NEGLIGENCE – DUTY OF CARE

EXISTENCE OF A DUTY

***Donoghue v Stevenson* [1932] AC 562, HL**

By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health:-

So held, by Lord Atkin, Lord Thankerton and Lord Macmillan; Lord Buckmaster and Lord Tomlin dissenting.

***Caparo Industries v Dickman* [1990] 1 All ER 568, HL**

See below.

Foreseeability and proximity

***Bourhill v Young* [1942] 2 All ER 396, HL**

The appellant, on Oct. 11, 1938, was a passenger on a tramcar. She alighted from the tramcar some 50ft. from the junction of the road along which the car was travelling and a cross road. After alighting from the car she passed along its near side, round the front, and then to the entrance to the (driver's platform on the off-side. Here, with the help of the driver, she placed her heavy creel upon her back. At the same time a motor cyclist passed between the near side of the tramcar and the footway and, not having seen a motor car turning into the cross road by reason of his view being obscured by the tramcar, he collided with the car, was thrown off his motorcycle, fell on his head and was killed. The appellant saw nothing of the accident but merely heard the noise of the impact of the two vehicles. After the body of the motor cyclist had been removed, she approached the spot and saw blood on the roadway. The injuries alleged to have been sustained by the appellant were that she wrenched and injured her back by being startled by the noise of the collision and that she was thrown into a state of terror and sustained a severe shock to her nervous system, though there was no reasonable fear of immediate bodily injury to her. She was about 8 months pregnant at the time and gave birth to a still-born child on Nov. 18, 1938. The driver of the motor-cycle was admittedly negligent as against the driver of the motor car, but the question was whether he owed any duty to the appellant in that he ought, as a reasonable man, to have contemplated the likelihood of injury to her in the circumtances.:-

HELD : the question to be decided was one of liability and not one of remoteness of damage. In the circumstances of this case the motor cyclist owed no duty to the appellant since he could not be held to have reasonably foreseen the likelihood that the appellant, placed as she was, could be affected by his negligent act.

The role of policy

See handout on Public Policy.

Smith v Littlewoods Organisation Ltd **[1987] 1 All ER 710, HL**

The respondents purchased a cinema with a view to demolishing it and replacing it wit a supermarket. They took possession on 31 May 1976, closed the cinema and employed contractors to make site investigations and do some preliminary work on foundations, but from about the end of the third week in June the cinema remained empty and unattended by the respondents or any of their employees. By the beginning of July the main building of the cinema was no longer lockfast and was being regularly entered by unauthorised persons. Debris began to accumulate outside the cinema and on two occasions attempts to start fires inside and adjacent to the cinema had been observed by a passer-by but neither the respondents nor the police were informed. On 5 July a fire was started in the cinema which seriously damaged two adjoining properties, one of which had to be demolished. The appellants, the owners of the affected properties, claimed damages against the respondents on the ground that the damage to their properties had been caused by the respondents' negligence. The judge found the claims established and awarded the appellants damages. An appeal by the respondents was allowed by the Court of Session. The appellants appealed to the House of Lords, contending that it was reasonably foreseeable that if the cinema was left unsecured children would be attracted to the building, would gain entry and would cause damage which, it was reasonably foreseeable, would include damage by fire which, it was reasonably foreseeable, would in turn spread to and damage adjoining properties.

Held - The appeal would be dismissed for the following reasons -
(i) (Per Lord Keith, Lord Brandon, Lord Griffiths and Lord Mackay) The respondents were under a general duty to exercise reasonable care to ensure that the condition of the premises they occupied was not a source of danger to neighbouring property. Whether that general duty encompassed a specific duty to prevent damage from fire resulting from vandalism in the respondents' premises depended on whether a reasonable person in the position of the respondents would foresee that if he took no action to keep the premises lockfast in the comparatively short time before the premises were demolished they would be set on fire with consequent risk to the neighbouring properties. On the facts and given particularly that the respondents had not known of the vandalism in the area or of the previous attempts to start fires, the events which occurred were not reasonably foreseeable by the respondents and they accordingly owed no such specific duty to the appellants. Furthermore (per Lord Mackay), where the injury or damage was caused by an independent human agency the requirement that the injury or damage had to be the probable consequence of the tortfeasor's own act or omission before there could be liability referred not to a consequence determined according to the balance of probabilities but to a real risk of injury or damage, in the sense of the injury or damage being a highly likely consequence of the act or omission rather than a mere possibility. The more unpredictable the conduct in question, the less easy it was to affirm that any particular result from it was probable and, unless the court could be satisfied that the result of the human action was highly probable or very likely, it might have to conclude that all the reasonable man could say was that it was no more than a mere possibility; *P Perl (Exporters) Ltd v Camden London BC* [1983] 3 All ER 161 explained; *Hay (or Bourhill) v Young* [1942] 2 All ER 396, *Smith v Leurs* (1945) 70 CLR 256, *Lamb v Camden London Borough* [1981] 2 All ER 408 and *King v Liverpool City Council* [1986] 3 All ER 544 considered.

(2) (Per Lord Goff, Lord Keith concurring) There was no general duty at common law to prevent persons from harming others by their deliberate wrongdoing, however foreseeable such harm might be if a defendant did not take steps to prevent it. Accordingly, liability in negligence for such harm caused by third parties could only be made out in special circumstances, namely (a) where a special relationship existed between the plaintiff and the defendant, (b) where a source of danger was negligently created by the defendant and it was reasonably foreseeable that third parties might interfere and cause damage by sparking off the danger and (c) where the defendant had knowledge or means of knowledge that a third party had created or was creating a risk of danger on his property and he failed to take reasonable steps to abate it. On the facts, no such special circumstances were present, and accordingly the respondents owed no duty of care to the appellants; *Stansbie v Troman* [1948] 1 All ER 599, *Haynes v G Harwood & Son* [1934] All ER Rep 103, *Goldman v Hargrave* [1966] 2 All ER 989 and *Thomas Graham & Co Ltd v Church of Scotland General Trustees* 1982 SLT (Sh Ct) 26 considered; *Squires v Perth and Kinross DC* 1986 SLT 30 disapproved.

Undertaking

***Barrett v Ministry of Defence* [1995] 3 All ER 87, CA**

The plaintiff was the widow and executrix of the deceased, a naval airman who died after becoming so drunk one night at the naval base where he was serving that he passed out into a coma and became asphyxiated on his own vomit. Following the deceased's death, his commanding officer was charged with, and pleaded guilty to, a breach of art 1810 of the Queen's Regulations for the Royal Navy 1967, under which it was the 'particular duty of all officers ... actively to discourage drunkenness ... by naval personnel' and in the event of alcohol abuse, to take appropriate action to prevent any likely breaches of discipline, possible injury or fatality, including medical assistance if ... available'. The plaintiff sued the Ministry of Defence claiming damages for herself and the deceased's estate in respect of his death, alleging that the defendant as his employer owed him while he was under its control a duty of care to prevent him becoming so drunk that he caused himself injury or death, and that it was in breach of that duty. At the hearing of the widow's action evidence was adduced of widespread laxity regard to alcohol consumption at the base, if not its actual encouragement, and the failure to take disciplinary action to prevent it. The judge found that the deceased had been a heavy drinker, that this was widely known, that it was therefore foreseeable that in the particular environment of the naval base with it lax attitude to drinking he would succumb to heavy intoxication, and that in the exceptional circumstances of the case it was just and reasonable to impose on the defendant a duty of care to protect a person of full age and capacity, such as the deceased, from his own weakness. He further held, comparing the Queen's Regulations and naval standing orders to the Highway Code and safety codes relating to factories, that the defendant was in breach of that duty because it had failed to enforce the standards it set itself in matters of discipline. He further held that the defendant had taken inadequate steps to care for the deceased after he had passed out in that no medical officer had been informed and the supervision of the deceased having been wholly inadequate by the defendant's own standards. However, the judge found that the deceased was guilty of contributory negligence and reduced the damages by 25%. The defendant appealed contending, inter alia, that the judge was wrong to fix it with a duty of care in the circumstances and that he was wrong to treat the Queen's Regulations and standing orders as setting the standard by which the defendant's fulfilment of that duty of care should be judged.

Held - (1) The judge had wrongly equated the Queen's Regulations and standing orders with the Highway Code and safety codes in factories, because the purpose of the regulations and standing orders was to preserve good order and discipline in the navy and to ensure that personnel remained fit for duty and while on duty obeyed commands and when off duty did not misbehave bringing the service into disrepute, and were in no sense intended to lay down standards or to give advice in the exercise of reasonable care for the safety of the men when off duty g in the bars on the base. The regulations and standing orders could not therefore be directly invoked in determining whether a duty of care was owed to the deceased, and if so whether the defendant was in breach of it.

(2) The mere existence of regulatory or other public duties did not of itself create a special relationship imposing a duty to take care in law for the safety of others. The characteristic which distinguished those special relationships was reliance, expressed or implied in the relationship, which the party to whom the duty was owed was entitled to place on the other party to make provision for his safety. Applying the principles that new duties to take care in law for the safety of others should develop incrementally and by analogy with established categories and according to whether, as well as there being reasonable foreseeability of harm, it was fair, just and reasonable for the law to impose a duty of a given scope upon one party for the benefit of another, there was no reason in the circumstances why it should not be fair, just and reasonable for the law to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink. No one was better placed to judge the amount that he could safely consume or to exercise control in his own interest as well as in the interest of others. To dilute self-responsibility and to blame one adult for another's lack of self-control was neither just nor reasonable. It followed that, until the deceased collapsed, he was in law alone responsible for his condition and the judge's finding that the defendant was liable at that stage would be reversed; *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294 and *Anns v Merton London Borough* [1977] 2 All ER 492 considered.

(3) However, once the deceased had collapsed and was no longer capable of looking after himself and the defendant had assumed responsibility for his care, it was accepted by the defendant that the measures taken fell short of the standard reasonably to be expected and its supervision of him was inadequate. To that extent, the defendant was in breach of a duty of care and liable in damages to the plaintiff. However, since the deceased had by his own behaviour involved the defendant in a situation in which it had to assume responsibility for his care and since the deceased's own fault was a continuing and direct cause of his death a greater share of the blame should rest upon him. The allowance to be made for the deceased's own contributory negligence would therefore be increased from one quarter to two thirds and the damages awarded to the plaintiff reduced accordingly. To that extent the appeal would be allowed.

Relationship between claimant and defendant

***Smoldon v Whitworth & Nolan* [1997] PIQR P133, CA**

The plaintiff, who was aged 17 at the time, suffered very serious personal injuries when playing hooker in a colts rugby match, when a serum collapsed, and his neck was broken. He claimed damages against the first defendant, a member of the opposing team, and against the second defendant, the referee. The claim against the first defendant was dismissed, and there was no appeal against that decision.

The plaintiff argued that the second defendant owed him a duty of care to enforce the Laws of the Game, to apply them fairly, to effect control of the match so as to ensure that the players were not exposed to unnecessary risk of

injury and to have particular regard to the fact that some of the players (including the plaintiff) were under the age of eighteen at the date of the match. The second defendant accepted that he owed the plaintiff a duty of care, but argued that the first defendant's duty to the plaintiff was only to refrain from causing him injury deliberately or with reckless disregard for his safety, that this standard of care itself qualified or informed his own standard of care, and that he could only be liable where he had shown deliberate or reckless disregard for the plaintiff's safety. The judge adopted the plaintiff's definition of the second defendant's duty. He found that the second defendant had not enforced safety requirements set out in the Laws of the Game which contained special provisions relating to players aged under nineteen, and requiring front rows to engage in a crouch-touch-pause-engage sequence. He also found that there had been roughly three or four times the number of collapsed scrums that would not be abnormal in such a game, at the conclusion of the last of which, close to the end of the match, the plaintiff sustained his injuries. He found that as as a consequence of the second defendant's failure to instruct the front rows sufficiently and require the crouch-touch-pause-engage sequence the relevant scrum collapse and the consequential injuries to the plaintiff occurred, in breach of the second defendant's duty of care to him. The second defendant appealed.

Held, dismissing the appeal, that the judge had adopted the correct formulation of the second defendant's duty. It was not necessary to show a high level of probability that if the scrum collapsed serious injury of the kind which occurred was a highly probable consequence; serious spinal injury was a foreseeable consequence of a collapse of the scrum and of failure to prevent collapse of the scrum, and that was sufficient. The plaintiff was not volens to the risk of injury; he had consented to the ordinary incidents of a game of rugby, not to a breach of duty by the official whose duty it was to apply the rules and ensure, so far as possible, that they were observed.

Control over third parties

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

Ten borstal trainees were working on an island in a harbour in the custody and under the control of three officers. During the night seven of them escaped. It was claimed that at the time of the escape the officers had retired to bed, leaving the trainees to their own devices. The seven got on board a yacht moored off the island and set it in motion. They collided with another yacht, the property of the respondents, and damaged it. The respondents sued the Home office for the amount of the damage. A preliminary issue was ordered to be tried whether on the facts pleaded in the statement of claim the Horne Office, its servants or agents owed any duty of care to the respondents capable of giving rise to a liability in damages with respect to the detention of persons undergoing sentences of borstal training, or with respect to the manner in which such persons were treated, employed, disciplined, controlled or supervised whilst undergoing such sentences. It was admitted that the Home Office would be vicariously liable if an action would lie against any of the borstal officers. On appeal against the decision of the preliminary point in favour of the respondents,

Held - (Viscount Dilhorne dissenting) the appeal would be dismissed because-

(i) (per Lord Reid, Lord Morris of Borth-y-Gest and Lord Pearson)

(a) the taking by the trainees of the nearby yacht and the causing of damage to the other yacht which belonged to the respondents ought to have been foreseen by the borstal officers as likely to occur if they failed to exercise proper control or supervision; in the particular circumstances the

officers prima facie owed a duty of care to the respondents; dictum of Lord Atkin in *Donoghue (or M'Alister) v Stevenson* [1932] All ER Rep at 11 applied;

(b) the fact that the immediate damage to the property of the respondents was caused by the acts of third persons, the trainees, did not prevent the existence of a duty on the part of the officers towards the respondents because (per Lord Reid) the taking of the yacht and the damage to the other was the very kind of thing which the officers ought to have seen to be likely, or (per Lord Morris of Borth-y-Gest and Lord Pearson) the right of the officers to control the trainees constituted a special relation which gave rise to an exception to the general rule that one person is under no duty to control another to prevent his doing damage to a third; dictum of Dixon J in *Smith v Leurs* (1945) 70 CLR at 261, 262, applied;

(c) the fact that something was done in pursuance of statutory authority did not warrant its being done unreasonably so that avoidable damage was negligently caused; dictum of Lord Blackburn in *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas at 455 applied;

(d) there was no ground in public policy for granting complete immunity from liability in negligence to the Home Office or its officers.

(ii) (per Lord Diplock) there was material, fit for consideration at the trial, for holding both that the officers were acting in breach of instructions and ultra vires and that they owed a duty of care to the respondents.

Decision of the Court of Appeal sub nom *Dorset Yacht Co Ltd v Home Office* [1969] 2 All ER 564 affirmed.

Control of land or dangerous things

Dominion Natural Gas v Collins and Perkins **[1909] AC 640, PC**

In actions for damages in respect of an accident against the appellant gas company it appeared that the appellants were not occupiers of the premises on which the accident had occurred and had no contractual relations with the plaintiffs, but that they had installed a machine on the said premises, and the jury found that the accident was caused by an explosion resulting from gas emitted, owing to the appellants' negligence, through its safety valve direct into the closed premises instead of into the open air:-

Held, that the initial negligence having been found against the appellants in respect of an easy and reasonable precaution which they were bound to have taken, they were liable unless they could shew that the true cause of the accident was the act of a subsequent conscious volition, e.g., the tampering with the machine by third parties.

TYPES OF CLAIMANT

Pitts v Hunt **[1990] 3 All ER 344, CA**

The plaintiff, who was aged 18, and a friend, who was aged 16, spent the evening drinking at a disco before setting off home on the friend's motor cycle with the plaintiff riding as a pillion passenger. The plaintiff was aware that the motor cyclist was neither licensed to ride a motor cycle nor insured. On the journey home the motor cyclist, encouraged by the plaintiff, rode the motor cycle in a fast, reckless and hazardous manner deliberately intending to frighten members of the public. The motor cycle collided with an oncoming car and the plaintiff was severely injured. The motor cyclist, whose blood alcohol level was more than twice the legal limit for driving a motor vehicle, was killed. The plaintiff claimed damages in negligence against the personal representative of the motor cyclist and against the driver of the oncoming car.

The judge found that there had been no negligence on the part of the driver of the car and held that the plaintiff could not recover damages against the motor cyclist's estate because the two were engaged on a joint illegal enterprise and the claim was barred by the maxim ex turpi causa non oritur actio and public policy. The judge further held that the claim would have been defeated by the defence of volenti non fit injuria but for the fact that s 148(3) of the Road Traffic Act 1972, by providing that any 'agreement or understanding' between the driver and a passenger of a motor vehicle had no effect so far as it purported to negative or restrict the driver's liability to the passenger, precluded the defendants from relying on that defence in the context of a motor accident, and that in the event the plintiff was 100% contributorily negligent. The plaintiff appealed against the dismissal of his claim against the motor cyclist's estate.

