TORT

NOTES OF A LECTURE

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BY

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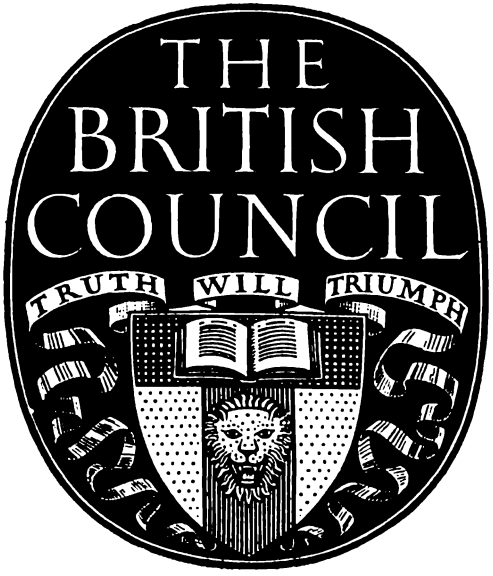

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By A. G. Coates, LL.M.

IN this lecture I will try as far as I can to follow the order in my predecessor's lecture last year. I think this will be convenient for those who have the printed notes of his lecture and I shall have to refer again to some of the cases he dealt with.

NEGLIGENT STATEMENTS

We start first with the tort of negligence and specifically whether any action lies in negligence for financial loss caused by negligent statements, and the first case I come to is one that was dealt with in the lecture last year, that is *Hedley Byrne & Co., Ltd.* v. *Heller & Partners* which has now gone to the House of Lords [1963] 3 W.L.R. 101; 2 All E.R. 575. I should, of course, now refer to the parties as the appellants and respondents, but I think it may perhaps be rather simpler to continue to use the words plaintiff and defendant. What happened, as you will know, is that the defendant bankers made an allegedly negligent statement in replying to an enquiry for a banker's reference about one of their customers made by the plaintiff's bankers. But, and in the event this was vital as you will see, the plaintiff's bankers in asking for the reference, said " without responsibility on your part ", and in reply to a later enquiry, the defendants specifically disclaimed any responsibility for what they were saying. The plaintiff, in reliance on these statements, lost a considerable sum of money. Assuming for the moment they were negligent, which in fact was not admitted in the House of Lords nor decided by that court, was there a duty of care owed by the defendants to the plaintiff as regards a negligent statement causing financial loss? Now it is well established that such a duty exists or may exist in two cases. First, where there is a contract between the parties. Thus successful actions in negligence against solicitors have usually been based on the contract between solicitor and client. Secondly, where there is a fiduciary obligation between the parties, there may be liability; the leading case is the House of Lords' decision in *Nocton* v. *Lord Ashburton* [1914] A.C. 932. Here the defendant was in a fiduciary relationship to the plaintiff because he was advising him as a solicitor (contract was not pleaded). A further modern example of the same point is *Woods* v. *Martins Bank* [1959] 1 Q.B. 45, though here the fiduciary relationship is perhaps rather a tenuous one—a bank manager had negligently given advice of a kind which it was in the course of a banker's business to give, to a rather foolish young man in order to persuade him to open an account.

But we come back to the point we are really concerned with—where there is no contractual or fiduciary relationship, is there ever a duty of

care as to a negligent statement causing pecuniary loss? The Court of Appeal in the *Hedley Byrne* case, as my predecessor reported to you a year ago, felt bound to follow its own decision in *Candler* v. *Crane Christmas & Co.* [1951] 2 K.B. 164; the principle being that in the absence of a contractual or fiduciary relationship between the parties, no duty of care is owed in respect of a negligent statement causing financial damage. In the *Hedley Byrne* case, and for that matter in *Candler's* case, there was no contract between the parties and no fiduciary relationship and, therefore, the action in negligence failed, although it may be remembered that in *Candler's* case there was a strong dissenting judgment by Denning, L.J., as he then was. This point now came up for decision in the House of Lords. If indeed it is the rule that although there is often liability in negligence for physical harm, yet there is no liability for a negligent statement causing pecuniary loss, it does, as Lord Devlin pointed out in his speech, lead to rather nonsensical results. For example, if a doctor negligently advises a patient that he can carry on working and as a result of doing so the patient suffers physical damage, then the doctor is liable in negligence. If, on the other hand, the doctor equally negligently advises the patient that he must give up his job, which he does, and as a result suffers pecuniary loss from the cessation of his employment, then no action would lie. This is in itself rather an illogical distinction and, of course, it must be remembered that had in either case the patient paid the doctor for the advice then he would quite clearly have had a remedy in contract. Is this then the law? The answer given by the House of Lords is that it is not.

It is well established, as I have said, that a duty may be owed if there is a contract between the parties, or if there is a fiduciary relationship between them. But, said the House of Lords, there are also other *special relationships* where a duty of care may arise and where, therefore, there could be liability in negligence. What then are these relationships? Definition is rather difficult because there are five full judgments in the House of Lords: each member of the House agreeing as to the existence of such special relationships but giving rather different definitions of when they arise: indeed the report in the All England Law Reports is 50 pages long and the head-note, as the editor says, represents an endeavour to combine the reasons of all the opinions delivered. I will take two statements—those of Lord Reid and of Lord Devlin.

Lord Reid refers to " all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him ". Lord Devlin's judgment is particularly interesting and perhaps the most helpful. Although he was quite happy to adopt any of the other statements showing the general rule as to when there will be special relationships creating a duty of care in these cases, he himself would have put it in this way—that these special relationships which

may give rise to a duty of care are not limited to contractual relationships, nor to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton* v. *Lord Ashburton* are " equivalent to contract ", that is where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be contract. Conversely, it is clear that a casual expression of opinion at a social event or party for example would not give rise to a special relationship, however it is defined. Further, of course, no duty would arise if the party giving the information or advice so clearly qualifies his answer as to show that he is not accepting responsibility for it.

Because of this second point, therefore, the defendants in the *Hedley Byrne* case were still not liable because of the express disclaimer of responsibility. However, in holding that this special relationship could exist the House of Lords disapproved of *Candler* v. *Crane Christmas* and of the earlier case of *Le Lievre* v. *Gould* [1893] 1 Q.B. 491, and approved of the dissenting judgment of Denning, L.J., in *Candler* v. *Crane Christmas & Co.* On the facts of that case, where the accountants knew that their report would be relied on by the plaintiff, there would now be a special relationship giving rise to liability. There was considerable discussion of the effect of the well-known case of *Derry* v. *Peek* [1889] 14 App. Cas. 337. This case is, of course, our authority for saying that negligence is not sufficient to found an action for the tort of fraud or deceit, but it appears to have been understood in later cases as going much farther than this and saying that a negligent statement will not in any event, in the absence of course of contractual or fiduciary relationship, give rise to an action in negligence. In fact, in *Derry* v. *Peek* the House of Lords never said this. Indeed in the later case of *Nocton* v. *Lord Ashburton*, the House had itself pointed this out.

Now I think it may be worthwhile to consider briefly what may be the results of the *Hedley Byrne* case. First, I would expect a proliferation of express disclaimers of responsibility. Secondly, a casual expresssion of opinion at a social event or party for example would not be within the " special relationships " giving rise to a duty of care, however the special relationship is expressed. Thirdly, would a banker giving a similar reference to that in the *Hedley Byrne* case *without* a disclaimer of responsibility owe a duty of care not to be negligent ? Probably not—their Lordships inclined to the view that he would be under no greater duty than to give an honest answer, because, as Pearson, L.J., said in the Court of Appeal, he could not reasonably be expected in the bank's time to spend time and trouble searching records, studying documents, weighing and comparing the favourable and unfavourable facts and producing a well balanced and well worded report. Though it does seem to me to be arguable that this consideration would go to the question of whether there had been a breach of the duty, rather than whether he owed one. Fourthly, its effect on solicitors, assuming that there is no contract. This has been considered by the Council of The Law Society, and Counsel's

opinion obtained, and there is a statement in the November, 1963, issue of the *Gazette* at page 740.

Clearly if a solicitor expresses a casual opinion even on a point of law at a social occasion it would be most difficult to imply an undertaking to accept responsibility. Equally clearly, on the other hand, if a client asks you for an opinion on a legal point regarding his contract as a director with a company and tells you he is going to show your opinion to his fellow directors, you may well be liable to the latter under this category of special relationship—unless you disclaim responsibility and this would not I think fortify your client's confidence in you.

