability of harm is now required (*Solloway v. Hants. C.C.* (1981) 79 L.G.R. 449), and whereas there used to be no duty to take steps to neutralise a nuisance due to natural causes, such a duty now exists (*Goldman v. Hargrave* [1967] 1 A.C. 645).

Nor is the decision in question supported by the sole authority on which it was based. *Ballard* was an unreserved, extempore decision. It is variously reported. Our Court of Appeal used the semi-official report. The report in the Law Journal series is fuller. The differences are crucial. Two instances. In the Law Reports we find, with regard to water pollution: ‘The principle of natural user does not apply at all.’ The Law Journal, however, makes it clear that what was said (in response to the defendant’s fatuous argument that it was not the defendant’s sewage that caused the harm but the plaintiff’s unnatural pumping of the water from his well) was this: ‘But I am of opinion that the doctrine of natural user does not apply to the plaintiff at all, it applies only to the defendant.’ Again, in the better report, and only there, Brett M.R. is found to be saying ‘The use of the phrases “natural” and “non-natural

user” goes to this extent, that though the defendant does pollute such water, still if his act is one which is considered by the law a natural user, then he is held not to be liable, as otherwise he might not be able to use his land at all.’ This is the very proposition, and the very sensible proposition, that our Court of Appeal roundly denies on the sole authority of the case which propounds it, actually saying of it that ‘The judgments contain no warrant for distinguishing between a deliberate act and spillages which (as the judge found) were inherently likely to occur. It was sufficient that the defendant’s act caused the contamination.’ Thus it is that the Court of Appeal reaches a decision which could be welcomed by only the most verdant Green or possibly – since the 1885 decision speaks of air as well as water! – the passive smoker. Should the House of Lords refuse leave to appeal, the decision must clearly be treated as given *per incuriam*. That, however, will be small comfort for the 140 employees of Eastern Counties Leather as they tramp the Fens in search of a new job.

The case of the careless referee

(1993) 52 Cambridge Law Journal 376

In *Spring v. Guardian Assurance* [1993] 3 All E.R. 273, the defendants wrote a ‘kiss of death’ reference about the plaintiff, an insurance agent who thereupon became unemployable as such. Their negative opinion was honestly held but unreasonably formed. The trial judge held that the defendants owed the plaintiff a duty in law to take reasonable care that what they wrote about him was true, and found them liable for breach of it. The Court of Appeal reversed (and overruled a prior decision to like effect — see [1987] C.L.J. 390). The case is on its way to the House of Lords.

The primary reason given by the Court of Appeal is not a good one. They held that there could be no duty to take care, and consequently no liability for negligence, since the giving of references is covered exclusively by the law of defamation, which in such situations of ‘qualified privilege’ requires proof of malice, and not just negligence. In the words of Glidewell L.J. ‘. . . the giver of a

reference owes no duty of care in the tort of negligence to the subject of the reference. His duty to the subject is governed by and lies in the tort of defamation.’

In order to test this, let us consider the various forms of liability for what one writes. If A writes to C and says something nasty about B, B can normally sue him ‘in defamation’. What this means is that B needn’t try to prove that what A said was false, or that it caused him any harm. Nor does he generally have to show that A’s conduct was in any way culpable. Sometimes, however, the situation of the parties is such that A ought to be free to tell C what he thinks of B, even if it is derogatory. If such ‘qualified privilege’ exists, B has to show that A acted with ‘malice’. This may be done by showing that A didn’t honestly believe in the truth of what he said, i.e. knew that it wasn’t true or didn’t care whether it was true or not, but B still doesn’t have to show that what A said was false or that it caused him any harm, much less that A owed *him* any ‘duty’.

The last paragraph applies only if what A writes to C about B is ‘defamatory’. If it is not (e.g. ‘B has retired from business’), B does have to show that what A wrote was false and also, subject to section 3 of the Defamation Act 1952, that he suffered harm. Furthermore he always has to prove that A was actuated by ‘malice’: it is not enough that A’s conduct was unreasonable. This is the tort of malicious falsehood.

Now let us see what happens if A writes *to* B rather than *about* him, and B suffers loss as a result of relying on what A has said. If A was actuated by ‘malice’, as above, he will certainly be liable, provided that B establishes the falsehood of the statement. This is the tort of deceit. Even if A is not deceitful, however, but simply negligent, B may win; this occurs if there is a ‘special relationship’ between A and B such that A ought to take care that what he says to him is true. This is the tort of ‘negligent misrepresentation’, stemming from *Hedley Byrne v. Heller* [1964] A.C. 465. Here liability depends upon the court’s holding that A owed B a duty to take care what he said to him, a requirement not present in the torts of deceit, defamation, malicious falsehood, or, indeed, trespass.

The question in *Spring* is whether, given that A can be liable for a negligent statement he makes to B, he can ever be liable for a

negligent statement he makes about B. It is no answer to say that because negligence does not suffice for malicious falsehood, A can never be liable at all unless he is malicious. The House of Lords exploded that fallacy in *Hedley Byrne v. Heller*, when it decided that although negligence does not suffice for deceit, there may nevertheless be liability for negligent speech, given a duty. The fact that the words in *Spring* were defamatory must be irrelevant, for it can hardly assist A that his words were not only false but unpleasant as well. References should be honest, of course, but they should also be careful, and if A can be liable to C for sending him an unduly flattering reference on B, surely he should be liable to B for sending one which is unduly unflattering, supposing that his anterior relationship with B was such as to engender a duty to take care of his interests. If an ex-employer owes a duty to a prospective employer he has never even seen, how can it be denied that he owes at least a like duty to the person who till recently used to turn up for work at the factory, office or shop every day? Take the case that the defendant carelessly mistakes B for D or erroneously states 'We have no record of ever having employed B'. Is B to have no redress for losing the prospective job, the very job in question?

The court in *Spring* said that to impose liability in negligence on facts such as those in *Spring* would emasculate the rules of defamation. This is not so. It is true that in defamation 'reasonableness' never plays a part, *pro* or *con* – liability 'in defamation' never being avoided because one's belief was reasonable nor incurred because it was not – but leaving aside the question whether the tort of defamation, which is undeniably sick, should be allowed to infect healthier torts, whether, given its false values and fatuous distinctions, it should not be superannuated rather than allowed to lord it over more modern forms of liability, it must be noted that in negligence the burden on the claimant (which is what distinguishes different causes of action) is wholly different. He has first to show that the words were false, then that they caused him harm, and above all he must persuade the judge by argument that his relationship with A was so close that it is fair just and reasonable to impose on A a duty to take care what he said about B to the person he said it to; not one of these requirements exists 'in

defamation'. Then B must establish by evidence that A acted unreasonably in thinking and saying what he did. This is admittedly not enough if he can't satisfy the other three requirements and consequently has to sue 'in defamation', but to modify one element while adding three extra ones hardly amounts to emasculation of a cause of action in tort.