Held - Where one person was injured as the result of the actions of another while they were engaged in a joint illegal enterprise the issue whether the injured party was entitled to claim against the other person or whether his claim was barred by the maxim ex turpi causa non oritur actio was to be determined not according to whether there was any moral turpitude involved in the joint illegal enterprise but whether the conduct of the person seeking to base his claim on the unlawful act and the character of the enterprise and the hazards necessarily inherent in its execution were such that it was impossible to determine the appropriate standard of care because the joint illegal purpose had displaced the ordinary standard of care. Since the plaintiff had played a full and active part in encouraging the motor cyclist to commit offences which, had an innocent third party been killed, would have amounted to manslaughter by the commission of a dangerous act, the plaintiff ought not to be permitted to recover for the injuries which he sustained arising out of that unlawful conduct, on the grounds of the application of the maxim ex turpi causa non oritur actio, public policy and the fact that the circumstances precluded the court from finding that the driver owed any duty of care to the plaintiff. The appeal would therefore be dismissed; dictum of Mason J *Jackson v Harrison* (1978) 138 CLR 438 at 455-456 applied; *Thackwell v Barclays Bank plc* [1986] 1 All ER 676 and *Saunders v Edwards* [1987] 2 All ER 651 not followed.

Per curiam (1) In the context of a plea of contributory negligence it is logically unsupportable to find that a plaintiff was 100% contributorily negligent since the premise on which s 1 of the Law Reform (Contributory Negligence) Act 1945 operates is that there is fault on the part of both parties which has caused the damage and that the responsibility must be shared according to the apportionment of liability. Where (per Dillon and Beldam LJJ) the parties have engaged in a joint illegal enterprise and the parties are equally to blame the correct apportionment of liability is 50% each.

(2) The effect of s 148(3) of the 1972 Act is that it is not open to the driver of a motor vehicle to say that the fact that his passenger could be said to have willingly accepted a risk of negligence on the driver's part relieves the driver of liability for his negligence since the defence of volenti non fit injuria is precluded by s 148(3) in the context of a motor accident; *Winnik v Dick* 1984 SLT 185 approved; dictum of Ewbank J in *Ashton v Turner* [1980] 3 All ER 870 at 878 disapproved.

Per Dillon and Balcombe LJJ. Section 148(1) of the 197z Act does not have the effect that an express or tacit agreement by the parties to engage in a joint illegal enterprise involving a motor vehicle cannot be relied on to negative or restrict liability for negligent driving, since s 148(3) is concerned to preclude a defence of volenti non fit injuria but is not concerned with any defence of illegality and the section does not contemplate an illegal 'agreement or understanding' to carry out an illegal purpose.

Per Beldam LJ. If the driver of a motor vehicle commits a road traffic offence so serious that it would preclude the driver on public policy grounds from claiming an indemnity under a policy of insurance statutorily required

to be effected for the benefit of a passenger, public policy will also preclude the passenger from claiming compensation if he is jointly guilty of that offence.

Clunis v Camden **[1998] 3 All ER 180, CA**

On 24 September 1992 the plaintiff, who had a history of mental disorder and of seriously violent behaviour, was discharged from the hospital where he had been detained as the result of an order under s 3 of the Mental Health Act 1983, and moved into the area covered by the defendant health authority. Under s 117 of the 1983 Act the health authority was under a duty to provide after-care services for the plaintiff, and a psychiatrist employed by it was designated as the plaintiff's responsible medical officer. However, the plaintiff failed to attend appointments arranged for him by the medical officer, and his condition deteriorated. On 17 December, in a sudden and unprovoked attack, the plaintiff stabbed a man to death at a tube station. He was charged with murder, but at his trial pleaded guilty to manslaughter on the grounds of diminished responsibility and was ordered to be detained in a secure hospital. Subsequently, the plaintiff brought an action for damages against the health authority alleging that it had negligently failed to treat him with reasonable professional care and skill in that, inter alia, the responsible medical officer had failed to ensure that he was assessed before 17 December, and that if he had been he would either have been detained or consented to become a patient and would not have committed manslaughter. The health authority applied to strike out the plaintiff's claim as disclosing no cause of action on the grounds (i) that it was based on his own illegal act which amounted to the crime of manslaughter, and (ii) that it arose out of the health authority's statutory obligations under s 117 of the 1983 Act and those obligations did not give rise to a common law duty of care. The deputy judge dismissed the application and the defendant appealed.

Held - (1) The rule of public policy that the court would not lend its aid to a plaintiff who relied on his own criminal or immoral act was not confined to particular causes of action, but only applied if the plaintiff was implicated in the illegality and was presumed to have known that he was doing an unlawful act. In the instant case, the plaintiff's plea of diminished responsibility accepted that his mental responsibility was substantially impaired but did not remove liability for his criminal act, and therefore he had to be taken to have known what he was doing and that it was wrong. It followed that the health authority had made out its plea that the plaintiff's claim was based on his crime of manslaughter; dictum of Best CJ in *Adamson v Jarvis* (1827) 4 Bing 66 at 72-73 and *Burrows v Rhodes* [1899] 1 QB 816 applied; *Meah v McCreamer* [1985] 1 All ER 367 doubted.

(2) Having regard to the fact that under the 1983 Act the primary method of enforcement of the obligations under s 117 was by complaint to the Secretary of State, the wording of the section was not apposite to create a private law cause of action for failure to carry out the duties under the statute. Moreover, bearing in mind the ambit of the obligations under s 117 and the statutory framework, it would not be fair, just and reasonable to impose a common law duty of care on an authority. The plaintiff could not, therefore, in the instant case establish a cause of action arising from the failure by the health authority or the responsible medical officer to carry out their functions under s 117 of the 1983 Act. Accordingly, the appeal would be allowed; *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 applied.

***Revill v Newbery* [1996] 1 All ER 291, CA**

The 76-year-old defendant was sleeping in a brick shed on his allotment in order to protect valuable items stored in it when he was awoken in the middle of the night by the sound of the plaintiff attempting to break in. He took his shotgun, loaded it and, without being able to see whether there was anybody directly in front of the door, fired a shot through a small hole in the door, wounding the plaintiff in the arm and chest. The plaintiff was subsequently prosecuted for the various offences which he had committed that night and pleaded guilty; the defendant was also prosecuted on charges of wounding but was acquitted. Thereafter the plaintiff brought proceedings against the defendant, claiming damages for breach of the duty of care under s 1 of the Occupiers' Liability Act 1984 and for negligence. The judge found that although the defendant had not intended to hit the plaintiff he could reasonably have anticipated that he might do so and was thus negligent by reference to the standard of care to be expected from the reasonable man placed in the defendant's situation. The judge further found that the defendant had used greater violence than was justified in lawful self-defence and rejected the defendant's submission that he was relieved of all liability on the basis of the maxim ex turpi causa non oritur actio since the plaintiff had been involved in a criminal enterprise at the time of injury. On the question of contributory negligence the judge found the plaintiff two-thirds to blame. The defendant appealed.

Held - A plaintiff in a personal injury claim for damages for negligence was not debarred from making any recovery by the fact that he was a trespasser and engaged in criminal activities at the time the injury was suffered. The duty of care owed to a trespasser by an occupier under s 1 of the Occupiers' Liability Act 1984 and by persons other than occupiers at common law, namely to take such care as was reasonable in all the circumstances of the case to see that the trespasser did not suffer injury on the premises, applied even where the trespasser was engaged in a criminal enterprise. On the facts, the judge had been justified in finding that the plaintiff was a person to whom the defendant owed some duty of care and that the defendant, who had used greater violence than was justified in lawful self-defence, was in breach of that duty, and in finding substantial contributory negligence on the part of the plaintiff. The appeal would accordingly be dismissed. *British Railways Board v Herrington* [1972] 1 All ER749 and *Pitts v Hunt* [1990] 3 All ER 344 considered.

***Haynes v Harwood* [1935] 1 KB 146, CA**

The plaintiff, a police constable, was on duty inside a police station in a street in which, at the material time, were a large number of people, including children. Seeing the defendants' runaway horses with a van attached coming down the street he rushed out and eventually stopped them, sustaining injuries in consequence, in respect of which he claimed damages:-

Held, (1) that on the evidence the defendants' servant was guilty of negligence in leaving the horses unattended in a busy street; (2) that as the defendants must or ought to have contemplated that some one might attempt to stop the horses in an endeavour to prevent injury to life and limb, and as the police were under a general duty to intervene to protect life and property, the act of, and injuries to, the plaintiff were the natural and probable consequences of the defendants' negligence; and (3) that the maxim "volenti non fit injuria" did not apply to prevent the plaintiff recovering.

Brandon v. Osborne Garrett & Co. [1924] 1 K. B. 548 approved. *Cutler v. United Dairies (London), Ld.* [1933] 2 K. B. 297 distinguished, and dicta therein questioned.

Decision of Finlay J. [1934] 2 K. B. 240 affirmed.

Ward v Hopkins; Baker and another v Hopkins **[1959] 3 All ER 225, CA**

A company, which carried on business as builders and contractors, undertook work on a well which involved clearing it of water. The well was some fifty feet deep and about six feet in diameter. H, a director of the company, and W and another workman employed by the company, erected a platform twenty-nine feet down the well and some nine feet above the water and lowered on to it a petrol-driven pump. After the engine of this pump had worked for about one and a half hours it stopped and a haze of fumes was visible in the well. The working of the petrol engine created also a dangerous concentration of carbon monoxide, a colourless gas. H returned to the well after working hours that evening and observed the haze and noticed a smell of fumes. On the following morning at about 7.30 a.m. H instructed the two workmen to go to the well, but said to W "Don't go down that bloody well until I come". The workmen arrived at the well at about 8.15 a.m., and, before H had arrived, one of the workmen went down the well and a few minutes later the other workman also went down it. Both were overcome by fumes. A doctor, who was called to the well, went down the well with a rope tied to his body in order to see if he could rescue the men, though be had been warned not to go. He also was overcome by fumes. Endeavour was made to haul him to the surface by the rope, but the rope caught in a down pipe in the well and he could not be brought to the surface until help arrived some time later. He died shortly afterwards. The court found that H had acted in good faith but that he lacked experience and did not appreciate the great danger that would be created in the well and did not seek expert advice on the proper method of emptying the well. In actions for damages for negligence resulting in the death of W and the doctor damages were awarded, but those awarded in the case of W were apportioned, one-tenth of the responsibility being attributed to W. On appeal,

Held: (i) the defendant company were liable for negligence causing the death of W because the method adopted to empty the well had created a situation of great danger to anyone descending the well on the morning in question, and the defendant company were negligent in that no clear warning of the deadly danger was given to W on that morning, H's order not to go down the well until he came being insufficient to discharge the defendant company's legal duty to take reasonable care not to expose W to unnecessary risk, though the apportionment of one-tenth of the responsibility to W would not be disturbed.

(ii) the defendant company were liable for negligence causing the death of the doctor because it was a natural and proper consequence of the defendant company's negligence towards the two workmen that someone would attempt to rescue them, and the defendant company should have foreseen that consequence; accordingly the defendant company were in breach of duty towards the doctor.

Dictum of Lord Atkin in *M'Alister (or Donoghue) v. Stevenson* ([1932] All E.R. Rep. at p. 11) applied.

(iii) no defence to the claim arising out of the death of the doctor was afforded either (a) by the principle of novus actus interveniens, for that did not apply where, as in the present case, the act in question was the very kind of thing that was likely to happen as a result of the negligence. Dictum of Greer, L.J., in *Haynes v. Harwood* ([1934] All E.R. Rep. at p. 107) applied.

or (b) by the maxim volenti non fit injuria, for that could not be successfully invoked as a defence by a person who had negligently placed others in a situation of such peril that it was foreseeable that someone would attempt their rescue. Dictum of Greer, L.J., in *Haynes v. Harwood* ([1934] All E.R. Rep. at p. 108) applied.

(iv) the doctor had not acted recklessly or negligently and had neither caused nor contributed to his own death.

Per Willmer, L.J.: bearing in mind that danger invites rescue, the court should not be astute to accept criticism of the rescuer's conduct from the wrongdoer who created the danger.

Decision of Barry, J. ([1958] 3 All E.R. 147) affirmed.

***Chadwick v BRB* [1967] 2 All ER 945, QBD**

In December, 1957, C. was about forty-four years old and since 1945 had been successfully engaged in a window-cleaning business and taking an interest in social and charitable activities in his community. In 1941 when he was twenty-eight years old, he had suffered some psycho-neurotic symptoms, but he had not suffered from them for sixteen years thereafter and he was not (so the court found) someone who would be likely to relapse under the ordinary stresses of life. On Dec. 4, 1957, immediately following a collision between two railway trains on a line a short distance from his home, C. voluntarily took an active part throughout the night in rescue operations at the scene of the accident, in which ninety persons had been killed and many others were trapped and injured. As a result of the horror of his experience at the scene of the accident C. suffered a prolonged and disabling anxiety neurosis necessitating hospital treatment. In an action brought by C. and continued after his death by his widow as his personal representative it was conceded by the defendants that the accident was caused by negligence for which they were legally responsible, but liability to C. in damages was denied.

Held: the defendants were in breach of duty to C. and his illness was suffered as a result of that breach, with the consequence that his personal representative was entitled to recover damages, for the following reasons-

(i) it was reasonably foreseeable in the event of such an accident as had occurred that someone other than the defendants' servants might try to rescue passengers and might suffer injury in the process; accordingly the defendants owed a duty of care towards C. *Ward v. T. E. Hopkins & Son, Ltd.* ([1959] 3 All E.R. 225) followed.

(ii) injury by shock to a rescuer, physically unhurt, was reasonably foreseeable, and the fact that the risk run by a rescuer was not exactly the same as that run by a passenger did not deprive the rescuer of his remedy.

(iii) damages were recoverable for injury by shock notwithstanding that the shock was not caused by the injured person's fear for his own safety or for the safety of his children. Principle laid down in *Hay (or Bourhill) v. Young* ([1942] 2 All E.R. 396) applied. *Dulieu v. White & Sons* ([1900-03] All E.R. Rep. 353) and *Owens v. Liverpool Corpn.* ([1938] 4 All E.R. 727) considered.

(iv) as a man who had lived a normal busy life in the community with no mental illness for sixteen years, there was nothing in C.'s personality to put him outside the ambit of the defendants' contemplation so as to render the damage suffered by him too remote. Dictum of Lord Wright in *Hay (or Bourhill) v. Young* ([1942] 2 All E.R. at pp. 405, 406) distinguished.

ECONOMIC LOSS

CARELESS ACTS

(a) As a consequence of physical damage to a third party's property

***Cattle v Stockton Waterworks* (1875) LR 10 QB 453**

Defendants, a waterworks company, under their Act laid down one of their mains along and under a turnpike-road, made under an Act which declared

the soil to be in the owners of the adjoining land, subject only to the right to use and maintain the road. K. was owner of land on both sides, at a spot where the road was carried across a valley on an embankment, and wanting to connect his land on either side, K. employed Plaintiff at an agreed sum, to make a tunnel under the road. In doing the work, it was discovered that there was a leak in the Defendants' main higher up the road, and on the Plaintiff digging out the earth, the water from the leak flowed down upon the work and delayed it, so as to cause pecuniary damage to the Plaintiff, for which he brought an action against Defendants:

-*Held*, that assuming K. could have maintained an action against Defendants for injury to his property (as to which the Court gave no opinion), the damage sustained by Plaintiff by reason of his contract with K. becoming less profitable, or a losing contract, in consequence of the injury to K.'s property, gave Plaintiff no right of action against Defendants. -The tunnel was formed by digging through half the width of the road, forming the tunnel, and then completing the other half in the same way. Before commencing the work K. obtained the consent of the road surveyor and the trustees: -*Held*, assuming K. could, under the circumstances, have been indicted for the nuisance to the high road, the partial obstruction to the highway did not render the whole proceeding so illegal as to prevent Plaintiff who was engaged in it from recovering damages for a wrong.

Weller v Foot and Mouth Disease Research Institute **[1966] 1 QB 569, QBD**

The principle of the common law that a duty of care which arises from a risk of direct injury to person or property is owed only to those whose persons or property may foreseeably be injured by a failure to take care is not affected by the decision in *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.* ([1963] 2 All E.R. 575); in order to have a right of action for negligence a plaintiff must show that he was within the defendant's duty to take care, and he may then recover by way of damages for the direct and consequential loss reasonably foreseeable, but, though proof of direct loss is not an essential part of the claim, he must establish that he was within the scope of the defendant's duty of care (see p: 570, letter D, post).