There may also be implications for members of the Bar. Previously because of the lack of an enforceable contract, they have not been liable in negligence to either the lay or professional client. But looking solely at the judgments in the *Hedley Byrne* case, I would have thought that they must now fall within any of the formulations of the special relationship in that case, unless again they fall back on the express disclaimer of responsibility. Nevertheless, the Bar Council takes the view that they are not affected and it may well be, of course, that the Courts would hold that this immunity is so long established that it falls into a category of its own.

My final comment must be I think a tribute to Lord Denning who has once again been proved to be right.

FORESEEABILITY

The next case on negligence is again a House of Lords decision, although this time on appeal from the Scottish Courts. This case is *Hughes* v. *Lord Advocate* [1963] 2 W.L.R. 779; 1 All E.R. 705. What happened was that post office employees working down a man-hole in an Edinburgh Street went off for their tea and negligently left the man-hole open and unattended with paraffin lamps around and a ladder whereby anybody could descend the man-hole. Some children came along, recognised these things for the allurements they undoubtedly were, and started playing in and above the man-hole and in a tent which was erected over the man-hole. Then the plaintiff knocked the paraffin lamp into the man-hole, which in some unforeseeable way caused an explosion which injured the plaintiff very badly by burning him. The explosion, as I say, was unforeseeable. Were the defendants liable? The House of Lords held that they were liable, because although the exact way in which the accident happened may not have been foreseeable, nevertheless the type of damage was foreseeable, that is burning. Clearly if the child had spilt some paraffin from the lamp which had caught fire and burnt him, the defendants would have been liable, and the type of injury, although this time caused by an explosion, was the same. To distinguish between burning caused by paraffin vapour, that is an explosion, and burning caused by liquid paraffin, that is a fire, would be too fine a distinction to

make. It is not really clear whether the House had in mind the question of whether a duty of care was owed by the respondent to the appellant, or whether they were considering whether or not the damage was too remote. It does seem though that nowadays these two questions will often be very hard to distinguish from each other, in so far as each now depends upon foreseeability. Indeed, it may well be unnecessary to distinguish between them. For duty of care see *Donoghue* v. *Stevenson* [1932] A.C. 562; for remoteness see *The Wagon Mound* [1961] A.C. 388. And it does appear that if the damage is of a type which is foreseeable, for example, physical injury by burning, then the defendants will be liable even though they could not foresee the exact way in which this might happen. It is, of course, already established by the case of *Smith* v. *Leech, Brain & Co., Ltd.* [1962] 2 W.L.R. 148; [1961] 3 A.E.R. 1159, that it is not necessary for the extent of the damage to be foreseeable.

To come back to *The Wagon Mound*, in which the Privy Council advised that the test of remoteness of damage in negligence is foreseeability. There is now a *Wagon Mound No.* 2. It is *Miller Steamship Co. Pty. Ltd.* v. *Overseas Tankships (U.K.) Ltd. (The Wagon Mound) No.* 2 [1963] 1 Lloyds Rep. 40. The judgment is that of an Australian Judge, Mr. Justice Walsh, of the Supreme Court of New South Wales, and it is a most lucid judgment. Let me remind you of the facts: because of the carelessness, and I deliberately use a neutral expression, of the ship's officers on " The Wagon Mound ", in Sydney Harbour, fuel oil escaped from the ship on to the surface of the water and spread across it. Eventually in some inexplicable way it caught alight, probably as a result of welding operations, and a wharf owned by Morts Dock & Engineering Co., Ltd. was burnt down. This gave rise to the first *Wagon Mound* case ([1961] A.C. 388) in which the Privy Council decided that the damage was too remote because it was not foreseeable. The fire, however, also caused damage to two ships which were moored alongside Morts Wharf; they too were burnt out, and in this second action the owners of the ships sued the original defendants in respect of this fire. The first problem with which the judge was faced was whether or not the fire was foreseeable. In this respect, of course, the finding that it was not foreseeable in the *Wagon Mound* (*No.* 1) was one of fact and there could, therefore, quite properly have been a different conclusion on different evidence, in the *Wagon Mound* (*No.* 2).

The judge, therefore, devoted considerable consideration to the meaning of foreseeable, and in particular the question—foreseeable by whom? A cogent criticism of the original *Wagon Mound* decision had been made in the *Cambridge Law Journal* by Mr. R. W. M. Dias, who had made the point that probably the average man in the street would have expected oil on water to catch fire and that it would only have been unforeseeable by the expert, who would not have anticipated such an occurrence. Whose foresight therefore is relevant? The judge, who had clearly read the *Cambridge Law Journal* and much else besides, came to the conclusion that the foreseeability was not that of the academic expert, nor that of the

reasonable man on the Clapham omnibus, nor, to show the Australian nature of the case, the reasonable man on the Bondi omnibus. The relevant foreseeability is that of the hypothetical reasonable observer of the class and calling whose conduct was in question—in this case the ship's officers on "The Wagon Mound". One must attribute to such persons not only a reasonable amount of knowledge and experience, but also a normal or average make-up, lying between extremes of over-confidence or rashness and extreme cautiousness. In other words the test is basically objective, but there is also a subjective element involved in it, notably the particular knowledge of this particular defendant. The judge then considered the evidence of the witnesses of this type, notably merchant navy officers. Some of them would have regarded the possibility of the oil on the water catching fire as out of the question. Others would have regarded it as a possibility, but an unlikely one. After weighing this evidence his Honour came to the conclusion that the possibility of the oil on the water catching fire was not one which would have been anticipated by the reasonable type of person whose foreseeability he was considering, and there was again in the second case no liability in negligence—exactly the same conclusion as *Wagon Mound* (*No.* 1) based on different evidence. Incidentally, he quoted with approval an extract from an article by Dr. Glanville Williams in the *Law Quarterly Review* which is, I think, borne out by the case of *Hughes* v. *Lord Advocate* which we have just been considering, and that is that "damage must occur broadly speaking in a foreseeable way" with some emphasis on the words "broadly speaking".

In *Wagon Mound* (*No.* 2), however, there were alternative claims under *Ryland* v. *Fletcher* (1868), 3 H.L. 330, in private nuisance and in public nuisance. Although I am at the moment dealing with the tort of negligence it is probably convenient to dispose of these other heads of liability in the *Wagon Mound* at the same time. It is, of course, not always appreciated that there was a claim in nuisance in the *Wagon Mound* (*No.* 1) and that the Privy Council did not pronounce on this aspect of the case. This in fact they referred back to the Full Court of New South Wales for further consideration. Therefore, liability under this heading was still an open question.

First of all, *Rylands* v. *Fletcher*. Here, said the judge, there was no liability, primarily because in order for there to be liability under the rule the dangerous substance must escape from the defendant's land, whereas here it had merely escaped from a ship. A second reason was that there was no non-natural user by the defendants of the harbour or their ship. A third reason upon which the judge did not express a concluded opinion was that it may well be that oil is not a dangerous thing within *Rylands* v. *Fletcher*. Then he came to private nuisance. Again there was no liability because the essence of private nuisance is an interference with the plaintiff's use or enjoyment of land or of rights over land such as easements. Again the only interference was with the plaintiff's ship—with the result that no action lay in private nuisance.

A further point relating to this tort is the open question as to whether or not in order to be a private nuisance the interference must emanate from the defendant's land. Quite clearly as I have said there must be interference with the plaintiff's interest in land, but whether this must emanate from the defendant's land is a question which it was not necessary to decide.