It follows that the Court of Appeal should not have dismissed the question of duty, but discussed it further. What the result of such discussion should be is more debatable. The crucial question is the scope of the duty owed by an ex-employer to an ex-employee whose chances of further employment are at risk. The position in tort must be seen in the context of the relationship set up by the past contract of employment – after all, some of the ex-employee's obligations survive its termination – and of any relevant statutory rules or business practices. Employers in the insurance business are required to 'make full and frank disclosure of all relevant matters which are believed to be true'. The court said of this rule that 'in summary form [it] incorporates the principles of the tort of defamation' – rather an odd thing to say, since the provision is evidently directed to preventing *suppressio veri* (which has nothing to do with defamation) rather than *suggestio falsi* (which has). As to contract, the court agreed with the trial judge that no term beyond the statutory duty could be implied into the contract of employment. This was despite a reference to *Scally v. Southern Health* [1991] 3 W.L.R. 778 (H.L.), where the employee won against an employer who had merely failed to inform him about his pension rights. In *Reid v. Rush & Tompkins* [1990] 1 W.L.R. 212, where also the employer failed to provide information, the decision went, rather harshly, against the employee, but if false information had been provided rather than none, liability would surely have been imposed.

It is clear that the relations between employer and employee are too complex to be regulated by the simple nostrum of 'duty to take reasonable care'. For example, an employer who has discretion to modify the conditions of work adversely to the employee's interests need not act reasonably in exercising it, though he must have a reason for doing so. This is because the employer has

interests of his own to advance. No such factor, however, applies to giving a reference once the employment is over. Again, while one can refuse to employ a person without any good reason, one must have a good reason for terminating the relationship. Many people would think, contrary to the view of the Court of Appeal, that if you have to have a good reason for rendering your employee unemployed, you should have to have a good reason for rendering him unemployable.

Rylands v Fletcher reconsidered

(1994) 53 Cambridge Law Journal 216

In 1947 the House of Lords decided that *Rylands v. Fletcher* did not apply where personal injury was suffered on the defendant's land – there had to be an escape – (*Read v. Lyons* [1947] A.C. 156), but for the next 40 years it did not advert to the case at all (save to say that it is not law in Scotland). Now, however, in reversing the Court of Appeal's decision in *Cambridge Water Co. v. Eastern Counties Leather* (noted in [1993] C.L.J. 17) and reinstating judgment for the defendant, it has extended the application of *Rylands v. Fletcher* by narrowing the defence of 'natural user': [1994] 2 W.L.R. 53.

The facts, in brief, were that over a number of years in the defendant's tannery daily dribs and drabs of a chemical akin to domestic stain-remover were spilt on the ground. The chemical percolated through the aquifer to the plaintiff's well more than a mile away, and though it did not make the water there unfit for drinking, it rendered it unsaleable for that purpose (thanks to a Brussels Directive). That such spillages could possibly collect in subterranean pools, instead of dissipating quite harmlessly, was a thing undreamt of at the time.

The trial judge had held that there was no liability in negligence because no reasonable person would have realised that the spillage could cause any harm, no liability in nuisance because the harm was not foreseeable, and a defence to the claim under *Rylands v. Fletcher*: in an industrial village such as Sawston, Cambs., the defendant's use of its land was not 'non-natural'. The Court

of Appeal reversed and gave judgment for the plaintiff: the plaintiff had a natural right to percolating water uncontaminated by any act of the defendant, however innocuous it might seem, and the defendant was liable in nuisance for invading that right notwithstanding that the ensuing damage was unforeseeable.

In the House of Lords Lord Goff gave the only speech. After dismissing as irrelevant the 1885 case which the Court of Appeal had held conclusive, he asked whether, given that in a nuisance claim only foreseeable damage is compensable (*The Wagon Mound (No. 2)* [1967] 1 A.C. 617), a similar rule applied to claims under *Rylands v. Fletcher*. He held that it did: *Rylands v. Fletcher* being just a particular instance of nuisance, there was no reason for a different rule, authority to the contrary being very fragile. Though this holding was worth over £1m. to Eastern Counties Leather, it will not benefit many future defendants. ‘Why not?’, one may ask. ‘Surely things often escape unforeseeably and cause damage.’ True, but it is not the escape that has to be foreseen, only the damage done by the thing, supposing it does escape, and such damage is usually very easy to foresee. ‘Suppose this thing escaped.’ ‘It can’t possibly escape. We take every precaution.’ ‘But suppose it did. Do you think it would do any harm?’ ‘Don’t be silly. Of course it would. Why do you think we take precautions?’ Judgment for the plaintiff, given a damaging escape, subject to discussion about the type of harm in issue (flooding/poisoning/burning).

Of much greater importance for future litigation is what Lord Goff said on the second question: did the defendant have a defence of ‘natural user’ to a possible claim under *Rylands v. Fletcher*, as the trial judge had held? Lord Goff did not attempt any definition; much less did he follow the Court of Appeal in doubting the very existence of any such defence; nor did he seek to equate ‘non-natural user’ under *Rylands v. Fletcher* with the admittedly cognate idea of ‘reasonable user’ in nuisance cases generally. He accepted the decision of the Privy Council in *Rickards v. Lothian* [1913] A.C. 263 that in the absence of negligence there is no liability for damage done by the vertical escape of water from a domestic wash-basin, but held that even quite normal uses of standard industrial materials in industrial areas would give rise to

liability for damage foreseeably resulting from any escape. So though his Lordship was quite right to observe that the new emphasis on the foreseeability of harm will take some of the pressure off the question of the naturalness or otherwise of the defendant's user of his land, we shall still have to distinguish between water escaping from a domestic cistern and sludge escaping from a factory, for while both may foreseeably cause harm the first does not, in the absence of negligence, involve liability.

Two other points are worth noting. First, Lord Goff was content that *Rylands v. Fletcher* had not developed in England, as it has in some of the United States, into a general principle of liability for harm done by ultra-hazardous operations. We may therefore now take it that this rule of strict liability applies only between those with interests in realty, and not to personal injury claims: cases of intentional harassment such as *Khorosandjian v. Bush* [1993] Q.B. 727, even if placed in the 'nuisance' chapter, must be kept distinct. Secondly, Lord Goff said that it may be undesirable for the courts to seek to develop the common law in an area currently receiving attention from the legislature. This is in line with previous observations in the House (*Murphy* [1991] 1 A.C. 398, 472, 491, 498, and *D & F Estates* [1989] 1 A.C. 177, 210), and is very wise.

The present decision should please everyone apart from the Cambridge Water Co. Those concerned with the local economy will be relieved that Eastern Counties Leather will not now be bankrupted as a result of a silly Brussels Directive and its demented overimplementation by our own government (though it might still, under the Water Resources Act 1991, s. 161(3) have to pay clean-up costs wholly disproportionate to any possible benefit); and environmentalists ought to be content that even if the common law no longer saddles entrepreneurs with the cost of the unforeseeable outcome of blameless conduct discontinued long ago, industry will now have to pay for many more emissions than heretofore.

Swag for the injured burglar
(1996) 55 Cambridge Law Journal 182

A burglar injured by shot from a gun recklessly discharged by a householder sued him for damages (*Revill v. Newbery* [1996] 2 W.L.R. 239). In deciding for the burglar the Court of Appeal explicitly disregarded the fact that the plaintiff was a criminal, as well as the fact that the defendant was the occupier of the premises being burgled. This deliberate refusal to take manifestly material considerations into account can only confirm the layman's view that 'the law is a ass – a idiot'. The court then reduced the plaintiff's damages by two-thirds. The layman would agree that if a burglar is to be awarded damages at all, they should be as small as possible, but the lawyer will know (or ought to know) that there was clear House of Lords authority against any such reduction.