In consequence, as was assumed, of the escape of a virus imported by the defendants and used by them for experimental work on foot and mouth disease at land and premises owned and occupied by them, cattle in the vicinity of the premises became infected with the disease. Because of the disease an order was made under statutory powers closing cattle markets in the district, with the result that the plaintiffs, who were auctioneers, were temporarily unable to carry on their business at those markets and suffered loss. The court was required to assume that the loss to the plaintiffs was foreseeable and that there was neglect on the part of the defendants which caused the escape of the virus. On the question whether in law an action for damages would lie for the loss,

Held: (i) an ability to foresee indirect or economic loss to another person as the result of a defendant's conduct did not automatically impose on the defendant a duty to take care to avoid that loss; in the present case the defendants were not liable in negligence, because their duty to take care to avoid the escape of the virus was due to the foreseeable fact that the virus might infect cattle in the neighbourhood and thus was owed to owners of cattle, but, as the plaintiffs were not owners of cattle, no such duty was owed to them by the defendants. *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.* ([1963] 2 All E.R. 575) distinguished. *Donoghue (or McAlister) v. Stevenson* ([1932] All E.R. Rep. 1) and *Morrison Steamship Co., Ltd. v. S.S.*

Greystoke Castle (Owners of Cargo) ([1946] 2 All E.R. 696) considered and applied.
(ii) the plaintiffs were also not entitled to recover under the rule in *Rylands v. Fletcher* ([1861-73] All E.R. Rep. 1) because they had no interest in the cattle endangered by the escape of the virus and the loss to the plaintiffs was not a sufficiently proximate and direct consequence of the escape of the virus. Dictum of Blackburn, J., in *Cattle v. Stockton Waterworks Co.* ([1874-80] All E.R. Rep. at p. 223) applied.

***Spartan Steel & Alloys v Martin* [1972] 3 All ER 557, CA**

The plaintiffs manufactured stainless steel alloys at a factory which was directly supplied with electricity by a cable from a power station. The factory worked 24 hours a day. Continuous power was required to maintain the temperature in a furnace in which metal was melted. The defendants' employees, who were working on a near-by road, damaged the cable whilst using an excavating shovel. The electricity board shut off the power supply to the factory for 14 ½hours until the cable was mended. There was a danger that a 'melt' in the furnace might solidify and damage the furnace's lining, so the plaintiffs poured oxygen on to the 'melt' and removed it, thus reducing its value by £368. If the supply had not been cut off, they would have made a profit of £400 on the 'melt', and £1,767 on another four 'melts', which would have been put into the furnace. They claimed damages from the defendants in respect of all three sums. The defendants admitted that their employees had been negligent, but disputed the amount of their liability.

Held - (i) The defendants were liable in respect of the physical damage to the 'melt' and for the loss of profit on it, for that loss was consequential on the physical damage; *SCM (United Kingdom) Ltd v WJ Whittall & Son Ltd* [1970] 3 All ER 245 followed.
(ii) (Edmund Davies LJ dissenting) The defendants were not liable for the loss of profit on the other four 'melts' because-
(a) no remedy was available in respect of economic loss unconnected with physical damage; *Cattle v Stockton Waterworks Co* [1874-80] All ER Rep 220 followed;
(b) there was no principle of 'parasitic' damages in English law to the effect that there were some heads of damage which, if they stood alone, would not be recoverable, but would be if they could be annexed to some other claim for damages, i e that the economic loss in respect of the four 'melts' was recoverable as a 'parasite' by being attached to the claim in respect of the first 'melt'; *Re London, Tilbury and Southend Railway Co & Gower's Walk Schools Trustees* (1889) 24 QBD 326, *Horton v Colwyn Bay and Colwyn Urban Council* [1908] 1 KB 327 and *Griffith v Richard Clay & Sons Ltd* [1912] 2 Ch 291 explained.

Per Lord Denning MR. At bottom the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of *duty*, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable - saying that they are or are not, too remote - they do it as a matter of policy so as to limit the liability of the defendants. The time has come to discard the tests which have been propounded in the reported cases and which have proved so elusive. It is better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.
Per Lawton LJ. The differences which undoubtedly exist between what damage can be recovered in one type of case and what in another cannot be reconciled on any logical basis. Such differences have arisen because of the

policy of the law and it may be that there should be one policy for all cases; but the enunciation of such a policy is not a task for the court.

Candlewood Navigation v Mitsui **[1985] 2 All ER 935, PC**

A vessel which was time chartered to the plaintiff time charterers was involved in a collision with the appellants' vessel while both vessels were waiting to berth at a New South Wales port. The collision was caused by the negligence of the crew of the appellants' vessel and resulted in the chartered vessel being damaged and put out of operation while repairs were carried out. The vessel underwent temporary repairs in Australia but those repairs were delayed for a period of some 32 days because the vessel was blacked by a trade union when the owners decided that permanent repairs should be carried out elsewhere. The charterers brought an action against the appellants in the New South Wales Supreme Court claiming damages for economic loss made up of hire they had had to pay while the vessel was repaired and loss of profits for the same period. The trial judge upheld the charterers' claim and also refused to discount the 32 days in assessing damages. The appellants appealed to the Privy Council, contending that recovery of economic loss suffered as a result of damage caused to a chattel by a wrongdoer should not be tied to the ownership of the chattel but by whether it was a direct result of the negligence and was foreseeable.

Held - (1) Applying the principle that a person who was not the owner of a chattel was not entitled to sue a person who damaged the chattel to recover economic loss which resulted from not being able to use the chattel, the charterers were not entitled to recover damages from the appellants for economic loss. To that extent the appeal would be allowed; *Cattle v Stockton Waterworks Co* [1874-80] All ER Rep 220 and *Simpson & Co v Thomson* (1877) 3 App Cas 279 applied; dictum of Scrutton LJ in *Elliott Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB at 139 approved; *Cattex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976) 136 CLR 529 considered.

(2) The period of 32 days lost by the strike while the chartered vessel was in dock in Australia for temporary repairs was a foreseeable loss arising from the collision and the fact that the strike might have been political rather than industrial in nature was irrelevant. Accordingly, the judge had properly included that period in quantifying the damages. To that extent the appeal would be dismissed; *HMS London* [1914] P 72 applied.

Leigh v Aliakmon Shipping **[1986] 2 All ER 145, HL**

The buyers agreed to buy from the sellers a quantity of steel coils which were to be shipped c & f from Korea to the United Kingdom. The steel was badly stowed on board the shipowners' vessel and suffered damage during the voyage from Korea to the United Kingdom. In the course of that voyage, and after the damage had occurred but before it was discovered, the sellers tendered the bill of lading to the buyers for payment but the buyers were unable to make payment. The parties then agreed to vary their contract so as to provide that the sellers would deliver the bill of lading to the buyers to enable them to take delivery of the steel, that the buyers would not, however, become the holders of the bill of lading but would merely take delivery as agents for the sellers and that after delivery the steel would be stored to the sole order of the sellers. When the damage to the steel was discovered the buyers brought an action against the shipowners claiming damages for breach of contract and negligence. The judge found for the buyers in contract and on appeal by the shipowners the question arose whether, assuming the buyers did not have title to the steel, they were nevertheless entitled to sue the shipowners in negligence. The Court of Appeal allowed the appeal, holding

that there was no contract between the buyers and the shipowners on the terms of the bill of lading and that, because the buyers did not have title to the steel, they were not entitled to sue the shipowners in tort. The buyers appealed.

Held - The appeal would be dismissed for the following reasons -

(i) Applying the principle that a person could not claim in negligence for loss caused to him by reason of loss of or damage to property unless he had either legal ownership or a possessory title to the property, at the time when the loss or damage occurred, the buyer of, shipped goods who had not become the holder of the bill of lading but who had, under the terms of a cif or c & f contract with the buyer, assumed the risk of damage to the goods was prevented by his lack of legal ownership or possessory title from suing the shipowner in negligence for damage occurring to the goods in the course of carriage. The fact that a buyer under a cif or c & f contract was the prospective legal owner of them made no difference to his inability to sue in respect of damage caused prior to his becoming the owner *Margarine Union GmbH v Cambay Prince Steamship Co Ltd, The Wear Breeze* [1967] 3 All ER 775 approved.

(2) The buyers could not claim as equitable owners of the goods because it was doubtful whether equitable interests in goods could be created or exist within the confines of an ordinary contract of sale. In any event an equitable owner of goods who did not also have possessory title to them was nor entitled by himself, and without the legal owner being made a party, to sue in negligence a person who by want of care caused loss of or damage to the goods.

(3) There were no policy reasons why, in the case of a cif or c & f buyer of goods to whom the risk but not the title had passed, an exception should be made to the general rule that only the legal owner or person having possessory title to goods could sue in negligence for damage to them. Furthermore, there was no principle of transferred loss in English law and no reason to introduce such a principle because there was no lacuna in the law, since in the case of an ordinary cif or c & f contract s 1 of the Bills of Lading Act 1855 entitled the buyer to sue the shipowner on the contract in the bill of lading for loss of or damage to the goods once the bill of lading was indorsed over to the buyer by the seller. *Candlewood Navigation Corp v Mitsui OSK Lines* [1985] 2 All ER 935 applied; dicta of Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 all ER at 498 and of Lord Roskill in *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER at 214 considered; dictum of Sheen J in *The Nea Tyhi* [1982] 1 Lloyd's Rep at 612 disapproved; *Schiffahrt und Kohlen GmbH v Chelsea Maritime Ltd* [1982] 1 All ER 218 overruled.

Decision of the Court Appeal [1985] 2 All ER 44 affirmed.

(b) As a consequence of acquiring a defective item of property

***Dutton v Bognor Regis UDC* [1972] 1 QB 373, CA**

By s 1 of the Public Health Act 1936 it was the duty of a local authority to carry the Act into execution. Pursuant to that duty, and under the statutory authority contained in s 61 of the Act to make building byelaws, the Bognor Regis Urban District Council ('the council') made byelaws regulating (inter alia) the construction of buildings in their area. The Act provided the council with powers to enforce the byelaws. The byelaws were in standard form and could not be relaxed except with the Minister's consent. The byelaws governed every stage of building work; in particular byelaw 18 provided that the foundations of a building should be properly constructed to sustain the loads of the building and to prevent any settlement that might impair its stability. The byelaws also provided for the appointment of surveyors and inspectors to visit building work to see whether the byelaws were being

complied with. Offences against the byelaws were punishable by a fine. In 1958 a builder, H, bought land in Bognor Regis for the purpose of developing it as a housing estate. He laid out the land in plots. One of the plots was on the site of an old rubbish tip, the tip having been filled in and the ground made up to look like the surrounding land. In October 1958 the builder submitted plans of this plot to the council for byelaw and planning approval. The plans showed that the house to be built on the plot had normal foundations for the type of soil in the area. In October 1958 the council gave byelaw approval to the plans, under the 1936 Act, on the printed form for that purpose. The form contained a note that all foundations and drains must be examined by the council's surveyor before being covered up, and that no new premises were to be occupied before being certified by the council's surveyor. A batch of notice forms was sent to the builder, with the form of approval for him to notify the council of the progress of the work. Planning permission for development of the plot was then granted. Having got the necessary approvals, the builder started work on the plot in 1959. While digging the trenches for the foundations he came on the remains of the rubbish tip; so he made the outer trench deeper than usual and reinforced the concrete floor with a steel mesh, but he did not bother about the inner walls. He duly notified the council that the foundations were ready for inspection. The council sent their building inspector to inspect them. The inspector approved the foundations for the purpose of the building byelaws. In doing so the inspector failed to carry out his task properly for had he made a competent inspection of the foundations he could easily have detected that the house was being built on a rubbish tip and that, in breach of the byelaws, the foundations laid by the builder were not properly constructed having regard to the nature of the land since they were not strong enough to take the load of the house. Having obtained approval for the foundations, the builder went ahead in building up the house to damp-proof course level, and the work at that stage too was passed by the council's surveyor. The house was finished at the end of 1959, and early in 196o the builder sold it to C. In December 1960 C sold the house to the plaintiff. As the house was new the plaintiff did not herself employ a surveyor but it was common ground that if a surveyor had been employed he could not have found out about the hidden defect in the foundations. The surveyor of the plaintiff's building society passed the house. Soon after the plaintiff had moved into the house in January 1961, the walls and ceiling cracked, the staircase slipped and the doors and windows would not close. This was due to subsidence of an internal wall caused by the inadequate foundations. The condition of the house got worse and in 1963 a surveyor instructed by the plaintiff's solicitor found out that the house had been built on a rubbish tip. In 1964 the plaintiff issued a writ against the builder and against the council for negligence claiming damages of £2,740 (being £2,240 for the cost of repairing the house and £500 for diminution in its value). The plaintiff's claim against the builder was settled for £625 because it was accepted that on the authorities (ie, *Bottomley v Bannister* [1932] KB 458 and *Otto v Bolton & Norris* [1936] 1 All ER 960) he was exempt from liability for negligence.

Held - (1) The council, through their building inspector, owed a duty of care to the plaintiff to ensure that the inspection of the foundations of the house was properly carried out and that the foundations were adequate, for the following reasons-

(i) There was no basis for the contention that, since under the 1936 Act the council merely had a power to examine the foundations and therefore could not be held liable for failing to exercise that power, it followed that neither could they be held liable for failing to exercise the power with proper diligence; that contention could not be sustained because-

(a) the effect taken together of the 1936 Act and the byelaws made thereunder by the council was to give the council control over building work and the way it was done; (per Lord Denning MR and Sachs LJ) that control

carried with it a duty to exercise their powers properly and with reasonable care; in particular the council were bound to take reasonable care to see that the byelaws were complied with and to appoint competent inspectors for the purpose;

(b) (per Sachs and Stamp LJJ) even if all that the council had was a 'mere power' they were nonetheless liable for the negligent exercise of that power as the negligence occurred in the course of a positive exercise of it; the assumption of control over building operations by the making of byelaws was a positive act and thereafter any negligence in the exercise of their control could give rise to liability; thus (per Sachs LJ) failure to inspect the foundations at all might according to the circumstances have constituted negligence; (per Stamp LJ) but for the failure to make a proper inspection the damage could not have occurred to the plaintiff; the situation could not be equated with one where an authority bid failed to exercise their powers to prevent damage which would otherwise have occurred in any event; *Geddis v Bann Reservoir Proprietors* (1878) 3 App Cas 430 applied; *East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527 distinguished.

(ii) It could not be argued that, in view of the fact that the builder, as the owner of the property, could not be held liable under the principle in *Donoghue v Stevenson*, therefore the council could not be held liable for passing the builder's bad work because-

(a) (per Lord Denning MR and Sachs LJ) the distinction between liability for chattels and liability for real property was unsustainable; the principles enunciated in *Donoghue v Stevenson* were applicable to an owner of realty; accordingly a builder who created a hidden defect was not absolved from liability merely because he was the owner of the premises which he had built; dictum of Lord MacDermott in *Gallagher v McDowell* [1961] NI at 41 applied; *Bottomley v Bannister* [1932] 1 KB 458 not followed; *Otto v Bolton & Norris* [1936] 1 All ER 960 overruled;

(b) (per Stamp LJ) there was no reason to acquit the council of negligence merely because the former owner or builder might not be made liable.

(iii) The building inspector owed a duty of care to the plaintiff as a professional adviser even though the plaintiff had not thought about and placed reliance on the inspector's conduct, because a professional man who gave advice on the safety of buildings, machines or material owed a duty to all those whom he knew, or ought to have known, might suffer injury if his advice were unsound; *Clay v AJ Crump & Sons Ltd* [1963] 3 All ER 687 applied; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 distinguished; *Robertson v Flemming* (1861) 4 Macq 167 considered.

(iv) The relationship between the building inspector and the plaintiff was sufficiently proximate to form the basis of a duty of care, although the plaintiff was only, a subsequent purchaser, since any defect in the foundations once covered up could not possibly come to light as a result of an intermediate examination but only when the damage appeared, therefore the inspector ought to have had the plaintiff in mind as someone likely to suffer damage if he was negligent in inspecting the foundations.

(v) (per Lord Denning MR and Sachs LJ) As between the council and the plaintiff there existed a duty situation because-

(a) although the plaintiff's claim fell within the wide principle stated in *Donoghue v Stevenson*, that principle was not of universal application; it was a question of policy whether it should be applied to the novel claim for negligence made against the council; however, since the primary object of the legislation was to protect purchasers of houses from jerry building it followed that, unless there were countervailing reasons of policy which would lead to a contrary conclusion, the council, who could afford to bear the loss, should be held liable to purchasers for failure to carry out the responsibility which had been entrusted to them under the relevant legislation;

(b) there were no countervailing reasons why the council should not be held liable; as the builder would be liable for building the house badly there

was nothing wrong in holding the council liable for passing the bad work and (per Sachs LJ) it was, in this category of case, particularly important that dual liability of the builder and council should exist; to impose liability on the council would not adversely affect the work of building inspection and to permit this new type of claim in negligence would not in practice lead to a flood of cases which neither the local authority nor the courts could handle. *Donoghue v Stevenson* [1932] All ER Rep 1 and dicta of Lord Pearson and Lord Diplock in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER at 321, 325, 326 applied.