Finally, we come to public nuisance in which—at long last—the plaintiff succeeded. This was, I suppose, inevitable, if not on legal principles, at least on mathematical ones if the law of probabilities and averages is anything to go by. First of all, of course, the conduct complained of in public nuisance need not emanate from the defendant's land, therefore there was no difficulty on this point. The test which the judge applied was—has the defendant without justification or excuse created or suffered or continued a state of affairs which constitutes a public nuisance causing direct and particular injury to the plaintiff ? Particular loss means serious loss which other members of the public did not suffer. This the plaintiff could clearly show. What element does the defendant's negligence play in an action of public nuisance ? Here there is a significant difference between the torts of nuisance and negligence. In the tort of negligence the burden of proving lack of care on the part of the defendant lies on the plaintiff, but in public nuisance, once the interference is proved, the burden of justifying it lies on the defendant. This quite clearly the defendant could not do and therefore he was liable in nuisance unless the damage could be said to be too remote. So the point now arises, does the foreseeability principle in relation to remoteness established by the *Wagon Mound* (*No.* 1) apply to the tort of public nuisance ? Obviously it does apply in negligence ; equally clearly the Privy Council itself said that it does not apply to a tort of strict liability such as liability under the rule in *Rylands* v. *Fletcher* where any element of negligence is unnecessary and therefore foreseeability can have no application. The judge applied the latter rule as to public nuisance. Since it is not necessary for the defendant to prove negligence by the plaintiff it is equally unnecessary for him to prove that the damage in question was foreseeable by the plaintiff. Therefore, as the damage in question was caused by the conduct of the defendants amounting to public nuisance the defendants were liable.

DUTY OF BUILDER

The next case, *Sharpe* v. *Sweeting* [1963] 1 W.L.R. 665; 2 All E.R. 455, involves a point which has raised considerable doubt, and that is to what extent does the principle of *Donoghue* v. *Stevenson* [1932] A.C. 562 apply to the defendant's use of or operations on land ? First of all it is quite clear the decision in *Donoghue* v. *Stevenson* did not affect the old common law rule that broadly speaking neither a landlord nor a vendor of land were liable in negligence for defects in the land demised or sold. As Lord Reid said in the *Hedley Bryne* case, *Donoghue* v. *Stevenson* " may encourage us to develop existing lines of authority but it cannot entitle us to disregard them ". This is well exemplified by

the continued immunity of the landlord and vendor, apart, of course, from some statutory intervention, for example, under the Occupiers' Liability Act, 1957. In this case the defendants were builders, who under an agreement with a local authority had constructed a number of council houses. These houses had concrete canopies over the front door, and because of the negligence of the builders, one of these concrete canopies collapsed and fell on the wife of the tenant of the council house in question, some eight or nine years after the house had been built. Could the builders be held liable under the rule in *Donoghue* v. *Stevenson* ? It was quite clear that their liability, if any, would be their own liability in that they were not in this respect acting simply as agents of the local authority. The Clerk of Works of the local authority had told them how the canopy should be built, but had in no sense exercised a detailed supervision over the work.

The judge held that the builders were liable and that the principles of *Donoghue* v. *Stevenson* were not confined to chattels or their manufacture, repair and installation, but could also apply to realty. He did not, of course, say that the owners themselves could have been liable. They would still have been protected by the old common law rule; and in fact the judge was of the opinion that if the owner was also the builder he would still retain his immunity as owner; but when the builder is not the owner he enjoys no such immunity. The judge relied on the northern Irish case of *Gallagher* v. *McDowell* [1961] N.I. 26 and cited an extract from the judgment of Macdermott, C.J., in that case, in which he said " will its extension (the rule of *Donoghue* v. *Stevenson*) to building contractors cause or lead to some mischief which would justify the rejection of such an extension ? The attitude that any enlargement of the fields of tortious liability is always to be regarded as a step in the right direction is not one to be commended. Some gap between morality and law is inevitable and, if the gap is not too large, may be for the benefit of both codes. On the other hand the changes to be expected in a progressive society call from time to time for such adjustments in the domain of legal responsibility as will promote justice and fair dealing". The judge found that the defendants had put the canopy up expecting the doorway to be used by the occupier of the council house, his family and visitors in circumstances in which they did not and could not reasonably have anticipated that there would be any such intermediate examination as would be likely to reveal defects such as existed. In view of this there was sufficient proximity between the parties in the *Donoghue* v. *Stevenson* sense to make the defendants liable.

OCCUPIER OF LAND

Now we come, still under the general heading of negligence, to the liability of an occupier of land. Most of us, of course, were brought up on the old common law rules which distinguish between an invitee, a licensee and a trespasser. Both the invitee and the licensee were lawfully on the land, but a different duty was owed to each of them. The

trespasser was unlawfully on the land, and it was always thought that no duty other than to treat him with common humanity was owed to him, at any rate by the occupier. Even in the case of the invitee and certainly in the case of the licensee it was clearly established that if he knew of the danger, for example, by having been warned of it by the occupier, then there was no liability (*London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737). The distinction between licensees and invitees was abolished by the Occupiers' Liability Act, 1957, which treated them both as lawful visitors and provided for a common duty of care owed to any lawful visitor. This is found in s. 2 sub-s. 2 of the Act and is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. The Act also provides in sub-s. 3 of s. 2 that " the relevant circumstances include the degree of care and of want of care which would ordinarily be looked for in such a visitor, so that (for example) in proper cases . . . (*b*) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risk ordinarily incident to it, so far as the occupier leaves him free to do so ". This sub-section confirmed the decision, under the common law rules, in *Christmas* v. *General Cleaning Contractors Ltd.* [1953] A.C. 180. One further sub-section I must read to you, that is sub-s. 4. This provides that " in determining whether the occupier of the premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—(*a*) where damage is caused to a visitor by a danger of which he has been warned by the occupier, the warning is not to be treated without more as absolving the occupier, unless in all the circumstances it was enough to enable the visitor to be reasonably safe . . . ". This of course overrules *London Graving Dock Co. Ltd.* v. *Horton.*

These statutory provisions all arose in our next case *Roles* v. *Nathan and Others; Roles* v. *Corney and Others* [1963] 2 All E.R. 908. In premises occupied by the defendant there was an old-fashioned system to carry away the smoke and fumes from a coke burning boiler. The system incorporated a horizontal flue running from the boiler under the floor to a vertical flue running up a chimney with inspection holes into the flues. When the system as a whole was cold, i.e., when the boiler was first lit, it was difficult to get the boiler burning satisfactorily. An expert advised cleaning the flues and two chimney sweeps were called in for this purpose. One of them crawled into the horizontal flue despite the expert's warning of the danger from fumes. However, he survived, and the flues were cleaned. Still the boiler was unsatisfactory and another expert was consulted. He immediately recognised the danger from fumes whilst the boiler was alight and the inspection holes into the flues were not sealed, and told everyone present to go out into the fresh air. The sweeps, however, told him forcefully and abusively that they did not need him to tell them their job and the expert had more or less forcibly to drag them out. Despite these emphatic warnings, however, they returned in

the evening to complete the job of sealing the inspection holes. They were working in a confined alcove, were overcome by the fumes and were found dead the next morning. In this action by their personal representatives against the occupiers the Court of Appeal held by a majority that the warning given by the expert, as agent for the occupier, was enough to enable the sweeps to have been reasonably safe had they only heeded it. Pearson, L.J., who dissented, differed on the facts—notably in that the occupier had also disregarded the expert's warning by having the coke boiler lit and that but for this the sweeps would in any event have been safe. Denning, M.R., was also of opinion that the defendants were protected by s. 2 (3) in that this was a risk incidental to the calling of chimney sweeps who knew of the danger, having been repeatedly warned of it. The occupier could, therefore, expect that they would guard against it. Harman, L.J., doubted on the facts whether this would afford a defence, and Pearson, L.J., was clearly of opinion that it would not.