As the climax or coda to a long evening of criminal activity two young adult thugs entered the 76-year-old defendant's allotment and tried to burgle the tool-shed in which he was spending the night. The defendant – his 'perception and judgment . . . clouded by fear', as Rougier, J. had found – fired a shot-gun through a hole in the door, not knowing that either thug was in the line of fire. The plaintiff, hit in the arm, was convicted in the criminal courts and proceeded to sue the object of his crime (the public doubtless paying both Q.C. and junior). He was awarded damages of over £4,000 – a second shot in the arm to alleviate the effect of the first.

Three distinct points of law were involved. (1) Was the claim barred by *ex turpi causa non oritur actio*? (2) If not, what was the basis of the defendant's duty? (3) If the duty was breached, could damages be reduced under the Law Reform (Contributory Negligence) Act 1945?

The third point is easy. In *Westwood v. Post Office* [1974] A.C. 1 Lord Kilbrandon, speaking for a bare majority in the House of Lords, said that to reduce damages just because the claimant was a trespasser 'might be rough justice, but it is not the law'. The 1945 Act applies only where the plaintiff was careless of his own safety, not simply disregarding of the rights of others. Accordingly,

the reduction of Revill's damages by two-thirds was not according to law. Realisation that they must award the burglar either full damages or none might have concentrated the judicial minds.

As to the second point, it is only right that the law should sometimes decline to help those who deliberately break it. The relevant defence is *ex turpi causa non oritur actio*. 'All that the rule means', according to Diplock L.J., 'is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right . . . which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right' (*Hardy v. M.I.B.* [1964] 2 Q.B. 745, 767). It applies to the right to claim damages for personal injuries due to negligence. It was so used in *Pitts v. Hunt* [1991] 1 Q.B. 24 to dismiss the claim by a youngster woefully injured on the highway: he had been riding pillion on a motor-cycle behind an even younger companion, to his knowledge drunk and uninsured, whom he was inciting to drive in a madly reckless manner. In *Revill* this precedent was dismissed. We must therefore suppose it to be the law that a criminal who would be refused damages if he sued his accomplice is to be granted them if he sues his victim instead. Evans L.J. regarded it as a causal defence. It is not, any more than *volenti*; but even if it were, a court which refused to apply it could not consistently reduce the plaintiff's damages on the ground of contributory negligence, which is unquestionably causal. Furthermore, in *Murphy v. Culhane* [1977] Q.B. 94, 98 Lord Denning said: 'The householder may be guilty of manslaughter and liable to be brought before the criminal courts. But I doubt very much whether the burglar's widow could have an action for damages.' Surely judicial candour required the Court in *Revill* to deal with this observation, which was apparently cited to it?

Having decided on insufficient grounds to ignore the criminal quality of the plaintiffs conduct, and to treat him like a toddler who had lost his way, the court turned to the defendant's duty. The judgment of Neill L.J. is perplexing: (1) The Occupiers' Liability Act 1984 Act does not apply. (2) 'the fact that [Mr. Newbery] was the occupier is irrelevant'. (3) His liability depended on the common law. (4) The common law duty (of the non-occupier) was that

laid down by s. 1(4) of the Act. We cannot engage in detail with this inconsequential farrago, but simply recall the opening words of the 1984 Act: ‘The rules enacted by this section shall have effect, in place of the rules of the common law, to determine – (a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them . . .’. Since the plaintiff was injured on the premises by the firing of the shot-gun, i.e. something done on the premises by the occupier, one may wonder why the Act was held inapplicable. The judgment will leave one wondering. In the event it is far from clear what the judge held the duty of the defendant (as non-occupier) to be, save that it was broken, and since by statute, so circuitously invoked, ‘all the circumstances of the case’ are relevant, one must infer that these do not include the circumstances that the defendant’s premises were being burgled in the middle of the night by two men half his age and twice his strength or that his ‘perception and judgment were clouded by fear’.

The decision of the court accordingly contrives to flout (a) the words of the legislator, (b) the holding of a superior court and (c) the dictates of common sense. Many more decisions like this and the Court of Appeal will forfeit the respect of lawyer and layman alike.

It is not suggested that an occupier may freely shoot at a burglar. A person who aims and hits his human target is guilty of an intended invasion, a trespass, which can be justified by self-defence if the means used are reasonable in all the circumstances. The defence of *ex turpi causa* may be available even in the case of excessive trespassory force, as Lord Denning suggests, but it should unquestionably be available where there is no intentional trespass at all. If one objects that this is to deprive the injured criminal of all remedy, the answer is that if the occupier is reckless, he will be prosecuted, and if convicted (by a jury) he will be subjected to a compensation order.

The criminal is not, as Evans L.J. observed, an outlaw. No, but this one was a scofflaw – until it came to claiming damages. This

decision is the latest and worst example of the courts' very negative attitude to self-help. The attitude is in urgent need of reappraisal: embattled citizens, like those who acquitted Mr. Newbery, are right to be outraged when a court makes a victim pay a criminal, and the letter which Rougier J. wrote to *The Times* in defence of his first instance decision did nothing to allay that outrage. Nor did the House of Lords in *Tinsley v. Milligan* [1994] 1 A.C. 340 when, in a context which also falls within the principle stated by Diplock L.J., they disavowed any concern with the question whether their decisions are 'an affront to the public conscience'. Whose law do they think it is, anyway?

Clamping

(1996) 55 Cambridge Law Journal 423

If a landowner in Scotland detains a vehicle parked without authorisation on his land and demands a sum of money for its release, he is guilty of theft and extortion (*Black v. Carmichael* 1992 S.L.T. 897). South of the Border, as the Court of Appeal has now held, such conduct is not even civilly actionable, provided there is a clearly visible notice which prohibits parking, warns of clamping and promises speedy release against a fee which is reasonable: *Arthur v. Anker* [1996] 2 W.L.R. 602. It is no tort because the driver is taken to have consented to the risk of being clamped and having to pay for release; in the absence of such (deemed) consent, the clammer is liable for trespass to the car, unless it has caused actual harm.

'Trespass' in Scotland 'is a popular term, not a legal one' (*Dumbreck v. Addie* 1928 S.C. 547, 554). In England it is fundamental. The driver trespasses by driving on to land in the possession of another (whether or not he knows he is trespassing), and his car, if he leaves it there, continues to trespass. The occupier of the land trespasses to the car by affixing the clamp. The driver trespasses by returning to the land to fetch his car. The question is whether these trespasses may be justified.

Not the first, clearly. Nor the last: there is no right to enter another's land to collect property which one wrongfully put there.

The question is as to the second, the clamping itself. The Master of the Rolls agreed with the trial judge that the plaintiff could not complain of the clamping: 'He consented not only to the otherwise tortious act of clamping the car but also to the otherwise tortious act of detaining the car until payment.' Yet here we seem to have a fourth wrong, the detention *per se*. But what sort of wrong is this? Let us assume that the plaintiff did not touch the car, but locked the gates so that it could not be removed. Had it been a person rather than a car, that would be false imprisonment, which requires no touching. But there is no tort of false imprisonment of goods. Nor has there ever been. If there had been, it would have been detinue, and detinue was abolished by the Torts (Interference with Goods) Act 1977. Only if the defendant in locking the gates were acting as if he owned the car would it be conversion (*England v. Cowley* (1873) L.R. 8 Exch. 126, 129). Thus an old lady may not play with the cricket ball which kids hit into her garden, but she need not let them in to fetch it nor bring it to the garden gate for them (see Lord Denning in *Miller v. Jackson* [1977] Q.B. 966, 978; not citing *British Economical Lamp Co.* (1913) 29 T.L.R. 386). It is not clear that mere detention without any handling constitutes a wrong such that the plaintiff's consent is needed to excuse it.