(2) The council were liable to the plaintiff for the damage caused by the breach of duty by their building inspector in failing to carry out a proper inspection of the foundations; the plaintiff was not precluded from recovering damages on the ground that her loss was solely economic because (per Lord Denning MR and Sachs LJ) the damage to the house was physical damage and the plaintiff was entitled to recover the cost of repairs: (per Sachs and Stamp LJJ) as an action in negligence lay for economic or physical loss, the correct test in ascertaining whether any particular damage was recoverable was not whether it was physical or economic damage, but what range of damage was the proper exercise of the power designed to prevent or what was the character of the duty owed; applying that test there was nothing, in the nature of the loss sustained by the plaintiff to preclude a claim being maintained for that loss; accordingly the plaintiff was entitled to recover the damages claimed against the council as representing the cost of repairing the house although (per Sachs LJ) it was doubtful whether damages could be awarded for any reduction in market value. Dictum of Salmon LJ in *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER at 1027 applied. Dictum of Lord Denning MR in *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd* [1970] 3 All ER at 250 considered.

Decision of Cusack J sub nom *Dutton v Bognor Regis Urban District Council* [1971] 2 All ER 1003 affirmed.

***Anns v Merton LBC* [1977] 2 All ER 492, HL**

The Public Health Act 1936 imposed and conferred a wide range of duties and powers on local authorities for the purpose of safeguarding and promoting the health of the public at large. In particular local authorities were enabled through building byelaws made under s 61 of the 1936 Act to supervise and control the construction of buildings in their area and in particular the foundations of buildings. Building byelaws were duly made under these powers by a local authority ('the council') in 1953. The byelaws contained provision for the deposit of plans and the inspection of work. Byelaw 18(1)(b) provided that the foundation of every building should be taken down to such depth or be so designed and constructed as to safeguard the building against damage by swelling and shrinking of the subsoil. In February 1962 the council approved building plans for the erection of a two storey block of maisonettes which were deposited under the byelaws. The approved plans showed, inter alia, the base wall and concrete foundations of the block '3 feet or deeper to the approval of local authority'. The written notice of approval drew attention to the requirement of the byelaws that notice should be given to the council surveyor both at the commencement of the work and when the foundations were ready to be covered. When the foundations were ready the council had the power to inspect and to insist on any corrections necessary to bring the work into conformity with the byelaws but were not under any obligation to inspect the foundations. On completion of the block in 1962 the builder, who was also the owner of the block, granted a long lease of each of the maisonettes, the last conveyance being made on 5th November 1965. In February 1970 structural movements began

to occur resulting in cracks in the walls, sloping of floors and other defects. On 21st February 1972 the plaintiffs, who were the lessees of the maisonettes, issued writs against the builder and the council claiming damages. Two of the plaintiffs were the original lessees of their maisonettes and the other plaintiffs had acquired their leases by assignment in 1967 and 1968. The plaintiffs claimed that the damage to the maisonettes was attributable to the fact that the block had been built on inadequate foundations, there being a depth of two feet six inches only instead of three feet or deeper as shown on the deposited plans. As against the council the plaintiffs claimed damages for negligence by their servants or agents in approving the foundations on which the block had been erected and/or in failing to inspect the foundations. A preliminary issue was tried on the question whether the plaintiffs' claims were barred under s 2(1)(a) of the Limitation Act 1939. The official referee held that the plaintiffs' cause of action had accrued on the date of the first conveyance of each of the maisonettes, i e more than six years before the issue of the writs, and that accordingly the claims were barred under s 2(1)(a). The Court of Appeal, however, allowed appeals by the plaintiffs, holding that a cause of action did not accrue before a person capable of suing discovered, or ought to have discovered, the damage. The council appealed to the House of Lords and obtained leave to argue the question whether it was under a duty of care to the plaintiffs at all.

Held - The appeal would be dismissed for the following reasons -

(i) The question whether the council were under a duty of care towards the plaintiffs had to be considered in relation to the duties, powers and discretions arising under the Public Health Act 1936. The fact that an act had been performed in the exercise of a statutory power did not exclude the possibility that the act might be a breach of the common law duty of care. It was irrelevant to the existence of a duty of care whether what was created by the statute was a duty or a power: the duty of care might exist in either case. The difference was that, in the case of a power, liability could not exist unless the act complained of was outside the ambit of the power; *Geddis v Bann Reservior Proprietors* (1878) 3 App Cas 430 and *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294 applied; *East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527 distinguished.

(ii) (per Lord Wilberforce, Lord Diplock, Lord Simon of Glaisdale and Lord Russell of Killowen) Although the 1936 Act and the byelaws did not impose a duty on the council to inspect the foundations, it did not follow that a failure to inspect could not constitute a breach of the duty of care; it was the duty of the council to give proper consideration of the question whether they should inspect or not.

(iii) it followed that the council were under a duty to take reasonable care to secure that a builder did not cover in foundations which did not comply with byelaws. That duty was owed to owners and occupiers of the building, other than the builder, who might suffer damage as a result of the construction of inadequate foundations. A right of action would, however, only accrue to a person who was an owner or occupier of the building when the damage occurred. Accordingly the council would be liable to the plaintiffs if it were proved that, in failing to carry out an inspection, they had not properly exercised their discretion and had failed to exercise reasonable care in their acts or omissions to secure that the byelaws applicable to foundations were complied with, or that the inspector having assumed the duty of inspecting the foundations, and acting otherwise than in the bona fide exercise of any discretion under the 1936 Act, had failed to take reasonable care to ensure that the byelaws were complied with, and that, in either case, the damage suffered by the plaintiffs was a consequence of that breach of duty; *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462 explained and applied.

(iv) On the assumption that there had been a breach of duty as alleged, the cause of action accrued on the date when the damage was sustained as a

result of the negligent act, i e on the date when the state of the building became such that there was a present or imminent danger to the health and safety of persons occupying it. If it was the case that the defects to the maisonettes had first appeared in 1970 then, since the writs had been issued in 1972, none of the actions was statute-barred; *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] 2 All ER 65 approved; *Higgins v Arfon Borough Council* [1975] 2 All ER 589 overruled.

Per Curiam. (i) A builder who is also the owner of a house is not immune from liability in negligence for defects in the building to a person who subsequently acquires it. Alternatively, since it is the duty of the builder, whether owner or not, to comply with the byelaws, an action may be brought against him for breach of statutory duty by any person for whose benefit or protection the byelaw was made; *Gallagher v N McDowell Ltd* [1961] NI 26 and dictum of Lord Denning MR in *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER at 471, 472 applied; *Bottomley v Bannister* [1931] All ER Rep 99 disapproved.
(ii) The damages recoverable include all those which foreseeably arise from the breach of the duty of care. Subject always to adequate proof of causation, those damages may include damages for personal injury and damage to property. They may also include damage to the dwelling-house itself, for the whole purpose of the byelaws in requiring foundations to be of certain standard is to prevent damage arising from weakness of the foundations which is certain to endanger the health or safety of occupants. The relevant damage to the house is physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying it and possibly (depending on the circumstances) expenses arising from necessary displacement.

***Murphy v Brentwood DC* [1990] 2 All ER 908, HL**

In 1970 the plaintiff purchased from a construction company one of a pair of semi-detached houses newly constructed on an in-filled site on a concrete raft foundation to prevent damage from settlement. The plans and calculations for the raft foundation were submitted to the local council for building regulation approval prior to the construction of the houses. The council referred the plans and calculations to consulting engineers for checking and on their recommendation approved the design under the building regulations and byelaws. In 1981 the plaintiff noticed serious cracks in his house and discovered that the raft foundation was defective and that differential settlement beneath it had caused it to distort. The plaintiff was unable to carry out the necessary repairs to the foundation, which would have cost £45,000, and in 1986 the plaintiff sold the house subject to the defects for £35,000 less than its market value in sound condition. He brought an action against the council claiming that it was liable for the consulting engineers' negligence in recommending approval of the plans and alleging that he and his family had suffered an imminent risk to health and safety because gas and soil pipes had broken and there was a risk of further breaks. The judge, who found as a fact that the plaintiff had been exposed to an imminent risk to health and safety, held the council liable for the consulting engineers' negligence and awarded the plaintiff damages of £38,777, being the loss on the sale of the house and expenses. The council appealed to the Court of Appeal, which held, following existing House of Lords authority, that the council owed a duty of care to the plaintiff to see that the house was properly built so that injury to the safety or health of those who lived in it was avoided and that it was in breach of that duty when it approved plans for a defective raft foundation. The court accordingly dismissed the appeal. The council appealed to the House of Lords.

Held - When carrying out its statutory functions of exercising control over building operations a local authority was not liable in negligence to a building owner or occupier for the cost of remedying a dangerous defect in the building which resulted from the negligent failure of the authority to ensure that the building was designed or erected in conformity with the applicable standards prescribed by the building regulations or byelaws but which became apparent before the defect caused physical injury, because the damage suffered by the building owner or occupier in such circumstances was not material or physical damage but the purely economic loss of the expenditure incurred either in remedying the structural defect to avert the danger or of abandoning the property as unfit for habitation, and, since a dangerous defect once known became merely a defect in quality, to permit the building owner or occupier to recover his economic loss would logically lead to an unacceptably wide category of claims in respect of buildings or chattels which were defective in quality, and would in effect introduce product liability and transmissable warranties of quality into the law of tort by means of judicial legislation. The council accordingly had owed no duty of care to the plaintiff when it approved the plans for a defective raft foundation for the plaintiff's house. The appeal would therefore be allowed. *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 followed. *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462 and *Anns v Merton London Borough Council* [1977] 2 All 492 overruled.

Per curiam. It is unrealistic to regard a building or chattel which has been wholly erected or manufactured and equipped by the same contractor as a complex structure in which one part of the structure or chattel is regarded as having caused damage to other property when it causes damage to another part of the same structure or chattel, since the reality is that the structural elements in a building or chattel form a single indivisible unit of which the different parts are essentially interdependent and to the extent that there is a defect in one part of the structure or chattel it must to a greater or lesser degree necessarily affect all other parts of the structure. However, defects in ancillary equipment, manufactured by different contractors, such as central heating boilers or electrical installations may give rise to liability under ordinary principles of negligence.

Decision of the Court of Appeal [1990] 2 All ER 269 reversed.

***Junior Books v Veitchi* [1982] 3 All ER 201, HL**

The respondents (the owners) engaged a building company to build a factory for them. In the course of construction the owners' architects nominated the appellants (the sub-contractors) as specialist sub-contractors to lay a concrete floor with a special surface in the main production area of the factory, and the sub-contractors duly entered into a contract with the main contractors to carry out the flooring work. There was, however, no contractual relationship between the sub-contractors and the owners. Two years after the floor had been laid it developed cracks in the surface and the owners were faced with the prospect of continual maintenance costs to keep the floor usable. The owners brought an action against the sub-contractors alleging that the floor was defective because of the sub-contractors' negligence in laying it, and claiming that the sub-contractors were liable for the cost of replacing the floor and for consequential economic loss arising out of the moving of machinery, the closing of the factory, the payment of wages and overheads, and the loss of profits during the period of replacement. The owners further alleged that it would be cheaper to lay a new floor than to carry out continuous maintenance on the existing floor. The sub-contractors in reply claimed that, in the absence of any contractual relationship between the

parties or a plea by the owners that the defective floor was a danger to the health or safety of any person or constituted a risk of damage to any other property of the owners, the owners' pleading did not disclose a good cause of action. The Lord Ordinary and, on appeal, the Court of Session rejected the sub-contractors' contention and held that the owners were entitled to proceed with their action. The subcontractors appealed, contending, inter alia, (i) that to impose liability on the subcontractors in the absence of any danger to the person or loss or damage to other property would in effect require sub-contractors and other manufacturers or suppliers of goods or work to give to an indeterminate class of potential litigants the same warranty regarding the fitness of the goods or work as they would be required to do when in a contractual relationship, and (ii) that a duty not to produce a defective article could not have a universally ascertainable standard of care, since whether an article was to be judged defective depended on whether it measured up to the contract under which it was constructed and the terms of that contract would not necessarily be known to the user of the article.

Held (Lord Brandon dissenting) - The appeal would be dismissed for the following reasons-

(i) (Per Lord Fraser, Lord Russell and Lord Roskill) Where the proximity between a person who produced faulty work or a faulty article and the user was sufficiently close, the duty of care owed by the producer to the user extended beyond a duty merely to prevent harm being done by the faulty work or article and included a duty to avoid faults being present in the work or article itself, so that the producer was liable for the cost of remedying defects in the work or article or for replacing it and for any consequential economic or financial loss, notwithstanding that there was no contractual relationship between the parties. Since (a) the owners or their architects had nominated the sub-contractors as specialist sub-contractors and the relationship between the parties was so close as to fall only just short of a contractual relationship, (b) the sub-contractors must have known that the owners relied on the subcontractors' skill and experience to lay a proper floor, and (c) the damage caused to the owners was a direct and foreseeable result of the sub-contractors' negligence in laying a defective floor, it followed that the proximity between the parties was sufficiently close for the sub-contractors to owe a duty of care to the owners not to lay a defective floor which would cause the owners financial loss; dicta of Lord Reid in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER at 297 and of Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 All ER at 498 applied; dictum of Stamp LJ in *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER at 489-490, *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 189, *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976) 136 CLR 529 and *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 considered.

(2) (Per Lord Keith) The sub-contractors were in breach of a duty owed to the owners to take reasonable care to avoid acts or omissions, including laying a defective floor, which they ought to have known would be likely to cause the owners economic loss, including loss of profits caused by the high cost of maintaining a defective floor, and in so far as the owners were required to mitigate the loss by replacing the floor itself the cost of replacement was the appropriate measure of the sub-contractors' liability.

Muirhead v Industrial Tank Specialities **[1985] 3 All ER 705, CA**

The plaintiff was a wholesale fish merchant. He wished to expand his lobster trade and decided to purchase lobsters during the summer, store them in a large tank, and then resell them on the Christmas market when prices were higher. The plaintiff intended to use a system by which seawater was

collected, filtered, pumped into the tank, and then recirculated in order to oxygenate it. The pumps were assembled in England by the manufacturers using electric motors manufactured in France by the manufacturers' parent company. The manufacturers then sold the pumps to a pump supplier, who in turn supplied them to the company responsible for the installation of the tank and pumps on the plaintiff's premises. The pumps were required to run for 24 hours a day, but within a few days of installation they started to cut out and continued to do so until they were replaced by pumps of a different make. On one occasion the recirculation of the water was affected and the plaintiff lost his entire stock of lobsters. Both before the installation of the pumps and when they began to cut out the plaintiff relied heavily on the advice of the company which installed the tank and pumps but at no stage was he aware of the existence of, nor did he have any contact with, the manufacturers. The plaintiff brought an action against, inter alios, the manufacturers claiming damages for, inter alia, the loss of the lobsters and economic loss, including loss of profit on intended sales. The judge found that the cause of the cutting out of the motors was their unsuitability for the English voltage system and he held that there had been sufficient reliance by the plaintiff on the manufacturers for the manufacturers to owe him a duty of care, on the basis that the plaintiff, as an ultimate user, was entitled to expect the manufacturers to have tested the electric motors to ensure that they were suitable for use in the United Kingdom. The judge further held that, although the actual physical damage to the plaintiff's lobsters could not have been foreseen, the economic loss suffered by the plaintiff was reasonably foreseeable by the manufacturers because the manufacturers were aware that pumps incorporating their motors were being sold for use at fish farms and should have realised that the pumps would be used for recirculation and oxygenation of water in ranks where fish were kept. The manufacturers appealed. At the hearing of the appeal the plaintiff contended that the actual physical damage suffered by him, namely the loss of his stock of lobsters, was reasonably foreseeable by the manufacturers.

Held - (1) A manufacturer of defective goods could be liable in negligence for economic loss suffered by an ultimate purchaser if there was a very close proximity or relationship between the parties and the ultimate purchaser had placed real reliance on the manufacturer rather than on the vendor. However, on the facts there was no such proximity and reliance by the plaintiff on the manufacturers and in the absence of such proximity and reliance there was nothing to distinguish the plaintiff's situation from that of an ordinary purchaser of goods who, having suffered financial loss as a result of a defect in those manufactured goods, could only look to the vendor and not to the ultimate manufacturer to recover damages for purely economic loss. The manufacturers' appeal on the issue of liability for economic loss would therefore be allowed; *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201 explained.

(2) Whether damages were recoverable by the plaintiff for the loss of his stock of lobsters depended on whether damage of that type was reasonably foreseeable by the manufacturers, and not on whether they could have foreseen the physical damage actually suffered by the plaintiff. On the facts, it was a necessary inference that damage of the relevant type, namely physical harm to fish if the electric motors failed, was reasonably foreseeable by the manufacturers and they were accordingly liable to the plaintiff in respect of the physical damage caused to the plaintiff's stock of lobsters and any financial loss suffered by the plaintiff in consequence of that physical damage.

