In *Blake* v *Galloway* [2004] 3 All ER 315, a group of 15 boys went out to play at the lunchtime break. They began throwing bits of bark and twigs at each other. The claimant picked up a piece of bark and threw it towards the defendant's lower body. The defendant threw it back in the general direction of the claimant, striking him in the eye and causing significant injury. The claimant sued in negligence and battery.

The Court of Appeal turned down the claim. In doing so, the court laid down some principles to apply in these cases. They are:

- The accident must not be the result of a departure from the conventions of the activity. For example, in a snowball fight it is a convention that there are no stones in the snowballs. There will normally be no liability unless the conduct in question is regarded by the court as overstepping the mark. In this case there was no deliberate aiming at the claimant's eye, nor were the missiles selected as being inherently dangerous.
- Where the above principles were established the court would *imply consent*.

  An additional case in this area is *Babbings* v *Kirklees Council* (2004) *The Times*, 4 November, where the Court of Appeal refused a right of Appeal to Lauren Babbings when she broke her arm in a gym class. The Court of Appeal said that although such injuries were foreseeable, they were in the nature of the ordinary risks of school activity and Ms Babbings' claim failed. Brooke LJ said of the case: 'How boring things would be if there was no risk.'

When we come to consider the duty of care in negligence in Chapter 21, we shall see how the Compensation Act 2006 is also attacking the compensation culture which has caused problems in terms, for example, of school trips and holidays.

## Notice

In addition, the claimant may be *expressly* put on notice that he undertakes a particular activity at his own risk. Thus in *Arthur* v *Anker* (1995) *The Times*, 1 December a motorist parked his car on private property despite having seen a warning notice. His car was clamped and a release fee of £40 charged. He sued for damages for tortious interference with his car. It was held by the Court of Appeal that his claim failed. By reading the sign he had impliedly consented to the clamping of his car. He had voluntarily accepted the risk that this would happen.

However, it is essential for the defendant to show as a matter of fact that the claimant agreed to *accept* the risk. This means, for one thing, that he must have had a choice and if a contract, e.g. of employment, forces him to accept the risk, there is no true assent.

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*Burnett* v *British Waterways Board*, 1973 – No true consent (**301**)

## Contractual consent

If a person's assent to harm being inflicted upon him is purely contractual, it can only operate within the limits allowed by the law of contract; the doctrine of privity of contract applies. Thus, if a carrier by road puts an exclusion clause in the contract with the customer excluding liability for damage to the goods, the customer could sue the driver if his negligence caused damage to the goods. The driver could not raise the exclusion clause in his defence because he was not a party to the contract in which it was contained. The above situation will only apply if the parties to the original contract have *not* granted third-party rights to the driver under the Contracts (Rights of Third Parties) Act 1999 or, if *not*, where the court does not in the circumstances *imply* the grant of rights. Sometimes a non-contractual agreement excluding liability for negligence has been upheld.

*White* v *Blackmore*, 1972 – A non-contractual assent (**302**)

## Defendant's knowledge of risk

The defendant must show that the claimant knew of the risk (see *White* v *Blackmore*, 1972). He must then go on to show that the claimant agreed to accept the risk. It does not follow that because a person has knowledge of a potential danger he assents to it. The rule applies equally to cases of *implied volenti* and to cases of *express volenti* (see *Burnett* v *British Waterways Board*, 1973). This principle, i.e. that knowledge is not assent, is most often exemplified in the employer and employee cases and in rescue cases, and has restricted the application of the defence.

*Baker* v *James Bros*, 1921 – Knowledge is not assent: a defective motor car (**303**)
*Dann* v *Hamilton*, 1939 – A drunken driver (**304**)
*Smith* v *Baker*, 1891 – Stone which fell from a crane (**305**)

## Inherent danger

Where the danger is inherent in the job, as in the case of a test pilot, the maxim applies; but where the danger is not inherent, the defence will rarely succeed (see *Smith* v *Baker*, 1891). In instances where an employee expressly assumes a risk, and is even paid extra for doing so, the harm resulting will hardly ever be laid at the door of the employer, unless there is evidence that the employer was negligent and created a risk which was not normally present even in a job inherently dangerous.

## Statutory duties

The doctrine of *volenti non fit injuria* cannot be pleaded by an employer in an action for damages based on breach of a statutory duty, e.g., to fence machinery under safety legislation. The reason is that the object of the statute, to protect workers, cannot be defeated by a private agreement between employer and employee.

However, where an employee is in breach of a statutory duty and the employer is not, then if the party injured by the breach of statutory duty seeks to make the employer vicariously liable for the tort of the employee, the employer can plead the defence if the circumstances are appropriate.