However, if there is no consent, it is unquestionably a trespass to affix an immobilisation device (as the Parliamentary draftsman calls what comparative lawyers know as a *Kralle*, *sabot* or Denver boot). Is it justifiable in law? The occupier of land is clearly entitled to disencumber his land of trespassory chattels: just as he may evict a human trespasser (after politely asking him to leave), he may expel intrusive objects. But if he may push the car on to the highway, why cannot he clamp it, something much less likely to do harm? The answer is that the right to do what would otherwise be a trespass is limited not only as to mode of user (you must not use more force than reasonable) but also by its purpose. Thus you may only use the highway over another's land in order to go along it to your destination (you may not stop on it to act as a scare-grouse – *Harrison v. Rutland* [1893] 1 Q.B. 142). Likewise, the occupier may use force only to get the trespasser *off* the premises, not to detain him *on* them. It was so held in a case where the plaintiff, in order

to effect a repair to the roof of his house, footed his ladder in the defendant's garden; the defendant shook the ladder and was held liable, because this could not get the plaintiff off the defendant's land, but rather on to it (*Collins v. Renison* (1754) 96 Eng. Rep. 830). So even if merely to prevent a trespassory chattel from leaving is no wrong, physical contact is excused under this head only if it is directed to the removal, not the immobilisation, of the chattel.

But the common law offered a distinct justification for impounding trespassory chattels. The donkeys which David Copperfield's great-aunt, the formidable Betsey Trotwood, so vigorously put to flight when they trespassed on her green she might equally lawfully have hobbled and held to ransom till their owners settled her claim against them for cattle trespass. 'Distress damage feasant', replaced as to animals by the statutory scheme under section 7 of the Animals Act 1971, is still available as regards inanimate chattels, but only, as the Court of Appeal held by a majority in *Arthur's* case, if the chattel has done actual damage (which trespassing cars rarely do). Here again we have a power limited by its purpose: its purpose being to afford security for a claim for damages, there is no power to impound if there is no damage to be compensated. Though much learning was deployed to reach this conclusion, which differs from that of the most learned of all commentators, Glanville Williams (*Liability for Animals*, pp. 70–76), the crucial consideration seems to have been that if innocuous trespassory chattels could be distrained at law, an occupier would be justified in clamping a car even if the driver had no idea that he was trespassing, a consequence which Hirst L.J. appeared ready to tolerate in this contemporary conflict between those with space and those with wheels.

One puzzle remains. In our particular conflict Arthur never paid the (reasonable) £40 fee. Could it have been claimed? If a car is released against a cheque and the cheque is then stopped, a claim would no doubt lie, since a promise to pay would be implied in the request for release. Arthur's car, however, was never released: he liberated it himself that night, the liberation being effected by another trespass (not to mention the conversion of two clamps, padlocks etc., for which he was rightly made to pay). Although he

was held to have *consented* to the risk of being clamped and having to pay, it can hardly be said that he *contracted* to pay if clamped: since clamping was not something he asked for, there is no consideration for any supposed promise. We must take it, then, that his consent simply modified his rights without imposing any obligation on him. Even so, seeing that it was by a further trespass that he avoided payment, might he not be liable to pay? A good question . . .

Suicide in custody

(1998) 57 Cambridge Law Journal 241

Remanded in custody on charges of fraud and failure to answer to bail, Martin Lynch, 29 years old, was placed in a very bare cell at Kentish Town Police Station just before one o'clock on 23 March 1990. The doctor called by the police, who knew that he was a suicide risk and had consequently removed his belt, thought him quite sane. At 1.57 p.m. the police checked his well-being, but on the next visit only eight minutes later he was found irremediably unconscious: he had hanged himself by threading his shirt through the hatch in the door and the much smaller spy-hole above it. This was possible only because the glass lens was missing from the spy-hole and the flap of the hatch had been left open, contrary to standing orders.

This last omission formed the basis for the claim brought by his unmarried partner under the Fatal Accidents Act 1976 for the benefit of their young child. The claim was dismissed by the trial judge, effectively on the ground that the death was due to the deliberate act of the decedent, but the Court of Appeal by a majority reversed and held that the police must pay the damages in full: *Reeves v. Commissioner of Police* [1998] 2 W.L.R. 401.

Although the damages were only £7,800, the forthcoming appeal to the House of Lords is of importance. If the police are held liable for the death of Martin Lynch, who so determinedly seized the brief and unobvious opportunity afforded to him, they will hardly ever be able to escape liability for a prison suicide –

and there were 70 of them last year alone, a number apt to increase when prisoners realise that they can provide for their families by dying, like those in the past who refused even under the *peine forte et dure* to plead to a charge of felony. The case is also important for students of the law, for in addition to a question of duty it involves all possible defences to a charge of negligence, namely *novus actus interveniens*, *volenti non fit injuria*, contributory negligence, and even *ex turpi causa* (which will not be further considered here or in the House).

The trial judge had held that the police were under a duty to take reasonable care of their prisoner. This is quite correct: being in charge of him against his will, they must try to see that he is not injured against his will. But in an earlier case of a suicidal prisoner not of sound mind (*Kirkham* [1989] 3 All E.R. 882, 887, affirmed [1990] 3 All E.R. 246) the duty had been described as one ‘to take reasonable care to prevent the person held committing suicide’. The defendant in our case did not challenge this, and Buxton L.J. felt able, with an iteration which lent no cogency to his conclusions, to *infer* as a matter of logic (and therefore of law!) that the defences of *novus actus interveniens*, *volenti non fit injuria* and contributory negligence were all *inapplicable ab initio*, even where the decedent was quite sane.

The learned judge was certainly in error as to the role of the ‘duty’ concept in the law of negligence. The function of the duty concept at common law is to conduce to an apparent rationalisation of a decision, reached on other grounds, that a defendant must – or need not – pay for harm suffered by the plaintiff as a relevant result of relevantly unreasonable conduct on the part of the defendant: it does not by itself determine what consequences are relevant. ‘Duty’ is an operator, not a real number. To say that the police are under a duty to take care of those in their charge (and whose autonomy is to that extent restricted) can rightly mean only that if a detainee is injured it is appropriate to inquire into the conduct of the defendant and ask, *inter alia*, whether it was a relevant cause of the injury. For an appeal judge to say, and keep repeating, that the finding of such a duty *precludes* any question as to causation or any other reason why the party injured should not

recover full damages is nothing short of dotty. Courts are supposed to answer questions, not beg them.

The eminently sound and sensible dissenting opinion of Morritt L.J. is in marked and welcome contrast to this algebraic and Q.E.D. approach: 'In my view', he said, 'the voluntary, deliberate and informed act of a plaintiff intended to exploit the situation created by the defendant albeit in breach of duty precludes a causative link between the breach of duty and the consequences of the plaintiff's action'. In other words the decedent's act was a *novus actus* which insulated the defendants from ulterior consequences of which their negligence was undoubtedly a precondition. He also, quite rightly, said that the decedent could not complain of the consequences of an act which he embraced and engineered. In this he followed the view of Lloyd L.J. in *Kirkham's* case that *volenti* would be a defence where the suicide was of sound mind.