Per curiam. Where a supplier of goods incorporates the products of another manufacturer into his goods and the contract for the supply of those products to the supplier includes a term excluding liability for damage consequent on defects in those products, the manufacturer is entitled to rely on that

exclusion clause in an action for negligence arising out of such a defect brought directly against him by a purchaser from the supplier.

Simaan General Contracting v Pilkington Glass (No 2) **[1988] 1 All ER 791, CA**

The plaintiffs were the main contractors for a building to be erected in Abu Dhabi. The plans and specifications required double glazed units of green glass to be incorporated in the curtain walling of the building and specified that a particular type of glass manufactured by the defendants be used. The supply and erection of the curtain walling was sub-contracted by the plaintiffs to another company which, as required by the specifications and the sub-contract, ordered the glass panels from the defendants. The glass supplied was not of a uniform colour when installed and the building owner withheld payment from the plaintiffs until the panels were replaced. The plaintiffs sued the defendants for the economic loss caused by the withholding of payment. On the trial of a preliminary issue whether the defendants owed the plaintiffs a duty to take reasonable care to avoid defects in the units the judge held that the defendants did owe such a duty. The defendants appealed to the Court of Appeal.

Held - Foreseeability of harm did not automatically lead to a duty of care, and accordingly there was no general rule that proof of foreseeable economic loss caused by a defendant would automatically establish a successful claim in negligence. In the circumstances, the plaintiffs could not, in the absence of a contract between the parties or of any damage to property owned by the plaintiffs, bring a direct claim against the defendants for economic loss alone, because the defendants had not voluntarily assumed direct responsibility to the plaintiffs for the quality of the glass and the plaintiffs had not relied on the defendants. Furthermore, it would not be just and reasonable to impose on the defendants a duty of care not to make the plaintiffs' contract less profitable, because the plaintiffs had a remedy against the sub-contractor who in turn could claim against the defendants, and at each stage liability could be determined in the light of the exemption clauses, if any, applying to each particular contract. Accordingly, the defendant's appeal would be allowed. *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201 considered.

Greater Nottingham Co-op Society v Cementation Piling & Foundations **[1988] 2 All ER 971, CA**

The plaintiff building owner entered into a contract with a contractor for the extension and alteration of the plaintiff's office premises. The defendants were engaged as subcontractors to provide piles for the extension. As well as entering into the sub-contract with the contractor, the defendants entered into a collateral contract with the plaintiff which required the defendants to exercise reasonable care and skill in the design of the works and the selection of materials. However, the contract was silent as to the manner in which the piling works were to be executed. As a result of negligent operation of the piling equipment by one of the defendants' employees damage was caused to an adjoining building and work was suspended while a revised piling scheme was worked out. The defendants agreed that they were liable for the damage to the adjoining building but the plaintiff also claimed damages for (i) £68,606 paid by the plaintiff to the main contractor under the main contract as the result of executing the revised piling scheme, (ii) £79,235 paid by the plaintiff to the main contractor as the result of delay in putting in piles, and (iii) £282,697 economic loss caused to the plaintiff by the delayed completion of the building. The defendants denied liability for those sums

and the plaintiff issued a writ. The judge hearing official referee's business gave judgment for the plaintiff on its claim. The defendants appealed.

Held - As a matter of policy the circumstances in which economic loss was recoverable in tort in the absence of physical damage was restricted to special cases or exceptional circumstances. Furthermore, if there was a contract between the parties it was to be assumed that the parties had defined in the contract whether and in what circumstances one party was to be liable to the other for economic loss. On the facts, the defendant subcontractors were not liable to the plaintiff building owner for economic loss resulting from the defendants' negligent execution of the piling work, notwithstanding the close proximity of the parties and the foreseeability of the loss, because it was to be assumed that the parties had defined their relationship exhaustively in the collateral contract, which did not provide for the defendants to be liable for the manner in which they executed the piling work or for them to be directly responsible to the plaintiff for economic loss. Having regard to the existence of the contract, the defendants had not assumed any responsibility beyond that expressly undertaken in the contract. The defendants' appeal would therefore be allowed.

Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd [1972] 3 All ER 557, *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201, *Muirhead v Inditstrial Tank Specialities Ltd* [1985] 3 All ER 705 and *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] 1 All ER 791 considered.

STATEMENTS

***Hedley Byrne v Heller* [1963] 2 All ER 575, HL**

If in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the information, or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results.

Cann v. Willson ((1888), 39 Ch.D. 39), *Fish v. Kelly* ((1864), 17 C.B.N.S. 194), approved. *Nocton v. Lord Ashburton* ([1914-15] All E.R. Rep. 45), *Robinson v. National Bank of Scotland* (1916 S.C. (H.L.) 154) and view of Denning, L.J., dissenting in *Candler v. Crane, Christmas & Co.* ([1951] 1 All E.R., see, e.g., at p. 432, letter A) applied.

Candler v. Crane, Christmas & Co. ([1951] 1 All E.R. 426) and *Le Lievre v. Gould*, ([1893] 1 Q.B. 491) disapproved.

A bank inquired by telephone of the respondent merchant bankers concerning the financial position of a customer for whom the respondents were bankers. The bank said that they wanted to know in confidence and without responsibility on the part of the respondents, the respectability and standing of E. Ltd., and whether E. Ltd. would be good for an advertising contract for £8,000 to £9,000. Some months later the bank wrote to the respondents asking in confidence the respondents' opinion of the respectability and standing of E. Ltd. by stating whether the respondents considered E. Ltd. trustworthy, in the way of business, to the extent of £100,000 per annum. The respondents' replies to the effect that E. Ltd. was respectably constituted and considered good for its normal business engagements were

communicated to the bank's customers, the appellants. Relying on these replies the appellants, who were, advertising agents, placed orders for advertising time and space for E. Ltd., on which orders the appellants assumed personal responsibility for payment to the television and newspaper companies concerned. E. Ltd. went into liquidation and the appellants lost over £17,000 on the advertising contracts. The appellants sued the respondents for the amount of the loss, alleging that the respondents' replies to the bank's inquiries were given negligently, in the sense of misjudgment, by making a statement which gave a false impression as to E. Ltd.'s credit. Negligence was found at the trial and contested on appeal; the appeal was determined, however, on the assumption that there had been negligence, but without deciding whether there had or had not been negligence.

Held: although in the present case, but for the respondents' disclaimer, the circumstances might have given rise to a duty of care on their part, yet their disclaimer of responsibility for their replies on the occasion of the first inquiry was adequate to exclude the assumption by them of a legal duty of care, with the consequence that they were not liable in negligence. *Robinson v. National Bank of Scotland* (1916 S.C. (H.L.) 154) applied.

SEMBLE (per Lord Ried, Lord Morris of Borth-y-Gest and Lord Hodson) in the absence of special circumstances requiring particular search and consideration on the part of a bank giving to another bank a reference concerning a customer's creditworthiness there is no legal duty on the replying bank beyond that of giving an honest answer.

Decision of the Court of Appeal ([1961] 3 All E.R. 891) affirmed, but not on the same ground.

***Smith v Eric Bush* [1989] 2 All ER 514, HL**

In two cases the question arose whether a surveyor instructed by a mortgagee to value a house owed the prospective purchaser a duty in tort to carry out the valuation with reasonable skill and care and whether a disclaimer of liability by or behalf of the surveyor for negligence was effective.

In the first case the respondent applied to a building society for a mortgage to enable her to purchase a house. The building society, which was under a statutory duty to obtain a written valuation report on the house, instructed the appellants, a firm of surveyors, to inspect the house and carry out the valuation. The respondent paid the society an inspection fee of £38-89 and signed an application form which stated that the society would provide her with a copy of the report and mortgage valuation obtained by it. The form contained a disclaimer to the effect that neither the society nor its surveyor warranted that the report and valuation would be accurate and that the report and valuation would be supplied without any acceptance of responsibility. In due course the respondent received a copy of the report, which container a disclaimer in terms similar to those on the application form. The report, which valued the house at £16,500, stated that no essential repairs were required. In reliance on the report and without obtaining an independent survey the respondent purchased the house for £18,000, having accepted an advance of £3,500 from the society. In their inspection of the house the appellants had observed that the first floor chimney breasts had been removed but they had not checked to see whether the chimneys above were adequately supported. Eighteen months after the respondent purchased the house, bricks front the chimney collapsed and fell through the roof causing considerable damage. The respondent brought an action against the appellants claiming damages for negligence. The judge held that the appellants were liable and awarded the respondent damages. The Court of Appeal affirmed his decision, holding that the disclaimer was not fair and

reasonable and was ineffective under the Unfair Contract Terms Act I977. The appellants appealed to the House of Lords.

In the second case the appellants applied to the local authority for a mortgage to enable them to purchase a house. The local authority, which was under a statutory duty to obtain a valuation before advancing any money, decided to carry out the valuation themselves and for that purpose instructed their valuation surveyor. The appellants signed an application form which stated that the valuation was confidential and was intended solely for the information of the local authority and that no responsibility whatsoever was implied or accepted by the local authority for the value or condition of the property by reason of the inspection and report. After receiving the surveyor's valuation of the house at the asking price of £9,450, the local authority offered to advance the appellants 90% of that sum subject to certain minor repairs being done to the house. The appellants, assuming that the house was worth at least the amount of the valuation and that the surveyor had found no serious defects, purchased the property for £9,000 without obtaining all independent survey. Three years later they discovered that the house was subject to settlement, was virtually unsaleable and could only be repaired, if at all, at a cost of more than the purchase price. The appellants brought in action against the local authority and their survevor claiming damages for negligence. The juice upheld their claim but the Court of Appeal reversed his decision on the ground that the notice had effectively excluded liability. The appellants appealed to the House of Lords.

Held – (1) A valuer who valued a house for a building society or local authority for the purposes of a mortgage application for a typical house purchase, knowing that the mortgagee would probably, and the mortgagor would certainly, rely on the valuation, and knowing that the mortgagor was an intending purchaser of the house and had paid for the valuation, owed a duty of care to both parties to carry out his valuation with reasonable skill and care. It made no difference whether the valuer was employed by the mortgagee or acted on his own particular account or was employed by a firm of independent valuers since he was discharging the duties of a professional man on whose skill and judgment he knew the purchaser would be relying. Furthermore, the fact that the local authority or building society was under a statutory duty to value the house did not prevent the valuer coming under a contractual or tortuous duty to the purchaser. The extent of liability was, however, limited to the purchaser of the house and did not extend to subsequent purchasers; dictum of Denning LJ in *Candler v Crane Christmas & Co* [1951] 1 All ER at 433-434 applied; *Yianni v Edwin Evans & Sons (a firm)* [1981] 3 All ER 592 approved.

(2) However, the valuer could disclaim liability to exercise reasonable skill and care by an express exclusion clause but such a disclaimer made by or on behalf of the valuer constituted a notice which was subject to the 1977 Act and therefore had to satisfy the requirement in s 2(2) of that Act of reasonableness to be effective. In considering whether a disclaimer might be relied on, the general pattern of house purchases and the extent of the work and liability accepted by the valuer had to be borne in mind. Having regard to the high costs of houses and the high interest rates charged to borrowers, it would not be fair and reasonable for mortgagees and valuers to impose on purchasers the risk of loss arising as a result of the incompetence or carelessness on the part of valuers. It followed therefore the disclaimers were not effective to exclude liability for the negligence of the valuers, and accordingly the first appeal would be dismissed and the second appeal would be allowed.

Per curiam. Where a surveyor is asked to survey industrial property, large blocks of flats or very expensive houses for mortgage purposes, where

prudence would seem to demand that the purchaser obtain his own survey to guide him in his purchase it may be reasonable for him to limit his liability to the purchaser or exclude it altogether.

Decision of the Court of Appeal in *Smith v Eric S Bush (a firm)* [1987] 3 All ER 179 affirmed. Decision of the Court of Appeal in *Harris v Wyre Forest DC* [1988] 1 All ER 691 reversed.

***Caparo Industries v Dickman* [1990] 1 All ER 568, HL**

The respondents owned shares in a public company, F plc, whose accounts for the year ended 31 March 1984 showed profits far short of the predicted figure which resulted in a dramatic drop in the quoted share price. After receipt of the audited accounts for the year ended 31 March 1984 the respondents purchased more shares in F plc and later that year made a successful take-over bid for the company. Following the take-over, the respondents brought an action against the auditors of the company, alleging that the accounts of F plc were inaccurate and misleading in that they showed a pre-tax profit of some £1.2m for the year ended 31 March 1984 when in fact there had been a loss of over £400,000, that the auditors had been negligent in auditing the accounts, that the respondents had purchased further shares and made their take-over bid in reliance on the audited accounts, and that the auditors owed them a duty of care either as potential bidders for F plc because they ought to have foreseen that the 1984 results made F plc vulnerable to a take-over bid or as an existing shareholder of F plc interested in buying more shares. On the trial of a preliminary issue whether the auditors owed a duty of care to the respondents, the judge held that the auditors did not. The respondents appeared to the Court of Appeal, which allowed their appeal in part on the ground that the auditors owed the respondents a duty of care as shareholders but not as potential investors. The auditors appealed to the House of Lords and the respondents cross-appealed against the Court of Appeal's decision that they could not claim as potential investors.

Held - (1) The three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty. In determining whether there was a relationship of proximity between the parties the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered was the kind of damage which the defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that a duty of care existed; dictum of Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43-44 adopted.

(2) Where a statement put into more or less general circulation might foreseeably be relied on by strangers for any one of a variety of different purposes which the maker of the statement had no specific reason to anticipate there was no relationship of proximity between the maker of the statement and any person relying on it unless it was shown that the maker knew that his statement would be communicated to the person relying on it, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or a transaction of a particular kind and that that person would be very likely to rely on it for the purpose of deciding whether to enter into that transaction; *Cann v Willson* (1888) 39 Ch D 39, dictum of Denning LJ in *Candler v Crane Christmas &Co* [1951] 1 All ER 426 at 433-436, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 and *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514 considered.

(3) The auditor of a public company's accounts owed no duty of care to a member of the public at large who relied on the accounts to buy shares in the company because the court would not deduce a relationship of proximity between the auditor and a member of the public when to do so would give rise to unlimited liability on the part of the auditor. Furthermore, an auditor owed no duty of care to an individual shareholder in the company who wished to buy more shares in the company, since an individual shareholder was in no better position than a member of the public at large and the auditor's statutory duty to prepare accounts was owed to the body of shareholders as a whole, the purpose for which accounts were prepared and audited being to enable the shareholders as a body to exercise informed control of the company and not to enable individual shareholders to buy shares with a view to profit. It followed that the auditors did not owe a duty of care to the respondents either as shareholders or as potential investors in the company. The appeal would therefore be allowed and the cross-appeal dismissed; dictum of Richmond P in *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 at 566-567 adopted; *Al Saudi Banque v Clark Pixley (a firm)* [1989] 3 All ER 361 approved; dictum of Woolf J in *JEB Fasteners Ltd v Marks Bloom & Co (a firm)* [1981] 3 All ER 289 at 296-297 disapproved.

Decision of the Court of Appeal [1989] 1 All ER 798 reversed.

***Spring v Guardian Assurance* [1994] 3 All ER 129, HL**

The plaintiff was employed a sales director and office manager by the second defendants, C Ltd, who were agents for the sale of life assurance policies. In April 1989 C Ltd was taken over by the first defendant, G plc, and in July the plaintiff was dismissed. He attempted to set up a business in the same locality selling the assurance policies of another company but that company was obliged by the code of conduct of the insurance industry's self-regulatory body (Lautro) to obtain a reference from the plaintiffs previous employer, which was in turn required by r 3.5(2) of the Lautro rules to give a reference which made 'full and frank disclosure of all relevant matters which are believed to be true'. The plaintiff's prospective employer received such a bad reference from G plc that it refused to have anything to do with him. The reference stated that he kept the best business for himself, that he was a man of little or no integrity and could not be regarded as honest and that he had mis-sold a policy with the aim of generating a very substantial commission for himself at the client's expense. The plaintiff endeavoured to obtain employment with two other life assurance companies which were members of Lautro but was rejected. He brought an action against the defendants alleging, inter alia, breach of an implied contractual term that the defendants would prepare any reference in regard to him using reasonable care and would provide a reference which was full, frank and truthful, and negligence in providing an unsatisfactory reference. He claimed damages for the loss caused to him by the reference. The judge held that there was no contract between the plaintiff and G plc and no implied term in the plaintiff's contract with C Ltd that any reference would be full, frank and truthful and prepared with reasonable care but he further held that the defendants owed a duty of care to the plaintiff in regard to the reference, that they had been negligent in preparing the reference and he gave judgment for the plaintiff for damages to be assessed. The defendants appealed. The plaintiff cross-appealed against the dismissal of his claim for breach of contract. The Court of Appeal allowed the appeal, holding that the giver of a reference owed no duty of care in negligence to the person who was the subject of the reference either in giving or compiling the reference or in obtaining the information on which it was based and that his only remedy lay in defamation, and a term could not be implied in the plaintiff's contract with the defendants that any reference would be full, frank and truthful and prepared with reasonable care since

such a term was not a necessary incident of the contract. The plaintiff appealed to the House of Lords. The defendants contended (i) that any duty to exercise due skill and care in preparing a reference should be negatived because, if the plaintiff were instead to bring an action for damage to his reputation, he could be met by the defence of qualified privilege which could only be defeated by proof of malice and (ii) that it would be against public policy to impose such a duty of care since it would inhibit frankness in the giving of references.