So much for lawful visitors—next for the under-privileged members of society, trespassers. *Videan and Another* v. *British Transport Commission* [1963] 3 W.L.R. 374; 2 All E.R. 860, involves the duties of an occupier of land to two quite different people, first of all the trespasser who is placed in danger, and secondly the rescuer of that trespasser. The station master of a small railway station in Devon lived with his wife and family in the station house. One day his young son aged two had wandered on to the line unseen by his parents or anyone else. Just as his presence was observed on the line a trolley approached the station, driven carelessly by the driver in that he was going too fast and was not keeping a proper look-out. The station master and a porter tried to stop him by holding their hands up but he ignored them. Eventually the station master at the very last minute leapt on to the line directly in the path of the trolley, managed to save the child's life by pushing him under the trolley, but was himself killed. In these circumstances what was the liability of the British Transport Commission, the occupiers of the railway line, towards first of all the infant who was injured and secondly the station master who was killed? It is conventional to say that no duty of care is owed by an occupier of land to a trespasser on that land, but this is usually qualified by some such expression as not to injure him intentionally, or not to act with reckless disregard when knowing of his safety. In this case the infant quite clearly was a trespasser, and the court held unanimously that whatever the exact duty owed to a trespasser there was no liability on the defendants in this case. What then is the duty owed to a trespasser? Again all three members of the court were agreed that a duty is owed to him if his presence is known to the occupier or should reasonably have been foreseen by the occupier (and it was this latter point on which the infant plaintiff failed in that the trolley driver could not have been expected to foresee a child on the line). Thus foreseeability is the test as to whether any duty at all is owed to a trespasser and, I repeat, if his presence should have been foreseen then the occupier does owe him a duty. The next point to arise, of course, is the content of

the duty, and here there was a division of opinion among the court. Denning, M.R., took the view that if the presence of the trespasser were foreseeable then the defendant owed him a duty to take reasonable care. In fact in one place, perhaps inadvertently, he says that the defendant owes him the common duty of care, but Pearson, L.J., demonstrated convincingly that the common duty of care as defined by the 1957 Act could not be adapted to apply to a trespasser, even if it were not specifically limited by the Act itself to lawful visitors. Lord Denning, however, considered that this duty to take reasonable care is only owed to a trespasser as regards current operations taking place on the land and then it is owed either by a third party doing the work or by the occupier himself doing the work. As regards the occupier's liability for the actual condition, or static condition, of the premises, Lord Denning would presumably apply the old common law rule which I stated a moment ago. On the other hand, Pearson, L.J., thought that the duty would be the same for an occupier or for a third party, and would not vary according to whether the case was one relating to the condition of the land or to things done or being done on it. He pointed to the difficulties inherent in distinguishing between the state of the premises and operations on them. If a pit is dug on Monday and someone falls in it on Tuesday is this due to the operation that took place on the Monday or the condition of the land on the Tuesday? He therefore would apply the same duty both as regards occupier and third party on the land, and as regards the static condition and current operations, and this is what he called broadly a duty to treat the trespasser with common humanity, which is substantially less than the duty owed to lawful visitors.

On the second cause of action, that brought on behalf of the deceased station master's estate under the Law Reform Act and on behalf of the widow under the Fatal Accidents Acts, the Court of Appeal, reversing the trial judge, held that the action would lie. The cause of action of a rescuer is quite independent of that of the rescued, and in this case the defendant trolley driver owed a duty to the father as station master, of which he had been guilty of a breach, causing the station master's death. Again the duty is expressed somewhat differently by the three members of the court. Lord Denning was of the opinion that although the trolley driver could not have foreseen the presence of this particular infant on the line, nevertheless, he should have foreseen that some emergency might occur, not necessarily the one that in fact happened, and he should, therefore, have realised that someone might be put in danger if the trolley approached too fast and without a proper look-out being kept. In these circumstances the trolley driver owed a duty of care to anybody, including the station master, who attempted a rescue from a danger thus created. I am bound to admit that my unsubtle mind has some difficulty in making the distinction which Lord Denning's argument seems to require. If the trolley driver must foresee that the station master might rescue someone from the line, then surely he must also foresee someone on the line to be rescued. However, the other members of the

court expressed the duty in rather a simpler form and that is that the trolley driver should have foreseen the presence of the station master as a railway official on the line for one purpose or another. For that reason they owed him a duty of care.

ANIMALS

The next two cases we come to concern negligence in relation to the keeping of animals. In *Searle* v. *Wallbank* [1947] A.C. 341, the House of Lords affirmed that there is no duty on the occupier of land adjoining a highway to prevent his domestic animals straying on to the highway, save perhaps in special circumstances giving rise to some particular duty on the part of the defendant. Historically this rule is comprehensible in a context of generally unfenced land, and highways in the nature of what we would call tracks running across it with, of course, traffic of the same kind and proceeding at the same speed as the straying animal. In the circumstances of today, with high-speed traffic and a fairly common practice of fencing land adjoining a highway, the immunity is much more open to criticism—see the 1953 Report of the Committee on the Law of Civil Liability for Damage done by Animals (Cmnd. 8746). On the other hand if the defendant brings the animals on the highway then he will be liable for negligence in controlling them.

In this lecture last year, the case of *Gomberg* v. *Smith* [1962] 2 W.L.R. 749; 1 All E.R. 725, was considered. There a majority of the Court of Appeal were of opinion that the immunity involved in the *Searle* v. *Wallbank* rule, did not extend to dogs. This expression of opinion was, however, *obiter* as the Court held that the defendant had brought the dog into the road and was therefore in any event liable for his negligence in controlling it. This year, however, the point has arisen directly—is a dog within the immunity conferred by the *Searle* v. *Wallbank* rule ? In *Ellis* v. *Johnstone* [1963] 2 Q.B. 8; 2 W.L.R. 176; 1 All E.R. 286 the defendant's house was on the opposite side of a highway from a common. The house had a concealed drive from which the defendant's dog was wont to cross the road to the common and was variously described as having " dashed out " of the gate or " run out " or come " bounding out " or " shot out ". The owner admitted that the dog had no road sense, that he had never tried to instil any, that he left the gate open, and had had no cause to worry about it. The accident happened when the dog came bounding out as the plaintiff was driving past in a perfectly proper manner. It struck and damaged the plaintiff's car and was itself killed. The Court of Appeal were unanimous in holding that despite the dicta in *Gomberg* v. *Smith*, a dog was within the immunity rule. Nevertheless they were also of opinion that the judgments in *Searle* v. *Wallbank* showed that in special circumstances there might be a duty of care. A knowledge of the animal's tendency to stray would not be sufficient, otherwise there would be little left of the immunity. Donovan, L.J., said " had it been established that the dog frequently

bounded out of this gate on to the highway turning itself for the moment into something more like a missile than a dog" then this in his opinion would have been special circumstances imposing a duty of care on the defendant. All the members of the Court appeared to think that special circumstances were not confined to the animal itself and its behaviour, but would include the local topography, visibility, width of road, presence of footpath and so on.

The other case relating to animals, *Fitzgerald* v. *E. D. & A. D. Cooke Bourne (Farms) Ltd. and Another* [1963] 3 W.L.R. 522; 3 All E.R. 36, relates to both liability in negligence and also liability under the scienter rule. The defendants owned two young unbroken fillies and for some months had kept them in a field across which a public footpath ran. There was no hedge or fencing alongside the footpath. In other words, the field reproduced in miniature the general picture of unfenced land with rudimentary highways running across it, in the context of which the common law rules as to liability for animals were established. Whilst the plaintiff was walking along the footpath the fillies, which were described as playful, galloped across the field from behind her and went in front of her. In prancing about one of them swerved towards her, struck her with its shoulder and knocked her down. She was badly frightened and subsequently suffered a nervous breakdown. The owners had previously received no complaint as to the fillies and the judge at first instance found that they were not vicious but were merely playful and had a natural propensity to gallop up and around people crossing the field. In effect he found the filly innocent of any *mens rea*—the filly had knocked the plaintiff down simply by getting too close to her without any malicious intention. The judge nevertheless found the defendants liable, both on the ground of negligence and under the scienter rule. The Court of Appeal reversed his judgment on both points. As regards negligence the rule in *Searle* v. *Wallbank*, which I mentioned above, establishes that in the absence of special circumstances no duty of care is owed to prevent domestic animals straying on to the highway, which expression of course, includes the public footpath running across the field. In this case, however, as the fillies were not vicious in the sense of being in any way dangerous to mankind there was no sufficient likelihood of injury to impose on the defendants a duty to prevent their horses straying on to the footpath.

In order to be liable under the scienter rule, the defendant must be proved to have had knowledge of a vicious propensity in that particular animal. All the members of the Court of Appeal were of the opinion that the word "vicious" involves some element of attack, that is behaviour of a hostile or offensive nature. As the trial judge had found that there was no propensity in these animals to attack human beings, there was no liability under the scienter rule. There was, however, discussion in all the judgments as to whether there would be liability under the scienter rule if the defendant had knowledge of an offensive propensity which was natural to the species in question. Both

Willmer, L.J., and Danckwerts, L.J., thought that this would be sufficient to impose liability, but Diplock, L.J., differed on this point. He pointed out that knowledge of such propensity would merely amount to the knowledge that this particular animal was not an exception to the general run of the species and said that the law even as to cattle could hardly be as silly as that—so on that point there is some doubt.