Lord Bingham, however, said that 'The deceased took advantage of the defendant's breach of duty, as it was known he might, but he cannot in my judgment be said to have consented to it'. This is a very odd reading of the facts: the deceased must have been delighted to see that the warder had unintentionally provided him with a means of escape. It also rests on an odd view of the *volenti* defence, akin to the misunderstanding of Buxton L.J. who asked: '... is it realistic to say that by deliberately killing himself Mr. Lynch assumed a risk that he might kill himself?' It is the question which is unrealistic, because although it is true that the defence may be applicable where the plaintiff has consented not to the actual damage but to the risk of it, a person who is *volens* as to the actual harm he intentionally does to himself is manifestly an a fortiori case, indeed the *paradigm* case, of this defence, though for obvious reasons it rarely comes to court.

But there is more behind Lord Bingham's view. He is unhappy with the distinction between those of sound and those of unsound mind: 'Since there is in any event no sharp line of demarcation between mental normality and mental abnormality, it would be unworkable in practice to treat the state of mind of a deceased as determinative of his estate's right to recover'. In other words, we

are all to be treated as mad because some are marginally madder than others, unless, indeed, we are back at the old-fashioned view that life is so marvellous, even in a police cell with a prosecution coming up, that anyone who wants and elects to quit it must be crazy. So much for the autonomy of the sane adult.

The divergence of views on the defence of *volenti* is matched by a difference of opinion on the applicability of the Law Reform (Contributory Negligence) Act 1945. The trial judge had held that the decedent was at fault as to 100 per cent. Morritt L.J. agreed with him, preferring the earlier of two contradictory Court of Appeal decisions on the point whether 100 per cent. contributory negligence was possible. On this question (as on the scope of the duty) Lord Bingham was hesitant, and would have preferred to reduce the damages by 50 per cent., but in the event he agreed with Buxton L.J. because Buxton L.J. would not agree with him: otherwise 'we should achieve the very unsatisfactory outcome that only one member of the court would support and two members would oppose each of the three possible solutions on contributory negligence'. The extraordinary ground on which Buxton L.J. held the Act inapplicable was that 'a claim that is not open to attack on grounds of *volenti* or *novus actus* can [not] be defeated on grounds of contributory negligence'. Nor could he see any difference 'in principle' between the case before him and the case where a child toys with a bomb.

To treat a sane and informed adult as demented or infantile cannot be right, and the law does not do it, even when he is in jail. If a prisoner decides to starve himself to death, the prison authorities are not entitled to use force to stop him: 'The right of the defendant to determine his future is plain. That right is not diminished by his status as a detained prisoner' (*Home Secretary v. Robb* [1995] 1 All E.R. 677, 682). The law of tort thus protects the autonomy of the individual by treating as wrongful any physical intervention designed to thwart his decision. But is starvation the only way that prisoners are to be allowed to kill themselves? A prisoner may have no residual liberty of movement (*Hague* [1992] 1 A.C. 58) but surely he is not to be deprived of all liberty of choice: to say that he must stand trial and serve his sentence

Down hill – all the way?

although he would much rather die is reminiscent of the practice in the past whereby those condemned to death were sedulously kept alive until the hangman came. Is the power of exit from life, which could not practically or legally be denied him when at liberty, to be removed from him when he is on remand? Respect for the free decision-making of the individual surely entails that he accept in law, as in fact, the consequences of his deliberate self-regarding acts. In *Barrett v. Ministry of Defence* [1995] 1 W.L.R. 1217 the Court of Appeal was correct to say that an occupier need not seek to prevent an off-duty employee drinking himself unconscious, but now once again it has shown itself disregardful of free choice.

Down hill – all the way?

(1999) 58 Cambridge Law Journal 4

WHEN suit was brought against the police in the name of the Yorkshire Ripper's final victim, alleging that they were negligent in failing to catch him sooner, every single one of the nine judges who heard the claim decided that it should be struck out (*Hill v. Chief Constable* [1989] A.C. 53). The House of Lords gave two reasons: first, that no duty was owed to the victim because the police were in no special relationship either with her or (unlike the case where Borstal boys wrecked a yacht while on the run from their dozy warders) with the criminal; secondly, that it was contrary to public policy for any such claims to be brought against the police in respect of their handling of criminal investigations.

In *Osman v. Ferguson* [1993] 4 All E.R. 344 the first ground in *Hill* was arguably inapplicable, since the police were aware of the identity of both the criminal – a deranged schoolmaster – and his targets – a pupil whom he injured and his father who was killed. It was on the second ground that the Court of Appeal in an unreserved judgment struck out the claim: 'The House of Lords decision on public policy . . . dooms this action to failure'. The European Court of Human Rights in Strasbourg (ECHR) has now held that the Court of Appeal thereby put the United

Kingdom in breach of the European Convention (*Osman v. UK*, Case No. 87/1997, 28 October 1998, *The Times*, 5 November 1998).

The Article breached was not Article 2 which protects the right to life and is construed to entail that the authorities may under certain circumstances have to take positive steps to protect citizens against obvious and imminent threats to their safety, but Article 6(1) which reads: ‘In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law’. Since the Court of Appeal – an independent and impartial tribunal established by law – had indeed in a fair and public hearing made a determination of the claimants’ civil rights under English law, namely that they had not even arguably been infringed, and this on the basis that every allegation made by them was true, the holding of the Strasbourg Court may occasion some surprise, especially as it had long disclaimed the power to determine precisely what substantive rights are accorded to citizens by their domestic law.

Recently, however, it has observed that ‘it would not be consistent with the rule of law in a democratic society . . . if, for example, a state could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons’ (*Fayed* (1994) 18 E.H.R.R. 393, 429). The first issue was therefore whether the second ground in *Hill* prevented the claimants from asserting a right which they would otherwise have. If so, Article 6(1) was applicable, and the question would be whether it had been breached, which turns on the legitimacy of the aim of the rule in question and the proportionality of its use.

ECHR held that if the applicants were in a relationship of proximity and suffered foreseeable harm, they had a right under the law of negligence to ‘seek an adjudication . . . that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in the *Hill* case’. There is a puzzle here. The Convention right is certainly a right to argue for what in domestic

law are arguable rights, but these domestic rights must surely be arguable rights to succeed, not just rights to argue, as suggested. The latent view of ECHR must therefore be that under English law the applicants were entitled to *compensation* if it would be fair, just and reasonable to impose liability. Yet given its position that only access to a court is in issue, it disclaims concern with whether or not the claimants actually obtain compensation for their harm: under the Convention ‘they were entitled to have the police account for their actions and omissions in adversarial proceedings’ since ‘the basic question’ was ‘Why did the police not take action sooner?’ – as if a tort suit were simply a fact-finding exercise, a public inquiry instigated by an individual, contrary to the view of Lord Templeman that a claim for damages was not an ‘appropriate vehicle for investigating the efficiency of a police force’. Accordingly, the £10,000 awarded to each applicant ‘on an equitable basis’ was not for the death or injuries, but ‘by way of compensation for loss of opportunity’ to proceed to an actual trial of their claim that the police were negligent.