*ICI* v *Shatwell*, 1964 – *Volenti* and breaches of statutory duty (**306**)

## The rescue cases

A different situation arises in what are known as *rescue cases*. In these the claimant is injured while intervening to save life or property put in danger by the defendant's negligence. If the intervention is a reasonable thing to do for the saving of life or property, this does not constitute the assumption of risk, nor does the defence of contributory negligence apply, but if it is not reasonable then the defences of *volenti* and contributory negligence could apply.

A person may take greater risks in protecting or rescuing life than in the mere protection of property, though even in protecting property reasonable risks may be taken.

*Baker* v *Hopkins*, 1959 – An attempted rescue (**307**)
*Cutler* v *United Dairies*, 1933 – An unnecessary intervention (**308**)
*Hyett* v *Great Western Railway*, 1948 – Preserving property (**309**)

## Duty to rescuers

The duty of care owed to a rescuer is an original one and is not derived from or secondary to any duty owed to the rescued person by another. Thus a rescuer may recover damages even though no duty was owed to the person rescued. In addition, the person rescued may be liable in negligence to the rescuer. In *Harrison* v *British Railways Board* [1981] 3 All ER 679, Mr Harrison, a guard, jumped off his train as it left the platform to rescue a fellow-employee, A, who was negligently trying to board the moving train, but had slipped and was hanging on to a carriage door. The driver, who was unaware of the incident, was not in any way negligent but A was held liable to Mr Harrison in negligence in regard to the injuries which Mr Harrison sustained when he jumped off the train in order to rescue A.

In *Frost* v *Chief Constable of South Yorkshire Police* (1996) 146 NLJ Rep 1651 police officers who suffered psychiatric illness as a result of their involvement as rescuers in the disaster at the Hillsborough football ground were held by the Court of Appeal to be owed a duty of care by the Chief Constable and entitled to damages. Rescuers were in a special category, it was said. People who witnessed the incident might not recover damages because they had to meet more stringent tests. Furthermore, the defendant could not successfully plead that the officers were volunteers.

This decision was reversed by the House of Lords on the basis that there was no duty of care to the police officers as rescuers for psychiatric injury because, although present, they were not relatives and to give them damages when bereaved relatives who had not seen the accident had been denied compensation would not fit easily or fairly with the general law on damages for nervous shock (see later in this chapter). A report of the case is to be found at [1998] 3 WLR 1509. The police officers were not regarded as volunteers, but the case illustrates that a rescuer even though not a volunteer will not be able to recover damages if there is in the circumstances no duty of care.

Moreover, it is important to remember that the question whether the claimant has assented to the possibility of harm being inflicted upon him does not arise until it has been shown that the defendant has committed a tort against the claimant. If the harm is not tortious, the defence is irrelevant.

Finally, Parliament has in s 149(3) of the Road Traffic Act 1988 legislated to prevent exclusion of liability to passengers in motor vehicles on the basis of *volenti*. This certainly covers cases of express *volenti* where a person is given a lift in a car in which there is a notice saying that passengers are at their own risk. Whether it covers cases of implied *volenti* such as *Dann* v *Hamilton* (1939) is more doubtful. A passenger who knows that a driver is under the influence of drink or drugs may, if he is injured, be barred from recovering damages on the grounds of *public policy* since he is aiding and abetting a criminal offence. For this reason there is doubt as to the correctness of the decision in *Dann* v *Hamilton* (1939) where the public policy principle was not considered.

Section 149 of the 1988 Act does not prevent the driver from pleading contributory negligence if this is appropriate.

*Videan* v *British Transport Commission*, 1963 – Where no duty is owed to the person rescued (**310**)

*Wooldridge* v *Sumner*, 1962 – Has the defendant committed a tort? (**311**)

*Nettleship* v *Weston*, 1971 – Matters of public policy (**312**)

## Inevitable accident

The mere fact that the damage caused is accidental cannot itself be a defence if there is a duty to avert the particular consequences, but there are occasions where the defence of inevitable accident can be raised. Such an accident would be one which was not avoidable by any precautions a reasonable person could have been expected to take. It should be noted, however, that most so-called accidents have a cause, and this defence is of comparatively rare occurrence.

*Stanley* v *Powell*, 1891 – An inevitable accident (**313**)

*National Coal Board* v *Evans*, 1951 – Cutting a cable (**314**)

## Act of God

This is something which occurs in the course of nature, which was beyond human foresight, and against which human prudence could not have been expected to provide. It is something in the course of nature so unexpected in its consequences that the damage caused must be regarded as too remote to form a basis for legal liability. It arises always from the course of nature and has no human causation. This distinguishes it from inevitable accident.

*Nichols* v *Marsland*, 1876 – An act of God (**315**)

## Necessity

This defence is put forward when damage has been intentionally caused, either to prevent a greater evil or in defence of the realm. The latter is somewhat obsolete but there are some older cases which have allowed trespass by one person to the land of another to erect fortifications to defend the realm against an army. Such damage is justifiable if the act was reasonable. Thus where a whole area is threatened by fire, the destruction of property not yet alight with a view to stopping the spread of the flames would be damage intentionally done but reasonable in the circumstances. Furthermore, in *Leigh* v *Gladstone* (1909) 26 TLR 139 the forcible feeding of a suffragette in prison was held justified by the necessity of preserving her life. This decision, which has been much criticised, means that it is not an assault for prison officials to take reasonable steps to preserve the health and life of those in custody. The practice of force-feeding is no longer applied in the prison service.