Held - (Lord Keith dissenting) The appeal would be allowed for the following reasons-

(1) (per Lord Goff) Applying the principle that where the defendant assumed or undertook responsibility towards the plaintiff in the conduct of his affairs and the plaintiff relied on the defendant to exercise due skill and care in respect of such conduct, the defendant was liable for any failure to use reasonable skill and care, an employer who provided a reference in respect of an employee, whether past or present, to a prospective future employer ordinarily owed a duty of care to the employee in respect of the preparation of the reference and was liable in damages to the employee in respect of economic loss suffered by him by reason of the reference being prepared negligently. The principle (Lord Lowry concurring) depended on the assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill and was wide enough to apply where the defendant had access to information and failed to exercise due care and skill in drawing on that source of information for the purposes of communicating it to another. Applied to the employer/employee relationship, the employer possessed special knowledge, derived from his experience of the employee's character, skill and diligence in the performance of his duties while working for the employer and when providing a reference to a third party in respect of the employee, he did so not only for the assistance of the third party, but also for the assistance of the employee, who necessarily had to rely on the employer to exercise due skill and care in the preparation of the reference before making it available to the third party. The employer was therefore required to use reasonable care and skill in ensuring the accuracy of any facts which either were communicated to the recipient of the reference from which he might form an adverse opinion of the employee, or were the basis of an adverse opinion expressed by the employer himself about the employee; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 explained and applied.

(2) (per Lord Lowry, Lord Slynn and Lord Woolf) In the employer/ employee relationship, where economic loss in the form of failure to obtain employment was clearly foreseeable if a careless reference was given and there was an obvious proximity of relationship, it was fair, just and reasonable that the law should impose a duty of care on the employer not to act unreasonably and carelessly in providing a reference about his employee or ex-employee. The duty was to avoid making untrue statements negligently or expressing unfounded opinions even if honestly believed to be true or honestly held.

(3) Since liability based on negligent misstatement could exist only in a restricted class of situations if (per Lord Goff) there was an assumption of responsibility or (per Lord Lowry, Lord Slynn and Lord Woolf) foreseeable damage was caused and there was proximity imposing a duty of care, the principle of liability was different and distinguishable from any general duty in regard to reputation not to defame any other person or to publish an injurious falsehood. Defamation and injurious falsehood on the one hand and negligence on the other were different torts and in particular, the torts protecting reputation did not involve the concept of a duty of care.

Accordingly, the fact that the plaintiff could have brought an action for damage to his reputation did not prevent the recognition of a duty of care where, but for the existence of the other two torts, it would be fair, just and reasonable to recognise it in a situation where the giver of a reference had said or written what was untrue and where he had acted unreasonably and carelessly in doing so. Furthermore, public policy was in favour of not depriving an employee of a remedy to recover the damages to which he would otherwise be entitled as a result of being the victim of a negligent reference and even if the number of references given was reduced it was in the public interest that the quality and value would be greater; *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148, *Balfour v A-G* [1991] 1 NZLR 519 and *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd, Mortensen v Laing* [1992] 2 NZLR 282 considered.

(4) (per Lord Goff, Lord Slynn and Lord Woolf) An employer's duty to take reasonable care in preparing a reference in respect of an employee could in appropriate circumstances be expressed as arising from an implied term of the contract of employment, ie that if a reference was supplied by the employer in respect of the employee, due care and skill would be exercised in its preparation. However, the duty arising under such an implied term did not add anything to the duty of care arising in negligence.

(5) Accordingly, the defendants owed a duty of care to the plaintiff in respect of the preparation of the reference and were prima facie liable for the negligence in its preparation and (Lord Lowry dissenting) the case would be remitted to the Court of Appeal to consider the issue of the extent to which the damage suffered by the plaintiff was caused by the breach of duty of the defendants.

Per Lord Goff. Quaere whether an employer providing a reference owes a duty of care to the recipient of the reference.

Per Lord Slynn. Those giving references can make it clear what are the parameters within which the reference is given, such as stating their limited acquaintance with the individual either as to time or as to situation, and it may be that employers can make it clear to the subject of the reference that they will only give one if he accepts that there will be a disclaimer of liability to him and to the recipient of the reference.

Per Lord Woolf. (1) There can be no action for negligence if the statement is true. (2) The circumstances in which a term will be implied in a contract of employment requiring the employer to take reasonable care in preparing a reference in respect of an employee are : (i) the existence of the contract of employment or services; (ii) the fact that the contract relates to an engagement of a class where it is the normal practice to require a reference from a previous employer before employment is offered; (iii) the fact that the employee cannot be expected to enter into that class of employment except on the basis that his employer will, on the request of another prospective employer made not later than a reasonable time after the termination of a former employment, provide a full and frank reference as to the employee.

Decision of the Court of Appeal [1993] 2 All ER 273 reversed.

***Ross v Caunters* [1979] 3 All ER 580, Ch D**

The testator instructed solicitors to draw up his will to include gifts of chattels and a share of his residuary estate to the plaintiff, who was his sister-in-law. The solicitors drew up the will accordingly, naming the plaintiff and giving her address in the will. The testator requested the solicitors to send

the will to him at the plaintiff's home, where he was staying, to be signed and attested. The solicitors sent the will to the testator with a covering letter giving instructions on executing it but failed to warn him that under s 15 of the Wills Act 1837 attestation of the will by a beneficiary's spouse would invalidate a gift to the beneficiary. The plaintiff's husband attested the will which was then returned to the solicitors who failed to notice that he had attested it. The testator died two years later, and nine months after that the solicitors informed the plaintiff that the gifts to her under the will were void because her husband had attested the will. The plaintiff brought an action against the solicitors claiming damages in negligence for the loss of the gifts under the will, and for her legal expenses in investigating her claim up to the date of issue of the writ. The plaintiff alleged that the solicitors were negligent in failing (i) to warn the testator about the consequences of s 15, (ii) on the return of the will, to check that it had been executed in conformity with the 1837 Act, (iii) to observe that the plaintiff's husband was an attesting witness, and (iv) to draw that fact to the testator's attention so that he could re-execute the will or make a new and valid will. The solicitors admitted negligence but denied that they were liable to the plaintiff, contending (i) that a solicitor was liable only to his client and then only in contract and not in tort, and could not, therefore, be liable in tort to a third party, (ii) that for reasons of policy a solicitor ought not to be liable in negligence to anyone except his client, and (iii) that in any event the plaintiff had no cause of action in negligence because the damage suffered was purely financial. The solicitors further contended that if damages were recoverable they ought not to include any sum in respect of the plaintiff's legal expenses prior to the issue of the writ, although they might be recoverable as costs in the action.

Held - The solicitors were liable to the plaintiff for the following reasons-

(1) A solicitor who was instructed by his client to carry out a transaction to confer a benefit on an identified third party owed a duty to that third party to use proper care in carrying out the instructions because (i) it was not inconsistent with the solicitor's liability to his client for him to be held liable in tort to the third party, having regard to the fact that the solicitor could be liable for negligence to his client both in contract and in tort, (ii) there was a sufficient degree of proximity between a solicitor and an identified third party for whose benefit the solicitor was instructed to carry out a transaction for it to be within the solicitor's reasonable contemplation that his acts or omissions in carrying out the instructions would be likely to injure the third party, and (iii) there were no reasons of policy for holding that a solicitor should not be liable in negligence to the third party, for the limited duty owed to him of using proper care in carrying out the client's instructions differed from the wider duty owed to the client of doing for the client all that the solicitor could properly do, and far from conflicting with or diluting the duty to the client was likely to strengthen it; *Donoghue v Stevenson* [1932] All ER Rep 1, *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009 and *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571 applied; dicta of Lord Campbell LC and of Lord Cranworth in *Robertson v Fleming* (1861) 4 Macq at 177, 184-185 and *Groom v Crocker* [1938] 2 All ER 394 not followed.

(2) The fact that the plaintiff's claim in negligence was for purely financial loss, and not for injury to the person or property, did not preclude her claim, for, having regard to the high degree of proximity between her and the solicitors arising from the fact that they knew of her and also knew that their negligence would be likely to cause her financial loss, the plaintiff was entitled to recover the financial loss she had suffered by their negligence. Judgment would therefore be entered for the plaintiff for damages to be assessed; *Donoghue v Stevenson* [1932] All ER Rep 1 and *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009 applied.

(3) The plaintiff's legal expenses of investigating her claim up to the date of the issue of the writ could not, however, be recovered as damages but only as costs, so far as they properly ranked as such; *Cockburn v Edwards* (1881) 18 Ch D 449 and dictum of Lord Hanworth MR in *Pecheries Ostendaises (SA) v Merchants' Marine Insurance Co* [1928] All ER Rep at 176 applied.

***White v Jones* [1995] 1 All ER 691, HL**

On 4 March 1986 the testator, who had quarrelled with the plaintiffs, his two daughters, executed a will cutting them out of his estate. In June the testator was reconciled with the plaintiffs and sent a letter to his solicitors giving instructions that a new will should be prepared to include gifts of £9,000 each to the plaintiffs. The solicitors received the letter on 17 July but nothing was done to give effect to those instructions for a month. On 16 August the solicitors' managing clerk asked the firm's probate department to draw up a will or codicil incorporating the new dispositions. The following day the managing clerk went on holiday and on his return to work a fortnight later he made arrangements to visit the testator on 17 September. However, the testator died on 14 September before the new dispositions to the plaintiffs were put into effect. The plaintiffs brought an action against the solicitors for damages for negligence. The judge held that the solicitors owed no duty of care to the plaintiffs and dismissed the action. The plaintiffs appealed to the Court of Appeal, which allowed the appeal on the grounds that a solicitor who was instructed to prepare a will for a client and, in breach of his professional duty, failed to do so was liable in damages to a disappointed prospective beneficiary if the client died before the will had been prepared or executed. The Court of Appeal held that the plaintiffs were each entitled to damages of £9,000. The solicitors appealed to the House of Lords, contending that the general rule was that a solicitor acting on behalf of a client owed a duty of care only to his client under the solicitor-client retainer, which was contractual in nature, that since the plaintiffs' daim was for purely financial loss any claim could only lie in contract and not in tort and there was no contract between the solicitor and a disappointed beneficiary, and that no claim lay in tort for damages in respect of a mere loss of an expectation, which fell exclusively within the zone of contractual liability.

Held - (Lord Keith and Lord Mustill dissenting) Where a solicitor accepted instructions to draw up a will and as the result of his negligence an intended beneficiary under the will was reasonably foreseeably deprived of a legacy the solicitor was liable for the loss of the legacy, for the following reasons-

(a) (per Lord Goff and Lord Nolan) The assumption of responsibility by a solicitor towards his client should be extended in law to an intended beneficiary who was reasonably foreseeably deprived of his intended legacy as a result of the solicitor's negligence in circumstances in which there was no confidential or fiduciary relationship and neither the testator nor his estate had remedy against the solicitor, since otherwise an injustice would occur because of a lacuna in the law and there would be no remedy for the loss caused by the solicitor's negligence unless the intended beneficiary could claim; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 applied; dictum of Lord Campbell in *Robertson v Fleming* (1861) 4 Macq 167 at 177 and *Ross v Caunters (a firm)* [1979] 3 All ER 580 doubted.

(b) (per Lord Browne-Wilkinson and Lord Nolan) Adopting the incremental approach by analogy with established categories of relationships giving rise to a duty of care, the principle of assumption of responsibility should be extended to a solicitor who accepted instructions to draw up a will so that he was held to be in a special relationship with those intended to benefit under it, in consequence of which he owed a duty to the intended

beneficiary to act with due expedition and care in relation to the task on which he had entered; *Nocton v Lord Ashburton* [1914-15] All ER Rep 45, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, *Caparo Industries plc v Dickman* [1990] 1 All ER 568 and *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 applied.

It followed that the solicitors owed the plaintiffs a duty of care and since their negligence had effectively deprived the plaintiffs of the intended legacies their appeal would be dismissed.

Decision of the Court of Appeal [1993] 3 All ER 481 affirmed.

NERVOUS SHOCK

Primary victims

***Page v Smith* [1995] 2 All ER 736, HL**

The plaintiff was involved in a collision with the defendant when the latter failed to give way when turning out of a side road. The plaintiff was physically unhurt in the collision, but the accident caused him to suffer the onset of myalgic encephalomyelitis (ME) from which he had suffered for about 20 years but which was then in remission. The recrudescence of ME was likely to prevent him from ever working again. The plaintiff brought an action against the defendant claiming damages for chronic and permanent ME. The defendant admitted liability for the accident but disputed liability for damages. The judge awarded the plaintiff damages of £162,153 on the ground that once it was established that the plaintiff had ME, that a relapse or recrudescence of his condition could be triggered by the trauma of an accident of moderate severity and that he had suffered nervous shock as the result of being involved in the accident, the aggravation of his condition was a foreseeable consequence for which the defendant was liable. The defendant appealed, contending (i) that the plaintiff had not proved a causal connection between the accident and the aggravation of his condition and (ii) that the judge, in deciding that the plaintiff's injury was foreseeable, had failed to consider whether a person of reasonable fortitude would have suffered shock from the accident and had wrongly decided that foreseeability of injury from nervous shock was not necessary in the case of a plaintiff who had been directly involved in the accident rather than a mere spectator. The Court of Appeal allowed the appeal on the grounds, inter alia, that in claims for damages due to nervous shock it was in all cases incumbent on the plaintiff to prove that injury by nervous shock was reasonably foreseeable by the defendant. The plaintiff appealed to the House of Lords.

Held - (Lord Keith and Lord Jauncey dissenting) Applying the principle that the defendant had to take his victim as he found him, a negligent driver sued for damages arising out of a motor vehicle accident caused by him was liable for damages for nervous shock suffered by a primary victim of the accident if personal injury of some kind to that person was reasonably foreseeable as a result of the accident. In the case of primary victims of an accident the test in all cases was the same, namely whether the defendant could reasonably foresee that his conduct would expose the plaintiff to the risk of personal injury, whether physical or psychiatric. In the case of an affirmative answer, the duty of care was established, even though physical injury did not in fact occur. The plaintiff was not required to prove that injury by nervous shock was reasonably foreseeable by the defendant and it was irrelevant that the defendant could not have foreseen that the plaintiff had an 'eggshell personality' since (per Lord Browne-Wilkinson) it was established by medical science that psychiatric illness could be suffered as a consequence of an accident although not demonstrably attributable directly to physical injury to the plaintiff. It followed that the appeal would be allowed.

Dictum of Geoffrey Lane J in *Malcolm v Broadhurst* [1970] 3 All ER 508 at 511 applied. Dictum of Denning LJ in *King v Phillips* [1953] 1 All ER 617 at 623 doubted. *Bourhill v Young* [1942] 2 All ER 396, *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)* [1961] 1 All ER 404, *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 38, *McLoughlin v O'Brian* [1982] 2 All ER 298 and *Jaensch v Coffey* (1984) 155 CLR 549 considered.

Per Lord Lloyd. In the case of secondary victims, ie persons who were not participants in an accident, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude and it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability.

Decision of the Court of Appeal [1994] 4 All ER 522 reversed.

***Dulieu v White* [1901] 2 KB 669**

By her statement of claim A. alleged that while she was sitting behind the bar of her husband's public-house (she then being pregnant) B.'s servant negligently drove a pair-horse van belonging to B. into the public-house. A. in consequence sustained a severe shock which made her seriously ill and led to her suffering a miscarriage. (She gave premature birth to a child. In consequence of the shock sustained by the plaintiff the said child was born an idiot.)

Held, that the statement of claim disclosed a good cause of action against B.

Per Kennedy, J.: Mere fright not followed by consequent physical damage will not support an action, but if it is followed by consequent physical damage, then, if the fright was the natural result of the defendants' negligence, an action lies, and the physical damage is not too remote to support it.

Per Phillimore, J.: Where there is a legal duty on the defendant not to frighten the plaintiff by his negligence, then fright with consequent physical damage will support an action. .

Victorian Railway Commissioners v. Coultas (58 L. T. Rep. 390; 13 App. Cas. 222) considered and questioned.