VICARIOUS LIABILITY

During the year there have been two interesting cases on vicarious liability—one in respect of the negligence of an independent contractor, the other in respect of a servant's negligence. The first is *Sumner* v. *Wm. Henderson & Sons, Ltd.* [1963] 2 W.L.R. 330; 1 All E.R. 408. This is an interesting decision on the liability of an employer towards his employee, with particular reference to the question of whether the employer is still liable even though he has delegated the work in question to an independent contractor. Unfortunately, however, the judgment of Mr. Justice Phillimore was set aside by the Court of Appeal, not on its merits, but because the decision had been given in the form of a special case for the opinion of the Court on questions of law based on assumptions as to certain facts, and the Court of Appeal was of the opinion that this was not a suitable case for such a procedure to have been followed ([1963] 1 W.L.R. 823; 2 All E.R. 712). As Lord Justice Harman said, citing an observation of Evershed, M.R., " it is highly undesirable that the Court should be constrained to tie itself in so many knots, and in the end merely say: ' well, if this was thus, then that was so ' ". Even so I think that the decision at first instance is well worthy of our attention. What happened was that the defendants owned a department store, and what the judge called a disastrous fire broke out in this store in the course of which eleven people were killed, one of them being the plaintiff's wife, who was an employee of the defendants. Considerable work of modernisation and extension was being done in the defendant's premises at the time, although it was still open to the public. Various independent contractors were involved; a firm of electrical contractors who were laying cable, under the directions of a firm of consultant electrical engineers; and a firm of builders who were doing work under the direction of a firm of architects. The electrical contractors had bought the electric cable in question from a reputable firm of manufacturers. The fire possibly started through a defect in the electric cable provided by the manufacturers and laid by the electrical contractors under the directions of the electrical consultants. Assuming this to be so, were the defendants as employers liable in negligence for breach of their duty of care towards their employee, the plaintiff's wife?

The judge took the employer's duty of care at common law towards his employee stated by Lord Herschell in *Smith* v. *Baker & Sons* [1891] A.C. 325, as " to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk ". The vital

question here, of course, was whether the employer would still be liable, assuming that there was negligence on the part of all or some of the independent contractors I mentioned a moment ago. First of all, his Lordship felt bound to hold that had the negligence been that of the manufacturer of the electric cable, then the employer would not be liable. In this he followed the House of Lords' decision in *Davie* v. *New Merton Board Mills, Ltd.* [1959] A.C. 604. He took the ratio of that decision as being that on the facts the employers could not be said to have delegated their duty to the manufacturers, to whose negligence the latent defect was presumably due. " It would seem impossible to say of an employer who merely went into a shop to buy a standard tool that he was delegating his responsibility for his employee's safety, either to the supplier who had merely bought it as a standard tool from the manufacturer, or still less that he was delegating it to the manufacturer with whom he entered into no contract and who had manufactured it months, or even years before ". In other words, to buy the cable from a reputable manufacturer did not make the employer responsible for any negligence by the manufacturer. On the contrary, it was an adequate performance of his duty to take reasonable care with respect to his employee. The judge did, however, decide that the employers would be liable for the negligence, if it was subsequently proved, of any of the other independent contractors, that is the electrical contractors, the electrical consultants, the builders, or the architect, because the duty of care owed by the master to the servant is a personal duty of which he cannot rid himself by employing an independent contractor; it is non-delegable. In this his Lordship relied on the House of Lords' decisions in *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co. Ltd.* [1961] A.C. 807, and *Wilsons & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57. Therefore, even though he does delegate performance of the duty to a competent independent contractor he remains liable for its due performance.

This breach of the law, that is the liability of an employer for the acts of his independent contractor, has caused much difficulty in recent years. The trend undoubtedly appears to be to extend liability in these cases, and it seems that one case where an employer will be liable for the negligence of his independent contractor is where this negligence occurs in connection with the performance of a duty which the master owes to his own servant. Nevertheless it does seem to me that the law is becoming enmeshed in a verbal dilemma. If the duty, as so often stated, is a duty to take reasonable care, then if the circumstances are such that the employer could not possibly perform a particular operation himself, for example the installation of electric cable which requires skill and experience, then quite clearly if he attempted to do it himself that would be a breach of his duty to take reasonable care, and the average man might be forgiven for thinking that the employment of an independent contractor is no more than the performance of his duty to take reasonable care. Nevertheless if it is to be decided, perhaps justifiably in the light of social policy, that the master should be liable in these cases, then

surely his duty towards his servant will have to be recast and expressed in stricter terms; this has been suggested in a comment in the September 1963, issue of *Modern Law Review* (page 574).

The other case on vicarious liability *Ilkiw* v. *Samuels & Others* [1963] 1 W.L.R. 991; 2 All E.R. 879 involves the classic problem as to whether a tort has been committed in the course of the servant's employment when the servant was acting in disobedience to express instructions of the master. The simplest way of putting the point is perhaps this, that if the prohibition is as to what the servant is to do then it will take such thing out of the course of his employment. If, on the other hand, it is merely a prohibition as to how he is to do a certain job then that job remains in the course of his employment, and a tort committed in performing it, albeit in defiance of the master's order, is still actionable against the master. In this case a lorry driver employed by the defendants had strict instructions from his employers not to allow the lorry to be driven by anyone else. He was delivering sacks of sugar at a warehouse and when he had finished doing so he had to move the lorry forward slightly. Instead of driving it himself he allowed a workman standing by to move it without enquiring as to his competence to drive the lorry. In fact this workman had never driven a lorry before, he was quite incompetent to do so and in manoeuvering the lorry in the confined space drove it forward and injured the plaintiff. In these circumstances were the defendants liable to the plaintiff in respect of his injuries? The first question, of course, is whether or not the lorry driver was, in fact, negligent. The Court of Appeal were unanimous in holding that he was although their reasons differed somewhat. Lords Justice Wilmer and Danckwerts thought that the driver was negligent in allowing the workman to drive the lorry without making any enquiry as to his ability to drive. Lord Justice Diplock was not satisfied that the driver was negligent merely in not making enquiries as to whether the workman was competent to drive. He preferred to base his decision on the broader ground that since the driver was employed to take charge and control of the lorry he was responsible for its being driven negligently whilst it was in his charge and control. However, for one reason or the other, the lorry driver had been negligent. Was his negligence in the course of his employment? The Court of Appeal unanimously held that it was, since he was employed to have charge and control of the lorry and was so engaged at the time of the accident; and the prohibition against allowing anyone else to drive was merely a prohibition as to the way in which he should do his job.

LIMITATION

The last case on negligence mentioned last year was that of *Cartledge and Others* v. *E. Jopling & Sons, Ltd.* [1962] 1 Q.B. 189. The plaintiffs were workmen who had contracted pneumoconiosis through inhaling silica dust in the defendant's factory. This is an insidious disease and the substantial results did not become apparent until the plaintiffs' claims

in negligence had become statute-barred. The claims therefore failed. This decision, reluctantly reached by the Court of Appeal, was equally reluctantly affirmed by the House of Lords [1963] 2 W.L.R. 210; 1 All E.R. 341. However, for once an obvious defect in the law has been rapidly rectified—in this case, by the Limitation Act, 1963. Section 1 applies to actions for damages for negligence, nuisance, or breach of duty (whether the duty exists by virtue of a contract, or by or under a statute, or independently). It provides that the normal three year time limit for personal injury cases shall not apply where the material facts relating to the cause of action were or included facts of a decisive character which were at all times outside the actual or constructive knowledge of the plaintiff until after the end of the three year period, or until a date not earlier than twelve months before the end of that period—in other words, where the plaintiff did not discover and could not reasonably have been expected to discover, such material facts until at the earliest two years from when his cause of action accrued. Material facts mean the fact of, or the nature or extent of, the personal injuries, or that they were attributable to the negligence, etc., which constituted the cause of action.

Obviously enough, having removed one limitation period, s. 1 of the Act imposes another and that is that the action must be started within twelve months of the date when the material facts came to the actual or constructive knowledge of the plaintiff. Further, leave of the court is necessary in order to rely on s. 1. This can be obtained, subject to certain conditions in s. 2 of the Act, before, or sometimes after, the commencement of proceedings.