Having so dubiously found Article 6(1) applicable, ECHR held that since the second ground in *Hill* barred claims against the police however negligent they had been or however grave the harm, it was more absolute than was justified by the legitimate aim of protecting police resources and thus not ‘proportionate’. In so holding, however, it did not advert to the considerations which militate in favour of not proceeding to a trial in the clear cases in which, alone, striking-out is practised. One wonders if the judges in Strasbourg were fully aware of quite how expensive in time and trouble litigation in England actually is, involving, as it does, discovery of documents, oral testimony of witnesses and the use of one of a small number of judges (ECHR alone has 39!) or, indeed, of how effective the threat of provoking such a waste of time and trouble can be in eliciting the reluctant settlement of an unmeritorious claim. ‘Striking-out’ is not, after all, a specifically English disease: a Committee of ECHR itself, if unanimous, can declare an individual application inadmissible (Article 28).

Our courts will soon have to ‘take account’ of the jurisprudence of ECHR. How will they read the present judgment? A claim

may still be struck out on the first ground of *Hill* in the absence of allegations giving rise to a plausible argument that there was proximity between the police and the claimant, but given such proximity, striking out under the second ground of *Hill* is outlawed, especially if the harm is serious and the negligence alleged very gross. But may a negligence claim be struck out on the ground that it would not be 'fair, just and reasonable' to impose a duty, or will 'fair, just and reasonable' come to be seen as merely 'public policy' in disguise, simply another exclusionary rule which prevents an individual exercising what would otherwise be his rights? After all, both are matters for argument, not evidence. Or is it that the former applies to individual cases, whose precise facts have to be ascertained, while the latter applies to classes of case identifiable in advance, and therefore more obviously qualifies as an unacceptable 'immunity'? We shall have to wait and see.

The real question, and it is indeed a question of public policy, is whether an individual should be compensated for the negligent failure of a public authority to protect his interests. On this matter there are currently major divergences of opinion within and between courts in England. ECHR's expansive decision will gratify those who believe that *everyone* should pay for any foreseeable harm to which their unreasonable conduct has contributed, just as if we had enacted article 1382 of the French Code civil. Nor is it surprising that it should be a court of human rights which implies that this is, or should be, our law, for article 1382 is a product of natural law, of which the view that people's rights must be the same everywhere is the late twentieth century version. Nevertheless, it is unwise to endorse a dubious arrogation of power just because one approves of its use in a particular instance: power once conceded can be used for less agreeable purposes. Nations should decide for themselves whether public funds should be directed to victims of past malfunction in public services or used to reduce the number of such malfunctions in the future. It is true that national legal systems are vouchsafed a 'margin of appreciation', but the margin is clearly narrowing as the page of text is filled up with extensive glosses on Article 6(1) of the Convention. In any case to answer this question in terms of 'human rights' is frankly absurd.

The unwanted child

(2000) 59 Cambridge Law Journal 238

When the news came forth from Downing Street last November that a fourth child was to be born to the premier and his wife, joy spread throughout the land. Gloom and despondency, by contrast, reigned in the McFarlane household when it transpired that Mrs. McFarlane was pregnant yet again, for in order to ensure that there would be no fifth child the couple had come to a decision: rather than rely on the physics of the condom or the chemistry of the pill the husband, like 9,000 other Scotsmen every year, was to resort to the surgery of vasectomy. So he did, and the health authority reported that the operation had been successful, but vital nature had counteracted medical art . . . and Catherine was born. She was in perfect health. Mrs. McFarlane claimed £10,000 for the pain of pregnancy and childbirth and both parents claimed £100,000 for the cost of keeping Catherine. They thereby joined the long line of those who, relying on the Court of Appeal's judgment in *Emeh v. Kensington and Chelsea and Westminster A.H.A.* [1985] Q.B. 1012, sought to throw on to the medical profession the cost of bringing up the child they had engendered and conceived, healthy though it was and in the event welcome – except for the expense.

For the fourteen years since *Emeh* the National Health Service, short of resources for curing the sick, has been disbursing large sums of money for the maintenance of children who have nothing wrong with them. To give but a single example out of very many: in 1993 the Lambeth Health Authority had to pay Mrs. Cort no less than £140,679 ('James might not have been planned, but I wouldn't give him up for the world'). The House of Lords has now put an end to that (*McFarlane v. Tayside Health Board* [1999] 3 W.L.R. 1301), but *Emeh* was not formally overruled, and so deserves a moment's notice.

In *Emeh* the child was not healthy, but handicapped. The principal defence, correctly dismissed, was that the mother should have had an abortion and was therefore solely responsible for the birth. The second line of defence was that the defendant was liable only

for the extra expense attributable to the child's being handicapped, in as much as it was contrary to public policy to allow parents to claim for the cost of bringing up a healthy child. This defence was also dismissed, rather cursorily. But does a decision that a claim for the cost of a healthy child is not barred by *public policy* entail the rejection *sub silentio* of all other grounds, not argued in the case, on which it might be barred? And are observations about a healthy child in a case involving a handicapped child not obiter dicta, since, as we shall see, the cases are clearly distinguishable and ought to be distinguished? In these circumstances one wonders why in *Thake v. Maurice* [1986] Q.B. 644 (where again the issue was collateral, the principal question being whether the doctor had guaranteed the success of the sterilisation operation (No)) the Court of Appeal was so eager to be bound by *Emeh*, and why the House of Lords refused leave to appeal. After all, *Emeh* was an unreserved decision, that is, one in which their Lordships took no time to reflect on a holding which would clearly prove a major drain on public funds.

Fortunately the Senators of the College of Justice are not bound by the Court of Appeal and Scots litigants need no leave to appeal to the House of Lords, so Lord Gill was able to dismiss the McFarlanes' claim as irrelevant and the defender could appeal from the reversal of his decision by the Inner House. The rule now laid down by the House of Lords is perfectly clear: the parents of a *healthy* child cannot claim the *cost of maintenance* from a person in *negligent* breach of his duty to take care to prevent that birth, although (Lord Millett dissenting) the mother can claim for the pain and suffering involved in the unwanted pregnancy and childbirth. The technical problem is how to distinguish these two claims, since both alleged harms are manifestly attributable to the same negligence – morning sickness and the cost of Pampers being equally part of the price to be paid for having a child.

The distinction cannot be drawn in terms of *fault*, if negligence is assumed, as here, nor in terms of *causation*, since both are equally foreseeable consequences of the negligence (it being agreed that neither the failure to have an abortion nor the decision not to put the child up for adoption could possibly constitute a *novus actus*

interveniens or an unreasonable failure to mitigate the damage). Can one say that there was no *harm*?² Not easily, since ‘There is another mouth to feed’. Can one say that there is no *net* harm, that is, can one set off against the economic expense the emotional benefits of parenthood and say that the cost of feeding is offset by the ensuing smile and gurgle? Not really, since the cost of the former is calculable and the value of the latter is not. So what about the *kind of damage*? In three of the speeches the financial nature of the cost of maintenance is emphasised, with the indication that there was perhaps no undertaking of responsibility for such expense (as opposed to the pain of pregnancy), and that it was not ‘fair, just and reasonable’ to impose liability for it.