***Hambrook v Stokes Bros* [1925] 1 KB 141, CA**

The defendants' servant left a motor lorry at the top of a steep and narrow street unattended, with the engine running, and without having taken proper precautions to secure it. The lorry started off by itself and ran violently down the incline. The plaintiff's wife, who had been walking up the street with her children, had just parted with them a little a point where the street makes a bend, when she saw the lorry rushing round the bend towards her. She became very frightened for the safety of her children, who by that time were out of sight round the bend, and who she knew must have met the lorry in its course. She was almost immediately afterwards informed by bystanders that a child the description of one of hers had been injured. In consequence of her fright and anxiety she suffered a nervous shock which eventually caused her death, whereby her husband lost the benefit of her services. In an action by the husband under the Fatal Accidents Act:-

Held (by Bankes and Atkin L.JJ.; Sargant L.J. dissenting), that, on the assumption that the shock was caused by what the woman saw with her own

eyes as distinguished from what she was told by bystanders, the plaintiff was entitled to recover, notwithstanding that the shock was brought about by fear for her children's safety and not by fear for her own. Dictum of Kennedy J. in *Dulieu v. White & Sons* [1901]1 2 K. B. 669 disapproved.

***Chadwick v BRB* [1967] 2 All ER 945, QBD**

In December, 1957, C. was about forty-four years old and since 1945 had been successfully engaged in a window-cleaning business and taking an interest in social and charitable activities in his community. In 1941 when he was twenty-eight years old, he had suffered some psycho-neurotic symptoms, but he had not suffered from them for sixteen years thereafter and he was not (so the court found) someone who would be likely to relapse under the ordinary stresses of life. On Dec. 4, 1957, immediately following a collision between two railway trains on a line a short distance from his home, C. voluntarily took an active part throughout the night in rescue operations at the scene of the accident, in which ninety persons had been killed and many others were trapped and injured. As a result of the horror of his experience at the scene of the accident C. suffered a prolonged and disabling anxiety neurosis necessitating hospital treatment. In an action brought by C. and continued after his death by his widow as his personal representative it was conceded by the defendants that the accident was caused by negligence for which they were legally responsible, but liability to C. in damages was denied.

Held: the defendants were in breach of duty to C. and his illness was suffered as a result of that breach, with the consequence that his personal representative was entitled to recover damages, for the following reasons-

(i) it was reasonably foreseeable in the event of such an accident as had occurred that someone other than the defendants' servants might try to rescue passengers and might suffer injury in the process; accordingly the defendants owed a duty of care towards C. *Ward v. T. E. Hopkins & Son, Ltd.* ([1959] 3 All E.R. 225) followed.

(ii) injury by shock to a rescuer, physically unhurt, was reasonably foreseeable, and the fact that the risk run by a rescuer was not exactly the same as that run by a passenger did not deprive the rescuer of his remedy.

(iii) damages were recoverable for injury by shock notwithstanding that the shock was not caused by the injured person's fear for his own safety or for the safety of his children. Principle laid down in *Hay (or Bourhill) v. Young* ([1942] 2 AR ER. 396) applied. *Dulieu v. White, & Sons* ([1900-03] All E.R. Rep. 353) and *Owens v. Liverpool Corpn.* ([1938] 4 All E.R. 727) considered.

(iv) as a man who had lived a normal busy life in the community with no mental illness for sixteen years, there was nothing in C.'s personality to put him outside the ambit of the defendants' contemplation so as to render the damage suffered by him too remote. Dictum of Lord Wright in *Hay (or Bourhill) v. Young* ([1942] 2 All E.R. at pp. 405, 406) distinguished.

Secondary victims

***McLoughlin v O'Brian* [1982] 2 All ER 298, HL**

The plaintiff's husband and three children were involved in a road accident caused by the negligence of the defendants. One of the plaintiff's children was killed and her husband and other two children were severely injured. At the time of the accident the plaintiff was at home two miles away. She was told of the accident by a motorist who had been at the scene of the accident and was taken to hospital where she saw the injured members of her family

and the extent of their injuries and shock and heard that her daughter had been killed. As a result of hearing, and seeing the results of, the accident the plaintiff suffered severe and persisting nervous shock. The plaintiff claimed damages against the defendants for the nervous shock, distress and injury to her health caused by the defendants' negligence. The judge dismissed her claim on the ground that her injury was not reasonably foreseeable. On appeal, the Court of Appeal held that the plaintiff was not entitled to claim against the defendants either because as a matter of policy a duty of care was not to be imposed on a negligent defendant beyond that owed to persons in close proximity, both in time and place, to an accident, even though the injuries received by the plaintiff might be reasonably foreseeable as being a consequence of the defendants' negligence, or because the duty of care owed by a driver of a motor vehicle was limited to persons on or near the road. The plaintiff appealed to the House of Lords.

Held - The test of liability for damages for nervous shock was reasonable foreseeability of the plaintiff being injured by nervous shock as a result of the defendant's negligence. Applying that test, the plaintiff was entitled to recover damages from the defendants because even though the plaintiff was not at or near the scene of the accident at the time or shortly afterwards the nervous shock suffered by her was a reasonably foreseeable consequence of the defendant's negligence. The appeal would accordingly be allowed.

Dictum of Denning LJ in *King v Phillips* [1953] 1 All ER at 623 approved. Dictum of Bankes LJ in *Hambrook v Stokes Bros* [1924] All ER Rep at 113 and of Lord Wright in *Hay (or Bourhill) v Young* [1942] 2 All ER at 405-4o6 applied. *Dillon v Legg* (1968) 68 C 2d 728 considered. *Chester v Waverley Municipal Council* (1939) 62 CLR 1 not followed.

Per Lord Russell, Lord Scarman and Lord Bridge (Lord Edmund-Davies not concurring). In the area of nervous shock caused by negligence on the highway, the sole test of liability is reasonable foreseeability without any legal limitation in terms of space, time, distance, the nature of the injuries sustained or the relationship of the plaintiff to the victim (although those are factors to be considered), since (per Lord Bridge) there are no policy considerations sufficient to justify limiting the liability of negligent tortfeasors by some narrower criterion than that of reasonable foreseeability. If (per Lord Scarman) public policy requires such a limitation, the policy issue where to draw the line is not justiciable but a matter for legislation.

Per Lord Wilberforce. The application of the reasonable foreseeability test in nervous shock claims ought to be limited, in terms of proximity, so that what is foreseeable is circumscribed by the proximity of the tie or relationship between the plaintiff and the injured person, the proximity of the plaintiff to the accident both in time and place, and the proximity of communication of the accident to the plaintiff through sight or hearing of the event or its immediate aftermath.

Decision of the Court of Appeal [1981] 1 All ER 809 reversed.

Alcock v Chief Constable of South Yorkshire **[1991] 4 All ER 907, HL**

Shortly before the commencement of a major football match at a football stadium the police responsible for crowd control at the match allowed an excessively large number of intending spectators into a section of the ground which was already full, with the result that 95 spectators were crushed to death and over 400 injured. Scenes from the ground were broadcast live on television from time to time during the course of the disaster and were broadcast later on television as news items. News of the disaster was also broadcast over the radio. However, in accordance with television

broadcasting guidelines none of the television broadcasts depicted the suffering or dying of recognisable individuals. Sixteen persons, some of whom were at the match but not in the area where the disaster occurred, and all of whom were relatives, or in one case the fiance, of persons who were in that area, brought actions against the chief constable of the force responsible for crowd control at the match claiming damages for nervous shock resulting in psychiatric illness alleged to have been caused by seeing or hearing news of the disaster. In the case of thirteen of the plaintiffs their relatives and friends were killed, in the case of two of the plaintiffs their relatives and friends were injured and in the case of one plaintiff the relative escaped unhurt. The chief constable admitted liability in negligence in respect of those who were killed and injured in the disaster but denied that he owed any duty of care to the plaintiffs. The question whether, assuming that each plaintiff had suffered nervous shock causing psychiatric illness as a result of the experiences inflicted on them by the disaster, they were entitled in law to recover damages for nervous shock against the defendant was tried as a preliminary issue. The judge found in favour of ten of the plaintiffs and against six of them. The defendant appealed in respect of nine of the successful plaintiffs and the six unsuccessful plaintiffs cross-appealed. The Court of Appeal allowed the appeals and dismissed the cross-appeals, holding that none of the plaintiffs was entitled to recover damages for nervous shock. Ten of the plaintiffs appealed to the House of Lords, contending that the only test for establishing liability for shock-induced psychiatric illness was whether such illness was reasonably foreseeable.

Held - A person who sustained nervous shock which caused psychiatric illness as a result of apprehending the infliction of physical injury or the risk thereof to another person could only recover damages from the person whose negligent act caused the physical injury or the risk to the primary victim if he satisfied both the test of reasonable foreseeability that he would be affected by psychiatric illness as a result of the consequences of the accident because of his close relationship of love and affection with the primary victim and the test of proximity in relationship to the tortfeasor in terms of physical and temporal connection between the plaintiff and the accident. Accordingly, the plaintiff could only recover if (i) his relationship to the primary victim was sufficiently close that it was reasonably foreseeable that he might sustain nervous shock if he apprehended that the primary victim had been or might be injured, (ii) his proximity to the accident in which the primary victim was involved or its immediate aftermath was sufficiently close both in time and space and (iii) he suffered nervous shock through seeing or hearing the accident or its immediate aftermath. Conversely, persons who suffered psychiatric illness not caused by sudden nervous shock through seeing or hearing the accident or its immediate aftermath or who suffered nervous shock caused by being informed of the accident by a third party did not satisfy the tests of reasonable foreseeability and proximity to enable them to recover and, given the television broadcasting guidelines, persons such as the plaintiffs who saw the events of a disaster on television could not be considered to have suffered nervous shock induced by sight or hearing of the event since they were not in proximity to the events and would not have suffered shock in the sense of a sudden assault on the nervous system. It followed that none of the appellants was entitled to succeed because either they were not at the match but had seen the disaster on television or heard radio broadcasts or their relationship to the victim had not been shown to be sufficiently close to enable them to recover. The appeals would therefore be dismissed.

Dicta of Lord Wilberforce in *McLoughlin v O'Brian* [1982] 2 All ER 298 at 304-305 and of Gibbs CJ and Dean J in *Jaensch v Coffey* (1984) 54 ALR 417 at 462-463 applied. *Hevican v Ruane* [1991] 3 All ER 65 and *Ravenscroft v Rederiaktiebolaget Transatlantic*[1991] 3 All ER 73 doubted.

Per curiam. The class of persons to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another is not limited by reference to particular relationships such as husband and wife or parent and child although it must be within the defendant's contemplation.

Per Lord Keith, Lord Ackner and Lord Oliver. A bystander who suffers shock-induced psychiatric illness after witnessing a particularly horrific catastrophe close to him may be entitled to recover damages from the person whose negligent act caused the catastrophe if a reasonably strong-nerved person would have been so affected; dictum of Atkin LJ in *Hambrook v Stokes Bros* [1924] All ER Rep 110 at 117 applied.

Per Lord Ackner and Lord Oliver. There may be circumstances where the element of direct visual perception may be provided by witnessing the actual injury to the primary victim on simultaneous television.

Decision of the Court of Appeal sub nom *Jones v Wright* [1991] 3 All ER 88 affirmed.

***McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1, CA**

The plaintiff was employed as a painter on an oil rig in the North Sea owned and operated by the defendants. On the night of 6 July 1988, while the plaintiff was off duty and lying on his bunk on a support vessel some 550 metres away from the oil rig, a series of massive explosions occurred on the rig. Over the next hour and three-quarters the plaintiff witnessed the explosions and consequent destruction of the rig before he was evacuated by helicopter. The explosions and fire on the rig caused the death of 164 men. The closest the plaintiff came to the fire was 100 metres when the support vessel moved in towards the rig in an attempt to fight the fire and render assistance. The plaintiff brought an action against the defendants claiming damages for psychiatric illness suffered as the result of the events he had witnessed. On the trial of a preliminary issue whether the defendants owed the plaintiff a duty to exercise reasonable care to avoid causing him psychiatric injury, the judge held that the plaintiff was owed such a duty, on the ground that he was a participant in the event who had been reasonably in fear for his life and safety and that his injury had resulted from the shock caused by his fear. The judge rejected an alternative submission that he was a rescuer and consequently even if he had not been reasonably in fear for his safety he was entitled to recover because the impact of the horrifying events had caused his shock. The judge expressed no opinion on a further alternative submission that even if he was only a bystander or witness to the events, they were so horrific that it was reasonably foreseeable that they would cause psychiatric injury in such a person. The defendants appealed.

Held - For the purpose of recovering damages for nervous shock caused by fear of physical injury to himself in a horrific event, a person was a participant in the event if (i) he was in the actual area of danger created by the event, even though he escaped physical injury by chance or good fortune, or (ii) although not actually in danger he reasonably thought he was because of the sudden and unexpected nature of the event, or (iii) although not originally within the area of danger he came into it later as a rescuer. However, a person who was a mere bystander or witness of horrific events could not recover damages for psychiatric illness resulting from the experience unless there was a sufficient degree of proximity, which required both nearness in time and place and a close relationship of love and affection between plaintiff and victim. On the facts, the plaintiff was not a rescuer and it could not be said that the defendants ought reasonably to have foreseen that

the plaintiff and other non-essential personnel on board the rescue vessel would suffer psychiatric injury, since the plaintiff could have taken shelter if he felt himself to be in any danger. Furthermore, it had not been shown that it was reasonably foreseeable that a man of ordinary fortitude and phlegm in the plaintiff's position would be so affected by what he saw that he would suffer psychiatric injury. It followed that the plaintiff was not entitled to succeed. The appeal would therefore be allowed. *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 applied.

***Vernon v Bosley (No 1)* [1997] 1 All ER 577, CA**

In August 1982 the plaintiff's two young children were passengers in a car driven by the defendant, their nanny, when it went off the road and crashed into a river. The plaintiff did not see the accident but was called to the scene shortly after, where he witnessed attempts to salvage the car when it was thought that the children might be still alive. The rescue attempt was unsuccessful and the children drowned. The plaintiff was at the time chairman and managing director of his own company, but in January 1986 his business failed and in 1992 his marriage broke up. He brought an action against the defendant claiming damages of more than £4m for her negligence, which he claimed had caused him mental or psychiatric injury by reason of the fact that he was an eye-witness of the unsuccessful rescue attempt. The defendant admitted that her negligence had caused the accident, but defended the claim on the ground that the plaintiff had suffered no more than normal grief reaction to the accident, that the failure of his business was due to his own fault and shortcomings as a businessman, as evidenced by his previous business career, and that if he was mentally ill the prime causes were the failure of his business and his marriage. The judge held that the plaintiff was entitled to recover damages in respect of his mental illness, but that such damages should not cover the loss of his business. The defendant appealed principally on the issue of liability.

Held (Stuart-Smith LJ dissenting) - (1) Although damages for normal grief and bereavement suffered as the result of another's negligence were not recoverable, a plaintiff in the position of secondary victim could recover damages for both post-traumatic stress disorder (ie the nervous shock of witnessing an accident or its immediate aftermath) or pathological grief disorder (ie grief which became so severe as to be regarded as abnormal and giving rise to psychiatric illness) provided the two preconditions for recovery of damages for psychiatric illness (ie nervous shock) were satisfied, namely that the plaintiff was in a close and loving relationship with the primary victim and was connected with the accident in time and place, ie as a bystander and direct viewer. The legal (as opposed to the medical) test determining recoverability was whether the plaintiff had suffered mental injury caused by the negligence of the defendant and not whether he had suffered post-traumatic stress disorder rather than pathological grief disorder. Accordingly, the secondary victim could recover damages for mental illness by the actionable negligence of the defendant, notwithstanding that the illness could also be regarded as a pathological consequence of the bereavement which the plaintiff had inevitably suffered. It followed that damages payable to a plaintiff who was a secondary victim of a breach of a duty of care owed by the defendant and who suffered mental illness, which was properly regarded as a consequence both of his experience as a bystander and of an intense and abnormal grief reaction to the bereavement which he suffered, should not be discounted for his grief and the consequences of bereavement, even though his illness was partly so caused.

(2) In the instant case, the judge had been entitled to conclude that the plaintiff suffered mental injury by reason of witnessing the aftermath of the

accident in 1982 and that the accident was the initiating cause of his mental illness. It was impossible as a matter of common sense to distinguish between the effect upon the plaintiff's mind of seeing the accident, which was especially traumatic for him because he knew that his children were victims of it and were almost certainly dead, and the effects of grief and bereavement which became inevitable when he knew that they had in fact been killed. The appeal against liability would therefore be dismissed.

Per curiam. The role of the expert medical witnesses is to inform the judge so as to guide him to the correct conclusions. It must be for the judge to gauge the weight and usefulness of such assistance as he is given and to reach his own conclusions accordingly. Expert witnesses are armed with the court's readiness to receive the expert evidence which it needs in order to reach a fully informed decision, whatever the nature of the topic may be, but their evidence ceases to be useful, and it may become counter-productive, when it is not marshalled by reference to the issues in the particular case and kept within the limits so fixed.