By s. 3 these provisions are applied, with suitable adaptations, to actions surviving for the benefit of the deceased person's estate under the Law Reform (Miscellaneous Provisions) Act, 1934, and to actions under the Fatal Accidents Acts; but in either case the action must in any event be commenced within twelve months of the death. Section 1 applies to causes of action accruing before or after the Act and whether or not proceedings have already been started. But it does not apply where a final judgment or order has been given before the passing of the Act. Thus it does not help the plaintiffs in the *Cartledge* case—they only have the cold comfort of knowing that they have been instrumental in improving the lot of those who follow after them.

We still have not finished with the Act, because s. 4 takes us into another field of the law of tort—one tortfeasor's right of contribution from another. Under s. 6 of the Law Reform (Married Women and Tortfeasor's) Act, 1935, a tortfeasor is in certain circumstances entitled to recover a contribution from another tortfeasor who is, or would, if sued, have been liable in respect of the same damage. But what is the time limit as regards this statutory right to recover contribution ? Previously, probably six years. But now s. 4 of the present Act imposes a new time limit of two years from when the right to contribution accrued—and this is the date of the original judgment or arbitration award against the person seeking

contribution. If there is no judgment or award then the period runs from the date on which the amount of the liability was settled. However, s. 4 is not retrospective. It only applies where the right to contribution arose after the passing of the Act—that is July 31, 1963. Before I leave the Act, may I advise those dealing with the type of case affected by the Act to study its provisions fully.

DEFAMATION

Now I turn to the tort of defamation and the first case I must deal with is again one which was mentioned in last year's lecture, *Lewis and Another* v. *Daily Telegraph Ltd.* and *Same* v. *Associated Newspapers Ltd.* [1963] 2 W.L.R. 1063; 2 All E.R. 151. The two newspapers had reported that the fraud squad of the police were enquiring into the affairs of the plaintiff company, of which the plaintiff was chairman. The plaintiffs sued both newspapers in defamation and at first instance succeeded. The jury in the action against one newspaper had awarded the plaintiff himself £25,000 and the company £75,000. Two days later in the action against the other newspaper the jury awarded the plaintiff £17,000 and the plaintiff company £100,000—a total of £42,000 for the individual plaintiff and £175,000 for the company. The defendants not unnaturally appealed. Now there is a fundamental distinction between words which are defamatory in their natural and ordinary meaning and those which are defamatory by reason of an innuendo. An innuendo is a separate cause of action which can only be pleaded where it is supported by proved extrinsic facts. If a so-called innuendo is not supported by extrinsic facts, but is merely to be found in the words complained of themselves, it is not a true innuendo at all but has been referred to as a " false innuendo ". That is clearly established by the Court of Appeal in the *Lewis* case, and two other cases mentioned in last year's lecture, *Loughans* v. *Odhams Press, Ltd.* [1963] 1 Q.B. 299 and *Grubb* v. *Bristol United Press, Ltd.* [1963] 1 Q.B. 309. In the *Lewis* case the plaintiffs alleged that this allegation that the fraud squad were enquiring into their affairs was an innuendo that they were suspected of fraud, and/or had been guilty of fraud or dishonesty in the conduct of their affairs. As this was not supported by extrinsic facts it was in the nature of a " false innuendo "; in other words, it could only be proved as an inference from the natural and ordinary meaning of the words. The Court of Appeal, therefore, ordered a new trial and this decision was affirmed by the House of Lords. The plaintiff was entitled to a ruling as to whether the words were capable of bearing this particular meaning in their natural and ordinary sense. Both the Court of Appeal and the House of Lords, though Lord Morris of Borth-y-Gest dissented on this point, were of the opinion that a statement that the fraud squad were enquiring into the affairs of the company could not bear the meaning that the company had been guilty of fraud. As Lord Justice Holroyd Pearce had said in the Court of Appeal " the announcement that *A* is charged with murder cannot *per se* mean that

he is guilty of murder ; *a fortiori* the announcement that the police are making enquiries about *A* in connection with a murder cannot *per se* mean that he is guilty of murder". A further reason for ordering a new trial was that the damages were so excessive they could not be allowed to stand. Also in this type of case, where there is more than one action arising from the same libel, the jury in each case should be directed that, in considering that case, they should bear in mind how far the damage suffered by the plaintiffs can reasonably be attributed solely to the libel with which they are concerned, and how far it ought to be regarded as a joint result of the libels. There is yet a further point, and that is in so far as the damages represent loss of profits, the principle is that the damages must be reduced by the amount of tax which the plaintiff would probably have had to pay on them had he received them in the form of profits. In other words the principle of *British Transport Commission* v. *Gourley* [1956] A.C. 185 applies, or can apply, to damages awarded in an action for defamation.

The other case on defamation which I will mention briefly, *Plummer* v. *Charman & Others* [1962] 1 W.L.R. 1144; 3 All E.R. 823, relates to the defence of privilege in relation to election addresses. It was held in *Braddock* v. *Bevins* [1948] 1 K.B. 580 that statements contained in an election address of one candidate concerning the opposing candidate and his supporters enjoyed qualified privilege, provided they were relevant to matters arising in the election. This decision was, however, overruled by s. 10 of the Defamation Act, 1952, which provides that " a defamatory statement published by or on behalf of a candidate in any election to a local authority or to Parliament shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue of the election, whether or not the person by whom it is published is qualified to vote at the election ". The defendants were candidates in the L.C.C. election for Deptford and they published in their election address a statement alleged to be defamatory of the plaintiff Sir Leslie Plummer, the Labour M.P. for Deptford. In their defence the defendants pleaded two defences (*a*) a denial that the words were defamatory; (*b*) fair comment. The case came on for trial about a year after the defence was filed, and ten days before the trial the defendants told the plaintiff that they were going to apply for leave to amend the defence by adding a plea of privilege, based broadly on the fact that the electors of Deptford had an interest in the subject matter of the election address and that the defendants as candidates were under a duty to the residents of Deptford. The Court of Appeal upheld the refusal of the trial judge to allow the amendment, first because the defence, even if it were allowed to be pleaded, was clearly invalidated by s. 10, and also because it was far too late—so near the trial—to allow such an amendment. Lord Denning pointed out that there might be exceptional cases where qualified privilege could be pleaded in relation to an election despite s. 10, where there was a matter of common interest quite independently of its being the occasion of an election, or being contained in an election address.

DAMAGES

The next cases I come to refer to damages and they really fall into three groups. First, what deductions should be made from damages in pursuance of the principle established in *British Transport Commission* v. *Gourley* [1956] A.C. 185? Secondly, what is the measure of damages in the case where very serious personal injuries have been suffered, and thirdly, damages under the Fatal Accidents Act.

You will remember that in the *Gourley* case the House of Lords decided that in awarding damages for loss of earnings or profits the damages should be reduced by the amount of income tax which the plaintiff would have had to pay on the earnings or profits, had they not been lost through the defendant's tortious act. The principle of *Gourley's* case has been very widely applied in the last few years in relation to tax (although its application as regards damages for breach of contract is now open to some doubt—see *Parsons* v. *B.N.M. Laboratories, Ltd.* [1963] 2 W.L.R. 1273; 2 All E.R. 658), but clearly the same principle can apply to other payments which the employee would have had to make out of his wages or earnings in addition to income tax. The principle is neatly summarised by Mr. Justice Lawton in *Cooper* v. *Firth Brown, Ltd.* [1963] 1 W.L.R. 418; 2 All E.R. 31. He said: " it seems to me that the object of damages is to compensate the plaintiff for what he has lost, and what he has lost is what would have been in his pay packet when he took it home ". Applying this principle, he held that the National Insurance contributions which would have been deducted by the employer from the employee's wages should be deducted from the damages for loss of earnings recoverable by the employee in an action against a tortfeasor who had deprived him of those earnings. Also, of course, the damages were reduced by the amount of income tax the employee would have paid.