Though prepared to accept these reasons, Lord Steyn preferred a bolder approach eschewing ‘formalistic propositions’. One can sympathise with this, since none of the grounds for rejecting the claim was *in itself* conclusive, especially as (though this was not mentioned) Lord Goff in *Henderson* had said that ‘fair, just and reasonable’ has no place in *Hedley Byrne* cases, and in *Hedley Byrne* itself Lord Devlin had said that a doctor’s duty extends as much to the patient’s wealth as to his health. For Lord Steyn, the true reason for rejecting the claim for the cost of rearing is distributive justice, militating in this case against corrective justice: it could not be right – and he was sure that people on the London Underground would agree with him – to give people money for a baby they didn’t want when so many people want one so badly that they go to great expense (or even Romania) to have one. Distributive justice had admittedly been invoked in the latest *Hillsborough* case as indicating that it was invidious to compensate shocked policemen while denying compensation to shocked relatives, but there the question was of discriminating between two groups who sought compensation for an admitted harm not, as here, of allowing one group to claim compensation for what another group would not think a harm at all.

We must therefore revert to the notion of ‘harm’. Our law’s reluctance to treat ‘harm’ as a legal rather than a factual concept has had sorry consequences. In the 1930s dead people, recently enfranchised by the 1934 Act, began to claim damages just for

being killed. The courts agreed that being killed was a harm: if life was good, being deprived of it must be bad and *therefore* an actionable harm. Life being held good, the next question was ‘How good is it?’ Ask a silly question, and you get the answer ‘Not very’ – £200, said the House of Lords, recognising that you must take the rough with the smooth. Nowadays one can no longer claim for being killed. This is by statute. Statutes don’t give reasons. But there must be one. What is it? Surely it is that being killed is not in itself a harm at all, and the courts themselves should have so held.

It is true that in *McFarlane* Lord Millett stated that ‘The contention that the birth of a normal healthy baby “is not a harm” is not an accurate formulation of the issue’, but he proceeded to say that ‘the birth of a healthy and normal baby is a harm only because his parents . . . choose to regard it as such’, that ‘plaintiffs are not normally allowed, by a process of subjective devaluation, to make a detriment out of a benefit’ and that ‘it is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth’. Is this not to say that in law there is no harm or no net harm?

But if the rule is clear enough, as this rule is, does it matter much if the reasons are doctrinally unconvincing? It does, rather, for the next case to come up will involve a child not healthy but handicapped – a situation which the House in *McFarlane* explicitly refused to consider. We must not do an *Emeh* in reverse and hold that the present dismissal of the claim for the healthy child entails the subsequent rejection of the claim where the unwanted child is handicapped, a distinction which cannot but turn on the condition of the child and relate to the ‘harm or not?’ question. After all, while one must not say that the handicapped child is ‘more trouble and expense than it is worth’ – words which may come back to haunt us – the birth of a handicapped child is surely a matter for condolence whereas that of a healthy child is (despite the expense) a reason for congratulation and a Hallmark card. It is perhaps significant that in countering the side-effects of *Emeh* the House did not overrule the decision itself.

The problem of the unwanted healthy child has been raised in many jurisdictions, as the speeches in *McFarlane* note. Nowhere

has it proved unproblematic or uncontroversial. In Germany, after an unseemly quarrel not only between the civil courts and the Constitutional Court, but also between the two senates of the Constitutional Court, parents can generally sue for their financial loss (the claim being in contract). In France, by contrast, the birth of a healthy child is said not to be a compensable harm at all, but (contrary to the position here – *McKay* [1982] Q.B. 1166 – and elsewhere) the handicapped child itself has been held entitled to sue for being born rather than aborted. Such diversity must be anathema to Brussels.

The result in *McFarlane* is quite right, and we should not be surprised if the reasoning is uneasy: whenever it enters the family home the law of obligations – not just tort, but contract and restitution as well – has a marked tendency to go pear-shaped.

The maddening effect of consecutive torts

(2001) 60 *Cambridge Law Journal* 237

A couple of thugs entered the Burger King near King's Cross and beat up the manager. They not only beat and kicked him, but also struck him in the eye with a gold knuckle-duster. The eye needed to be operated on, but the operation went wrong, and he can no longer see out of it. In consequence of these experiences he is now a total psychological wreck, unable to work for the foreseeable future. His employer, the first defendant, was held liable for failing to protect him from attack, and the hospital, the second defendant, admitted liability for the negligent operation: *Rahman v. Arearose Ltd.* [2000] 3 W.L.R. 1184 (C.A.). *Quid iuris?*

The solution in received tort law is as follows. (I) The hospital cannot be held liable for anything that preceded the negligent operation, since causation operates only forwards, not backwards, and the surgeon did not assault the claimant. By contrast, while the employer did not himself operate on the claimant's eye, he can and should be held liable for its loss and the consequent psychological sequelae: only if the negligence of the surgeon was a *novus actus interveniens* is the employer off the hook. As Hart and Honoré

state, it is a 'generally accepted principle of common law that only an extraordinary medical mistake negatives causal connection' (*Causation in the Law*, 2nd ed., p. 357).

(II) The harm consequent on the operation was greater than might have been expected, since the claimant was already vulnerable by reason of the prior assault. This does not, however, diminish the hospital's liability, for the 'thin-skull' doctrine provides that in relation to subsequent harm a tortfeasor (including a second tortfeasor) takes the claimant as he finds him. Accordingly, while the employer alone is liable for the immediate consequences of the assault prior to the surgical intervention, both employer and hospital are liable for everything thereafter.

(III) The victim is entitled to judgment against each tortfeasor for the damage for which that tortfeasor is liable. Thereafter, the liability of the tortfeasors *between themselves* for such damage as both are liable for (the 'same damage') is determined by the application of the Civil Liability (Contribution) Act 1978, the apportionment being what is 'just and equitable' in view of their respective responsibility.

What actually happened in the Court of Appeal was quite different. First, Laws L.J. asked whether the Contribution Act applied, and held that it did not. This is surprising. How can one consider the Contribution Act before deciding for what damage each defendant is liable? Contribution or apportionment between defendants should take place only after the victim has obtained judgment against each of them. But why was the Act held inapplicable? True, it applies only where the tortfeasors are liable for 'the same damage' and here there was some damage for which the first and not the second defendant was liable. But the fact that there was some damage which was not the same does not mean that there was no damage which was the same, and for the great bulk of the damage in this case both were surely liable, as stated above.

That left the (logically anterior) question of what damage each was liable for. Here the Court accepted an absurd report connected jointly by the experts for the three parties, who tentatively divided up the victim's present condition in terms of the two

causes. They should not have been asked to do this, and their answer should have been ignored, for there is no scientific basis for any such attribution of causality: the claimant is not half-mad because of what the first defendant did and half-mad because of what the second defendant did, he is as mad as he is because of what both of them did. His mania is aetiologically indiscernible, as when grief and shock combine to wreck the life of a parent who witnesses the death of her children. Suppose that the claimant was so maddened that he committed suicide: would his death have been divided up between those responsible for the triggering injuries?

In the event, the claimant got judgment against each defendant for part of his loss only. For his pain and suffering/loss of amenity he obtained judgment for £7.5K against the employer and £55K against the hospital, and for his economic loss of about £500K, one quarter against the employer and three-quarters against the hospital, the trial judge's split of one-third/two-thirds being varied on the ground that the greater blame of the employer was irrelevant except under the (supposedly inapplicable) Contribution Act.