***Greatorex v Greatorex and Others* [2000] The Times LR May 5, QBD**

There was no duty of care owed by a victim of self-inflicted injuries towards a secondary party who suffered only psychiatric illness as a result of having witnessed the event causing the injuries or its aftermath.

The policy considerations against there being such a duty owed clearly outweighed the arguments in favour, since to impose liability for causing psychiatric harm in such circumstances, particularly where the parties were members of the same family, would be potentially productive of acute family strife.

Mr Justice Cazalet, sitting in the Queen's Bench Division, so stated when dismissing an application on a preliminary issue in proceedings brought by the claimant, Christopher Greatorex, for damages against the first defendant, John Simon Greatorex, the second defendant, the Motor Insurers' Bureau, and Haydon Pope, joined as a defendant in the proceedings under Part 20 of the Civil Procedure Rules by the MIB who were seeking an indemnity on the basis that he had allowed the first defendant to drive his car without insurance against third-party risks in breach of the Road Traffic Act 1998.

Mr Nicholas Mason for the claimant; Mr Graham Eklund for the MIB; neither the first defendant nor Mr Pope appeared or was represented.

MR JUSTICE CAZALET said that there was no reported English decision on the issue which in essence, was whether a victim of self-inflicted injuries owed a duty of care to a third party not to cause him psychiatric injury.

The agreed facts were that the first defendant, who had been drinking, negligently drove a car belonging to his friend, Haydon Pope, on the wrong side of the road.

In the crash which occurred the first defendant suffered head injuries and was unconscious for about an hour. Initially he was trapped inside the car.
The claimant, who was the first defendant's father and a leading fire officer, went to the scene in the course of his employment and was subsequently diagnosed as suffering from long-term severe post-traumatic stress disorder as a result of the accident.

His Lordship said that *Caparo Industries plc v Dickman* ([1990] 2 AC 605) had confirmed that, besides foreseeability of damage and proximity between the parties, it must also be fair, just and reasonable to impose a duty of care in a particular situation.

A quartet of House of Lords decisions, starting with *McLoughlin v O'Brian* ([1983] 1 AC 410) and continuing through *Alcock v Chief Constable of South*

Yorkshire Police ([1992] 1 AC 310), *Page v Smith* ([1996] 1 AC 155) to *White v Chief Constable of South Yorkshire Police* ([1999] 2 AC 455) showed that the existence and scope of the duty of care in the area of negligently inflicted psychiatric injury were founded upon policy considerations.

Where a claimant who was not put in personal danger by an accident claimed damages for psychiatric injury arising out of the accident, he could succeed only if, in addition to satisfying the requirement of foreseeability, he also met the requirements of the control mechanisms defined in *Alcock* which had been conveniently summarised by Lord Hoffmann in *White*.

Those were that the claimant must have had close ties with the victim, have been present at the accident or its immediate aftermath and that the psychiatric injury must have been caused by direct perception and not upon hearing of it from another person.

His Lordship said it was clear from the decision of the majority in *White* that a rescuer seeking to recover damages for purely psychiatric injury was to be regarded as a secondary victim having no special status.

The claimant thus failed in his claim qua rescuer as on the agreed facts he had never been in any physical danger.

Although as a father he clearly met the requirements of the control mechanisms governing a claim for psychiatric injury suffered by a secondary victim of an accident laid down in *White*, his dual status as father and rescuer added nothing, in terms of proximity, to his status as the first defendant's father.

Although there was no English decision on the point, the preponderance of opinion in the Commonwealth authorities which had been cited was unfavourable to the concept of a victim of self-inflicted injuries owing a duty of care to a secondary victim not to cause him psychiatric harm.

To impose liability in such circumstances would be to curtail the right of self-determination and liberty of the individual, creating a significant further limitation upon an individual's freedom of action.

Because of the requirements of the control mechanism, the issue with which the court was concerned would normally only arise where there were close family ties between the primary and secondary victims.

Home life might involve many instances of a family member injuring himself through his own fault.

To allow one family member to sue another family member in respect of psychiatric injury suffered as a result of the former being present when the injury was sustained or having come upon the other in his injured state would be to open up the possibility of a particularly undesirable type of litigation within the family, involving questions of relative fault as between its members and be potentially productive of acute family strife.

Given the policy considerations involved, any decision that there should be civil liability to a secondary victim who suffered psychiatric harm in consequence of a primary victim's self-inflicted injuries would be better left to Parliament as the best arbiter of what the public interest required in this difficult field.

Frost v Chief Constable of South Yorkshire **[1999] 1 All ER 1 (*White and others v Chief Constable of South Yorkshire* in the Court of Appeal), HL**

A number of police officers sued their employer, the defendant chief constable, for damages in negligence for post-traumatic stress disorder suffered in the aftermath of a disaster at a major football match. The immediate cause of the disaster was a senior police officer's decision to open an outer gate to the stadium where the match was being played without cutting off access to two sections which were already full, thereby enabling an excessive number of intending spectators to enter those sections with the result that 95 spectators were crushed to death and over 400 were injured.

The officers were on duty at the time and became involved in the aftermath of the disaster: two helped carry the dead and injured at the stadium; two tried unsuccessfully to resuscitate injured spectators at the stadium; and one assisted at a mortuary to which the dead were taken. The plaintiffs were subsequently diagnosed as suffering from post-traumatic stress disorder brought about by their experiences in dealing with the aftermath of the disaster. In their action against the chief constable they claimed damages for negligence on the basis (i) that he owed them a duty of care as their de facto employer to take reasonable care not to expose them to unnecessary risk of injury, whether physical or psychiatric, and was vicariously liable for the negligence of the senior officer which had given rise to their psychiatric illness, and (ii) that they were to be equated to rescuers rather than mere bystanders, since they had actively rendered assistance and, as rescuers, they were entitled to be treated as primary victims of the disaster and their claim ought not to be subjected to the control mechanisms imposed on claims for psychiatric injury by bystanders. The judge dismissed the claims. The plaintiffs appealed to the Court of Appeal, which dismissed the appeal of the officer who had been at the mortuary but allowed the appeals of the officers at the stadium on the grounds that they had a right of action because their injury was caused by the antecedent negligence of the chief constable and they fell within the special category of rescuers and were therefore in a primary relationship with the tortfeasor and were not subject to the restrictions on claims by secondary victims for psychiatric injury. The chief constable appealed to the House of Lords.

Held - (1) (Lord Goff dissenting) An employee who suffered psychiatric injury in the course of his employment had to prove liability under the general rules of negligence, including the rules restricting the recovery of damages for psychiatric injury. Accordingly, if an employee who witnessed an accident at work would otherwise have been unable to sue because as a mere bystander he was only a secondary victim who was not in a sufficiently close relationship with the victim, the mere fact that his relationship with the tortfeasor was that of employee and employer could not make him a primary victim; *Alcock v Chief Constable of South Yorkshire Police* [1991] 4 AR ER 907 and *Page v Smith* [1995] 2 All ER 736 applied.

(2) (Lord Griffiths and Lord Goff dissenting) The proximity requirement in the special situation of psychiatric harm suffered by a rescuer was satisfied by showing actual or apprehended danger. Accordingly, in order to recover compensation for pure psychiatric injury suffered as a rescuer the plaintiff had at least to satisfy the threshold requirement that he had objectively exposed himself to danger or reasonably believed that he was doing so, even if it was not necessary for him to establish that his psychiatric condition was caused by the perception of personal danger. A rescuer was not placed in any special position in relation to liability for psychiatric injury merely by virtue of the fact that he was a rescuer; and there was no logical reason why rescuers, who were subject to the normal rules on the issues of foreseeability and causation, should be given special treatment as primary victims for the purpose of liability for psychiatric injury when they were not within the range of foreseeable physical injury and their psychiatric injury was caused by witnessing or participating in the aftermath of accidents which caused death or injury to others. It followed that police officers were not entitled to recover damages against the chief constable for psychiatric injury suffered as a result of assisting with the aftermath of a disaster, either as employees or as rescuers. Accordingly, the appeals would be allowed; *Chadwick v British Transport Commission* [1967] 2 All ER 945 considered.

Decision of the Court of Appeal sub nom *Frost v Chief Constable of the South Yorkshire Police* [1997] 1 All ER 540 reversed.

Employees

***Dooley v Cammell Laird* [1951] 1 Lloyd's Rep 271, Liverpool Assizes**

Negligence - Joint tortfeasors - Breach of Shipbuilding Regulations, 1931, by occupiers of yard - Common law negligence of sub-contractors - Contribution - Remoteness of damage - Nervous shock - Ship being fitted out in first defendants' shipbuilding yard - Insulation work on board being carried out by second defendants - Plaintiff crane driver in employ of first defendants - Crane and driver (plaintiff) loaned by first defendants to second defendants - Defect in sling supplied by second defendants, resulting in slingload of repairing materials being precipitated into ship's hold in which men were working - No physical injuries in fact caused to workmen by fall and no risk of physical impact upon plaintiff - Claim brought by plaintiff in respect of nervous shock thereby sustained - Alleged failure by first defendants to take "Precautions against injury from falling materials" as required by Shipbuilding Regulations - Regulations re-enacted by Factories Act, 1937 – "Risk of bodily injury to persons employed" - Duty of second defendants towards plaintiff - Extent of duty of care - Foreseeable danger - Bodily injury to persons not actually within risk of physical impact - Measure of damages - Third-party indemnity proceedings brought by first defendants against second defendants - Right of first defendants to contribution - Ship-building Regulations, 1931, Regulations 33, 36 - Law Reform (Married Women and Tortfeasors) Act, 1935, Sect. 6 - Factories Act, 1987, Sect. 60.

- Held, that the first defendants were in breach of their statutory duty under the Shipbuilding Regulations in that they failed to comply with the regulations requiring them to take ("Precautions against injury from falling materials"; that second defendants were under a duty of care towards plaintiff, who was within the range of foreseeable danger of physical impact or shock, and that they were in breach of that duty in supplying a defective sling; and that accordingly plaintiff was entitled to damages against both defendants in respect of the nervous shock proved to have been sustained.

- Held, further in the third-party proceedings, that first and second defendants were joint tortfeasors and that first defendants would be indemnified by second defendants in respect of three-quarters of plaintiff's claim and three-quarters of the costs.

***Walker v Northumberland CC* [1995] 1 All ER 737, QBD**

The plaintiff was employed by the defendant local authority as an area social services officer from 1970 until December 1987. He was responsible for managing four teams of social services fieldworkers in an area which had a high proportion of child care problems. In 1986 the plaintiff suffered a nervous breakdown because of the stress and pressures of work and was off work for three months. Before he returned to work he discussed his position with his superior who agreed that some assistance should be provided to lessen the burden of the plaintiff's work. In the event, when the plaintiff returned to work only very limited assistance was provided and he found that he had to clear the backlog of paperwork that had built up during his absence while the pending child care cases in his area were increasing at a considerable rate. Six months later he suffered a second mental breakdown and was forced to stop work permanently. In February 1988 he was dismissed by the local authority on the grounds of permanent ill health. He brought an action against the local authority claiming damages for breach of

its duty of care, as his employer, to take reasonable steps to avoid exposing him to a health-endangering workload.

Held - Where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of the stress and pressures of his workload, the employer was under a duty of care, as part of the duty to provide a safe system of work, not to cause the employee psychiatric damage by reason of the volume or character of the work which the employee was required to perform. On the facts, prior to the 1986 illness, it was not reasonably foreseeable to the local authority that the plaintiff's workload would give rise to a material risk of mental illness. However, as to the second illness, the local authority ought to have foreseen that if the plaintiff was again exposed to the same workload there was a risk that he would suffer another nervous breakdown which would probably end his career as an area manager. The local authority ought therefore to have provided additional assistance to reduce the plaintiff's workload even at the expense of some disruption of other social work and, in choosing to continue to employ the plaintiff without providing effective help, it had acted unreasonably and in breach of its duty of care. It followed that the local authority was liable in negligence for the plaintiff's second nervous breakdown and that accordingly there would be judgment for the plaintiff with damages to be assessed. Dictum of Miles CJ in *Gillespie v Commonwealth of Australia* (1991) 104 ACTR 1 at 15 considered.

***Young v Charles Church Ltd* [1997] The Times LR May 1, CA**

An employee who suffered psychiatric illness after seeing a workmate electrocuted close to him could recover damages for breach of statutory duty under regulation 44(2) of the Construction (General Provisions) Regulations (SI 1961 No 1580).

The Court of Appeal so held in a reserved judgment allowing an appeal by the plaintiff, Ian Young, against the dismissal by Sir Maurice Drake, sitting as a judge of the Queen's Bench Division on June 13, 1996, of his claim for damages for negligence and breach of statutory duty for psychiatric injuries sustained when working as a labourer for the second defendant, Southern Construction Services, on the land of the first defendant, Charles Church (Southern) Ltd.

Regulation 44 of the 1961 Regulations provides: "(2) Where any electrically charged overhead cable or apparatus is liable to be a source of danger to persons employed during the course of any operations or works to which these regulations apply ... all practicable precautions shall be taken to prevent such danger . . ."

Mr Martin Porter for the plaintiff; Mr Guy Anthony for the defendants.

LORD JUSTICE EVANS said that the plaintiff claimed damages for a severe psychiatric illness which he had suffered since May 1989 following an accident at his place of work when a workmate alongside him had been electrocuted and killed.

His Lordship, having held that the defendants were liable to the plaintiff in damages for negligence at common law, turned to the alternative claim for breach of statutory duty.

The defendants admitted that they were in breach of regulation 44(2) of the 1961 Regulations as regarded the deceased but they denied that they were in breach as regarded the plaintiff, because he was not injured or affected by electrocution, meaning the transmission to him of electric current. The defendants submitted that the plaintiff's injury was not of a type or inflicted in a manner which the statute was intended to prevent.

His Lordship would hold simply that regulation 44(2) was not limited to physical electrocution. The statute gave protection to employees from the kinds of injury which could be foreseen as likely to occur when the electrical cable or equipment was allowed, in the words of the regulation, to become a source of danger to them.

That certainly included mental illness caused to the plaintiff by the shock of seeing his workmate electrocuted so close to him and in circumstances where he was fortunate to escape electrocution himself.

Lord Justice Hutchison delivered a concurring judgment and Lord Justice Hobhouse agreed.

Hunter v British Coal Corp and another **[1998] 2 All ER 97, CA**

The plaintiff was employed by the second defendant as a driver of a diesel-powered vehicle at the first defendant's coal mine. Whilst moving four junction legs on his vehicle he became aware of a hydrant protruding down into the roadway on his right from a water range. He tried to manoeuvre the vehicle around the hydrant, but as he did so the front edge of the load struck the hydrant causing water to flow. Concerned that the vehicle would get stuck in the mud, the plaintiff attempted, with help from a fellow employee, C, to close up the hydrant valve, but was unable to do so, and he went off in search of a hose-pipe to channel the escaping water onto the conveyor. When he was 30 metres away from the scene, the hydrant burst and he rushed to find a stop valve to shut the water off, which he managed to do after about ten minutes. Whilst doing so, he heard a message over the tannoy that a man had been injured and, on his way back to the scene of the accident, he met a workmate who told him that it looked like C was dead. The plaintiff immediately thought that he was responsible and suffered nervous shock and depression as a consequence. Thereafter, he brought proceedings against the defendants for damages for psychiatric injury. The judge found that the defendants were negligent in failing to maintain the prescribed minimum vehicle clearances at the accident site and in breach of s 83 of the Mines and Quarries Act 1954, but dismissed the plaintiff's action on the ground, inter alia, that he did not qualify as a primary victim because he was not a participant in the accident as his participation had ceased when he turned off the water. The plaintiff appealed.

Held - (Hobhouse LJ dissenting) A plaintiff who believed that he had been the involuntary cause of another's death or injury in an accident caused by the defendant's negligence could recover damages as a primary victim for psychiatric injury suffered as a result if he had been directly involved as an actor in the incident. However, a plaintiff who was not present at the scene of an accident could not recover damages as a primary victim for such injury because he felt responsible for the accident when the news of it was broken to him later. In the instant case, the plaintiff was not involved as an actor in the incident in which C died, since he was 30 metres away when the hydrant burst, and he only suffered his psychiatric injury on being told of C's death 15 minutes later and because he felt responsible for it. It followed that there was not a sufficient degree of physical and temporal proximity present for the plaintiff to be treated as a primary victim. Moreover, the illness which he suffered was an abnormal reaction to the news of C's death triggered off by an irrational feeling of responsibility and not a foreseeable consequence of the defendants' breach of duty of care. Accordingly, the appeal would be dismissed.

Alcock v Chief Constable of the South Yorkshire Police [1991] 4 All ER 907 and *Frost v Chief Constable of the South Yorkshire Police, Duncan v British Coal Corp* [1997] 1 All ER 540 considered. *Young v Charles Church (Southern) Ltd* (1997) Times, 1 May distinguished.