The next case in this group is *Browning* v. *War Office & Another* [1963] 1 Q.B. 750; 2 W.L.R. 52; [1962] 3 All E.R. 1089. The plaintiff was a sergeant in the United States Air Force stationed in England, who was very severely injured in a motor accident caused by the negligence of an employee of the War Office. As a result of his injuries he was eventually discharged from the United States Air Force and became entitled as of right to a disability pension, known as a Veteran's Benefit. In his action against the War Office he was clearly entitled to damages representing the loss of future earnings in the Air Force, as he would normally have been expected to serve in it until usual retirement age. But the defendants alleged that these damages should be reduced by the amount of the disability pension. The judge of first instance held that the pension should not be taken into account, following *Payne* v. *Railway Executive* [1952] 1 K.B. 26, in which the Court of Appeal had held, in a similar action brought by a sailor in the Royal Navy, that his disability pension should not be taken into account to reduce his damages—although in that case the disability pension was discretionary and not as of right in

the present case. The defendant appealed, and the majority of the Court of Appeal held that they were not bound to follow the earlier decision in *Payne's* case because the ratio was inconsistent with the House of Lords' decision in the *Gourley* case. The principle, according to Lord Denning, is that the plaintiff should give credit for all sums which he received in diminution of his loss save in so far as it would not be fair or just to require him to do so. This leads to a rule that he should give credit for any sums which he receives as of right in consequence of his injury, though this, of course, is subject to certain exceptions, notably payments under an insurance policy the injured person has himself taken out. It was quite clear that he would have to give credit for his earnings whilst he still remained in the Air Force and for any half-pay which he received whilst still in the service. It would therefore be illogical to draw a distinction between half-pay received during his service and half-pay in the form of the disability pension received after his service had officially finished. Lord Justice Diplock based his reasoning on the fact that if the pension was not taken into account the damages would partake of a punitive rather than a compensatory nature and, as this was clearly inconsistent with the ratio of *Gourley's* case, the decision in *Payne* must be regarded as having been overruled. Indeed, in *Payne's* case itself, Singleton, L.J., preferred to put his decision on the ground that the pension was discretionary. The dissenting member of the Court, Lord Justice Donovan, felt that *Payne* was still binding and was not overruled by *Gourley*, as the House of Lords had not had this kind of problem in mind in that case.

Rather similarly, in the case of *Parsons* v. *B.N.M. Laboratories, Ltd.*, the Court of Appeal, again by a majority, reduced the damages by the amount of the unemployment benefit which the plaintiff had received after being wrongfully dismissed by his employers. There is obviously a strong parallel between this case and *Browning's* case. This is, of course, a case on contract and was I think mentioned to you in the lecture on contract, but the principle would seem clearly to apply in tort as well as in contract. It can hardly be said, however, that the Court of Appeal applied its earlier decision in the *Browning* case. This was again a majority decision, and the two majority members of the Court were a little dubious of the ratio in the *Browning* case, based as it was on the implicit understanding that *Payne's* case had been overruled by the House of Lords in *Gourley*. Nevertheless, they both clearly thought that *Gourley's* case and *Browning's* case between them had considerably weakened the authority of *Payne* v. *Railway Executive*. The dissenting member of the Court, Sellers, L.J., unrepentantly adhered to the decision in *Payne* in which case he was the judge at first instance.

The question as to what amount of damages are to be awarded in respect of a personal injuries claim is always a difficult one, because of course personal injuries cannot be measured accurately in terms of money, and yet the compensation must be a monetary compensation.

Nevertheless, in the usual cases where, for example, the plaintiff has lost a leg as a result of the defendant's tort, the court arrives at a figure of damages without too much difficulty. There have, however, recently been two very tragic cases where the plaintiff had suffered very serious injuries indeed, and here the question has become particularly difficult. In the earlier case, *Wise* v. *Kaye* [1962] 1 Q.B. 638, which was mentioned to you last year, the plaintiff was, and remained till she died after the action, completely unconscious. She had lost all the amenities of life and would remain in hospital for the remainder of her life. The later case, *H. West & Son, Ltd. and Another* v. *Shephard* [1963] 2 W.L.R. 1359; 2 All E.R. 625, was a House of Lords decision in which the Court of Appeal decision in *Wise* v. *Kaye* was under review. The plaintiff, a married woman of 41 and the mother of three children, had been most seriously injured by the defendant's tortious act. The result was that she was permanently bedridden and would need constant hospital treatment. She was unable to speak and almost entirely paralysed, but she did show some slight recognition of relatives and members of the nursing staff and of food she liked or disliked. Her expectation of life was seven years from the accident and she had, of course, lost all the amenities of life. She was maintained and would remain in a hospital under the National Health Service. The trial judge awarded £17,500 general damages, of which £2,500 were attributable to the possibility of the plaintiff being to some extent aware of her sad condition. In *Wise* v. *Kaye* where the plaintiff remained completely unconscious the damages awarded had been £15,000. The cases really raised two general problems. First, how are general damages affected, if at all, by the fact that the plaintiff is unconscious ? Secondly, how are they affected, if at all, by the fact that the sufferer will not be able to make use of any monetary damages which may be awarded to him or her ? The House of Lords in *West* v. *Shephard* upheld by a majority the award of the trial judge. Lord Morris of Borth-y-Gest pointed out that damages "are awarded as a fair compensation for that which has in fact happened and will not arise in respect of anything that has not happened". In measuring these damages there is both an objective and a subjective element. The subjective element relates to those heads of damage which can only exist by being felt or thought or experienced. The fact of unconsciousness is therefore relevant in this connection, since an unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowing of what in life has been lost, or from knowing that his or her life has been shortened. Nevertheless, the fact of unconsciousness does not eliminate the fact that the ordinary experience and amenities of life have been taken away as the inevitable result of the physical injuries and here the damages are awarded on an objective basis. In this case, although the damages were high, they were not so high that they should be interfered with by an appellate court. At the age of 41 virtually everything had been taken away from the plaintiff. For about the seven years which she was expected to live, instead of having a full life of activity she would have

nothing more than a mere existence, except that she might in addition have the torment of realising her dreadful condition. This constituted grave and sombre deprivations for which she was entitled to receive substantial compensation. As Lord Pearce said, " the practice of the courts has been to treat bodily injury as a deprivation which in itself entitled a plaintiff to substantial damages according to its gravity ". The majority of the House also held that *Benham* v. *Gambling* [1941] A.C. 157 did not affect this kind of problem, as it was confined to the measure of damages for loss of expectation of life, for which nowadays of course a conventional, and much smaller, figure is given.

The second problem, that the sufferer would probably not be able to make use of any money which was awarded, was held not to affect the measure of damages. If it did a rich man who was not in need would not be granted proper compensation in so far as he would not need it or be able to make use of it in view of the wealth he already possessed. The judge at first instance might have been open to criticism had he arrived at the figure of £17,500 merely by taking the £15,000 awarded in *Wise* v. *Kaye* and adding to that £2,500 for the possible realisation of her plight by the plaintiff. In fact, however, Lord Pearce expressed the view that to assume this would not do justice to the experience of the judge and that he was merely referring to *Wise* v. *Kaye* as a check on his own view of the appropriate damages to be awarded, as he was fully entitled to do.

FATAL ACCIDENTS ACTS DAMAGES

Of the two cases on damages to be awarded under the Fatal Accidents Acts, 1846-1959, the shorter point arose in *Curwen* v. *James & Others* [1963] 1 W.L.R. 748; 2 All E.R. 619. A young husband of 22 had been killed, and his widow, aged 24, was awarded damages under the Fatal Accidents Acts of £4,000. The trial judge had reduced the damages he would otherwise have awarded because of the fact that she was an attractive young woman who might quite possibly re-marry. In fact, after the trial and before the expiry of the time for giving notice of appeal, she did re-marry. The Court of Appeal held that where the re-marriage occurred before the time for giving notice of appeal had expired, the re-marriage was a known fact which should be taken into account and accordingly her damages were reduced by one-half from £4,000 to £2,000. The position if the re-marriage had occurred after the expiry of the time limited for service of notice of appeal was not decided. The damages might well have been reduced more had the defendants, upon whom lay the burden of proof in this respect, adduced evidence to show the means of the widow's second husband.