Such apportionment of the loss against the claimant rather than between the tortfeasors is quite wrong. Nor is this just a matter of aesthetics. Consequences ensue. If, in the present case, either defendant had been insolvent, the claimant would not have been fully indemnified. Indeed, he was not fully indemnified in this case, for after the trial his employer, which had denied liability altogether, got the claimant to settle for 60% of its eventual liability. Had the correct decision been made, the claimant would have obtained his full post-operational loss from the hospital, less anything actually received towards that loss from his employer, and the employer, whose greater fault would then have been taken into account, could not have raised the settlement when sued for contribution by the hospital.

At the heart of this regrettable decision lies something very ominous. A few months previously, Stuart-Smith L.J. (the very judge who gave leave to appeal on the causation issue in our case) had said (in *Holby v. Brigham & Cowan (Hull) Ltd.* [2000] 3 All E.R.

421, 428) that the claimant ‘is entitled to succeed if he can prove that the defendant’s tortious conduct made a material contribution to his disability’. So far so good: this is the precise message of *Wardlaw*, the leading case on causation ([1956] 1 A.C. 613). However, Stuart-Smith L.J. went on to say ‘But strictly speaking the defendant is liable only to the extent of that contribution.’ This is an extremely heterodox view which even led him to cast doubt on *Wardlaw*. Now in *Wardlaw* the harm was lung disease which, like deafness or pollution, is an indivisible harm incrementally caused, and in such case this novel doctrine may possibly be entertained, on the view that a defendant should not be liable for *already existing* harm to which he did not contribute. It is, however, utterly unacceptable to extend it to a case like *Rahman*, where the harm was not incremental, but the indivisible result of a synergistic or catalytic concatenation of events.

The last thing we need in tort law, where questions of duty are presently at sixes and sevens, is to have the law of causation unravel under our very eyes. Anyone tempted to adopt the mantra of ‘liability in proportion to contribution to harm’ should consider the chaos resulting in the United States from tampering with the doctrine of joint and several liability (see D. Dobbs, *The Law of Torts* (St. Paul 2000), pp. 1077ff.), a doctrine which is beneficial in protecting victims when one of the tortfeasors is insolvent, and otherwise does no harm to the paying tortfeasor, given that the Contribution Act allows the courts to make a just apportionment, which is more than was done by the courts in *Rahman*.

Making it more likely vs making it happen

(2002) 61 Cambridge Law Journal 519

When the gods looked down and spied lusty Ares entangled with lovely Aphrodite in the net which her grimy husband used to entrap them, there arose on Mount Olympus ‘unquenchable laughter’ – in Homer’s words ‘asbestos gelos’. In the modern world, however, asbestos is no laughing matter: inhale the fibres of that mineral wool and you may contract asbestosis, a debilitating

lung disease, or, as was discovered 30 years later, mesothelioma, a fatal cancer. Asbestosis is cumulative – you get worse the more you inhale – so that everyone who culpably fails to protect you contributes to your ultimate condition. Mesothelioma is quite different, for it is most likely caused by a single fibre: of course the more you inhale, the greater the risk of getting that fatal fibre, but until you get it, exposure makes you no more likely to get it, and once you have got it, you are a dead man, and further exposure makes no difference. Thus if you get mesothelioma after being exposed to fibres in six successive employments, each employer has contributed to the risk of your getting the disease, but the disease itself is due to only one of them. To ascertain in which employment the fatal fibre struck is, however, quite impossible and will likely remain so whatever advances are made in medical science, since the symptoms take up to forty years to manifest themselves, and before then no one can tell whether, much less when, the victim has been hit.

Asbestos affects lawyers, too. Cases of asbestosis have induced the Court of Appeal to hold, in flagrant deviation from the established rule that a person whose fault contributed to the occurrence of harm is liable for all of it, that an employer is liable only to the extent of his contribution, proportional to the period of employment (*Holtby v. Brigham & Cowan (Hull) Ltd.* [2000] 3 All E.R. 421), and now, in a mesothelioma case, the House of Lords, going the other way, has imposed full liability on all those who exposed the victim to the risk of the fatal fibre even though only one of them can actually have been responsible for it: *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2002] 3 W.L.R. 89. Novel though it is to hold in an English case that there are (un)certain circumstances in which it is enough for a claimant to show that the defendant's fault probably contributed not to the occurrence of the harm but only to the risk of its occurrence, the speeches in the House of Lords, unanimous in reversing a unanimous Court of Appeal, are Olympian in their assurance. Their Lordships' conviction was supported by principle, authority and the 'wider jurisprudence'.

Principle we must, in a case note, leave to works on the narrower jurisprudence. The 'authority' was *McGhee v. National Coal*

Board [1973] 1 W.L.R. 1 (H.L.). How silly we were to suppose that it had been demolished as an authority in 1988 when Lord Bridge, with the concurrence of all his brethren, had said that *McGhee* had turned on a bold inference of fact and ‘had added nothing to the law’. Now we know that Lord Bridge was wrong to say so and that *McGhee* laid down a brand new, indeed revolutionary, rule of law, that, in Lord Reid’s words, there is ‘no substantial difference between saying that what the [defenders] did materially increased the risk of injury to the [pursuer] and that what [they] did made a material contribution to his injury’. He did, however, preface this with the words ‘From a broad and practical viewpoint’, which is hardly the introit to a proposition of law, and Lord Hoffmann has now explained that Lord Reid didn’t mean what he said but rather that ‘a breach of duty which materially increased the risk should be treated *as if* it had materially contributed to the disease’, a fiction now turned into a proposition of law.

But this is water over the bridge. No longer does a claimant always have to prove that the defendant’s misconduct actually contributed to the harm he is complaining of; it may be enough for him to prove that it probably contributed to the risk of the occurrence of that harm. So the question is: When can he profit from this alleviation? Lord Bingham and Lord Rodger list six requirements each, Lord Hoffmann only five, while Lord Nicholls calls for considerable restraint and adds that ‘It is impossible to be more specific’. It appears – to begin with, at any rate, until claimants’ attorneys really get the bit between their teeth – that the standard test of causality will be relaxed only for a claimant who cannot possibly prove that the defendant’s breach of duty actually contributed to the harm actually suffered, provided that the harm is of a kind against the risk of his suffering which it was the actionable duty of the defendant to guard him. Thus if a healthy young woman has unsafe sex with six partners, each of whom fails to disclose that he is HIV positive, all of them will be liable if she contracts AIDS: one of them must have infected her but she cannot possibly show which. It must be a comfort that if a child is born, medical science can now tell which was the actual father, or they would all be paying maintenance.

Making it more likely vs making it happen

The ‘wider jurisprudence’ (with which the House was supplied at its own suggestion) shows that other systems sometimes dispense with the need to prove causation in the old sense. The *tour d’horizon* was admittedly superficial. Omitted is the salient fact that in almost none of the jurisdictions glanced at would the claimants in *Fairchild* have succeeded: in most places an employee simply cannot sue his employer in tort, since workmen’s compensation or social security takes its place. We, too, have some social security, but the fact that these claimants were entitled to industrial disablement benefit was not mentioned in the speeches: indeed, the speeches rather suggest that unless the claimants could get damages in tort, they would get nothing at all. This might affect one’s view of the unfairness of the rule now overturned. Of its effect, too, for now that the claimants do get damages, the state can claw back what it paid out: the decision consequently effects a huge transfer to the public purse from private insurers still reeling from Acts of God and his followers. This is surely to add a new twist to ‘public policy’.

In the 1988 case Lord Bridge ended by saying ‘. . . whether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases.’ Their Lordships in *Fairchild* seem to disagree with him on this, too.