The second case, *Malyon* v. *Plummer* [1963] 1 Q.B. 419; 2 W.L.R. 1213; 2 All E.R. 344, also concerns the death of a husband. He and his wife were the sole directors and shareholders of a small company

which was in effect a family business. The wife was paid a salary which varied in amount between £600 and £800 a year and this was clearly in fact more than her actual services warranted. Her salary was paid into the husband's bank account and was used for the general benefit of the family. The defendants contended that the damages should be reduced by the amount of this salary as it was not a benefit to the wife attributable to the husband-wife relationship, but was derived from an employer-employee relationship (see *Burgess* v. *Florence Nightingale Hospital for Gentlewomen Management Committee* [1955] 1 Q.B. 349).

The judgment of Diplock, L.J., who incidentally referred to the Fatal Accidents Act, 1846, as the re-introduction by Parliament of " the principle of blood money " sets out very clearly the measure of damages under the Acts as follows: " the pecuniary loss which the court has to assess is a loss which will be sustained in the future. This involves making two estimates, *videlicet* (i) what benefit in money or money's worth arising out of the relationship would have accrued for the person for whom the action is brought from the deceased if the deceased had survived, but has been lost by reason of his death, and (ii) what benefit in money or money's worth (subject to certain statutory exceptions) the person for whom the action is brought will derive from the death of the deceased which would not have been enjoyed had the deceased lived?". The difference between these two figures is the measure of damages recoverable under the Fatal Accidents Acts. Incidentally, he thought that the reduction in damages which is sometimes made to allow for the likelihood of a young widow's re-marriage (as in *Curwen* v. *James*) is based on the fact that this is a benefit which the widow will derive from the death of the deceased which she would not have enjoyed if the deceased had lived on. This is no doubt justifiable on grounds of pure logic, but is perhaps not a statement which would appeal to all bereaved young widows. In applying these principles to the widow's salary in the present case, the Court of Appeal decided that the only deduction which should be made from the Fatal Accidents Acts damages was one which represented the true value of the services rendered to the company by the widow. This was in fact assessed at £200 per year, attributable to the husband as employer; but the remaining £400 was attributable to him as her husband and was a loss properly recoverable under the Act. In fact it was paid as a salary primarily for the tax advantages which earned income of a wife bestows on a married couple and was therefore part of the dependency and so an element in the damages under the Acts.

The other problem which arose in this case related to insurance. The company had insured the husband's life for £2,000 and the insurance money was paid to the company on his death. The effect was to increase the value of each share in the company which for death duty purposes were valued on an assets basis and which passed to the wife under the husband's will, from 14s. 6d. to £2 14s. 6d., the main asset of the company being the insurance money The wife clearly had to give some credit

for the value of the shares which she received as this was a benefit accruing due to the husband's death. But the Court of Appeal held that the £2,000 insurance money should not be taken into account because of the very wide wording of s. 2 (1) of the Fatal Accidents Act, 1959. This provides that " in assessing damages in respect of a person's death in any action under the Fatal Accidents Act, 1846 . . . there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death ".

CHATTELS

Now we come to an entirely different topic—the rights of a finder of goods. It is a topic with which students of tort soon become familiar, but after that it very often becomes forgotten and merely recalls vague memories of chimney sweeps' boys (*Armory* v. *Delamirie* (1721), 1 Stra. 505) and of prehistoric boats (*Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562). The common law rule is, of course, that a finder of goods in a public place has a better title to them than anyone except the true owner. The difficulties have always arisen where goods were found on or in or under private land, as the prehistoric boat found embedded in the mud in *Elwes* v. *Brigg Gas Co.* and the valuable rings found at the bottom of the pool in *South Staffordshire Water Co.* v. *Sharman* [1896] 2 Q.B. 44.

In the case of *Corporation of London and Others* v. *Appleyard and Another* [1963] 1 W.L.R. 982; 2 All E.R. 834, the Corporation were the freeholders of a site in the City of London. This was let to leaseholders who were in possession (there were in fact two of them, but I do not think we need distinguish between them for our purpose). They had entered into a building contract with a firm of builders to erect a new building on the site. Whilst working on the site, two workmen employed by the builders found in the cellar an old wall safe built into the wall. This contained bank notes worth some £5,728. The true owner of the notes had never been found. The competing claimants were the Corporation as freeholders, the leaseholders, and the finders themselves. The judge applied *South Staffordshire Water Co.* and decided that where the notes were found in these circumstances, as the safe being built into the wall formed part of the demised premises, possession and the right to possess anything in it was the leaseholders as the persons in possession of the land. In point of fact a decision in favour of either the leaseholders, or the workmen who found the notes, would not have done either of them much good, in that the leaseholders, who were held entitled, immediately had to account for the value to the Corporation of London, not under any common law rule, but under the terms of a contract between them; and the judge was of the opinion that had the workmen been entitled they would have had to hand the value of the notes over to their employers, the building contractors, on the principle that a servant who receives property or money (whether honestly or corruptly) by reason

of his employment is accountable for it to his master. The judge did not find it necessary to consider the possible distinctions that may exist between, for example, chattels found upon premises, those found under land, and those found embedded in land. In this case the wall safe was quite clearly part of the demised premises of which the leaseholders were in lawful and *de facto* possession.

The last case, *General & Finance Facilities, Ltd.* v. *Cooks Cars (Romford), Ltd.* [1963] 1 W.L.R. 644; 2 All E.R. 314, involves the now relatively uncommon tort of detinue. I will not go into the facts of this case but the judgment of Lord Justice Diplock is well worthy of attention as setting out the differences between the causes of action in conversion and detinue, and the differences between the remedies for each. The cause of action in conversion is a single wrongful act which accrues at the date of the conversion, whereas in detinue the cause of action is a continuing one which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up, or judgment in the action for detinue. Demand for delivery up of the chattel was an essential requirement of the action in detinue and the action would only lie if at the time of the demand for delivery up of the chattel the defendant was either in actual possession of it, or was estopped from denying that he was still in possession. A similar unqualified refusal to comply with the demand for delivery up could also constitute conversion, but again only if the defendant at the time of the refusal was in actual possession of the chattel. If he had already wrongly delivered it to a third person before the date of the demand, the wrongful delivery constituted the conversion and not the subsequent refusal to comply with the demand. As to the differences in the remedies available in actions for conversion and detinue, the action in conversion, being purely personal, results in a judgment for pecuniary damages only. This is for a single sum of money, of which the measure is generally the value of the chattel at the date of the conversion, together with any consequential damage flowing from the conversion and not too remote to be recoverable. This, said the judge, is not necessarily the same as the measure of damages for detinue, where the same act constitutes detinue as well as conversion, although often this will be so (he criticised the dictum of Goddard, C.J., in *Sachs* v. *Miklos* [1948] 2 K.B. 23, to this effect, being of the opinion that the headnote in *Rosenthal* v. *Alderton* [1946] 1 K.B. 374, on which it was based, misrepresented the effect of part of the judgment in that case). The judgment for damages in conversion does not divest the plaintiff of his property in the chattel, but he is not entitled to the assistance of the court to recover possession of such chattel.

On the other hand an action in detinue today may result in a judgment in one of three different forms. First of all, for the value of the chattel as assessed and damages for its detention; or, secondly, for the return of the chattel or recovery of its value as assessed and damages for its detention; or, thirdly, for return of the chattel and damages for its detention. The first of these forms of judgment is much the same in

effect as the remedy in conversion, although the sum recoverable may not be the same. It deprives the defendant of the option which he formerly had under the old common law form of judgment of returning the chattel. This form would, of course, be most appropriate where the chattel is an ordinary article of commerce without any particular intrinsic value. A judgment in the second form gives the defendant the option of returning the chattel, but also gives the plaintiff the right to apply to the court to enforce specific restitution of the chattel by writ of delivery, or attachment or sequestration as well as recovering damages for its detention. Since the plaintiff had this option of applying for the return of the chattel, although such return would be in the discretion of the court, it is necessary that the judgment should specify separate amounts for the assessed value of the chattel and for the damages for its detention. The latter, of course, the plaintiff will get in any event. In this case the form of judgment was merely for return of the chattel, or recovery against the defendant of its value and damages to be assessed. The court held that this would have to go back to the master on the assessment of damages as it was necessary for the value of the chattel to be assessed separately from the damages for its detention. The latter would be recoverable by the plaintiff in any event; the former would give him the chance of deciding whether to apply for the return of the chattel itself, or to take its value.

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