However, duress does not appear to be a defence and in *Gilbert* v *Stone* (1647) Aleyn 35, the defendant was held liable for trespass although he entered the claimant's house only because 12 armed men had threatened to kill him if he did not do so.

*Cresswell* v *Sirl*, 1948 – Necessity: when dogs worry sheep (**316**)

*Cope* v *Sharpe*, 1912 – Necessity: a heath fire (**317**)

## Mistake

It is normally no defence in tort to say that the wrongful act was done by mistake. Even if the consequences of an act were not fully appreciated, everyone is, at least in civil law, presumed to intend the probable consequences of his acts. A mistake of law is no excuse, and this is usually true of a mistake of fact, unless it is reasonable in the circumstances, e.g. in a case of wrongful arrest.

However, the defence of unintentional defamation under ss 2–4 of the Defamation Act 1996 is to some extent based on mistake (see Chapter 21).

*Beckwith* v *Philby*, 1827 – A mistaken arrest (**318**)

## Act of state

Sometimes the state finds it necessary to protect persons from actions in tort when they have caused damage whilst carrying out their duties. This defence cannot be raised in respect of damage done anywhere to British subjects or where the court holds that damage has been done to a friendly alien.

*Buron* v *Denman*, 1848 – Act of State and a slave trader (**319**)

*Nissan* v *Attorney-General*, 1967 – Defence not available against British subjects (**320**)

*Johnstone* v *Pedlar*, 1921 – Damage to a friendly alien (**321**)

## Statutory authority

The acts of public authorities, e.g., local authority councils, are often carried out under the provisions of a statute. This statutory authority to act may give the public authority concerned a good defence if an action in tort arises as a result. However, much depends upon the wording of the relevant statute. *Statutory authority may be absolute*, in which case the public authority concerned has a duty to act. Alternatively, *statutory authority may be conditional*, in which case the public authority concerned has the *power* to act but is not bound to do so.

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If the authority given is *absolute*, the body concerned is not liable for damage resulting from the exercise of that authority, provided it has acted reasonably and there is no alternative way of performing the act.

On the other hand, if the authority given is *conditional*, the body concerned may carry out the relevant act only if there is no interference with the rights of others.

Whether statutory authority is *absolute* or *conditional* is a matter of construction of the statute concerned, though statutory powers are usually conferred in *conditional* or permissive form. The basic rules of construction in these cases appear to be as follows:

(*a*) Is the authorised act of such public importance as to override private interests?
(*b*) If it is not, statutory powers are probably conferred subject to common-law rights.

In addition, the matter of statutory compensation may be relevant. If the statute provides for compensation for loss resulting from an authorised act, there may be no other claim even though the maximum compensation allowed by the statute is less than the actual loss. On the other hand, if there is no provision for compensation in the statute, there is a presumption that private rights remain and that an action in respect of any infringement of these rights may be brought.

It should be noted that the above principles also apply where the act done is authorised by delegated legislation.

*Vaughan* v *Taff Vale Railway*, 1860 – An absolute authority (**322**)
*Penny* v *Wimbledon UDC*, 1899 – A conditional authority (**323**)
*Marriage* v *East Norfolk Rivers Catchment Board*, 1950 – Statutory compensation (**324**)

### Justification or self-defence

Where a person commits a tort in defence of himself or his property, he will not be liable, provided the act done in such defence is reasonable or proportionate to the harm threatened, though no provocation by words can justify a blow (*Lane* v *Holloway* [1967] 3 All ER 129). The defence extends to acts in defence of the members of one's family and probably to acts in defence of persons generally.

The matter of self-defence is most often raised in criminal cases and is an important part of the criminal law (see Chapter 25).

### Illegality

It would appear that an action in tort may be defeated on the ground that the claimant was committing an illegal or immoral act when the tort occurred. Thus, in *Ashton* v *Turner* [1980] 3 All ER 870 three men committed a burglary after an evening's drinking and sought to escape in a car owned by one of them. The car crashed and a passenger was injured. He claimed damages alleging negligence against the driver and the car owner. It was held by Ewbank, J, dismissing the claim, that as a matter of public policy the law might not recognise a duty of care owed by one participant in a crime to another for acts done in the course of that commission, and in any case *volenti non fit injuria* was a defence open to the driver. Again, in the Irish case of *Hegarty* v *Shine* (1878) 4 LR Ir 288 the claimant, an unmarried woman, brought an action for trespass on the grounds that she had contracted venereal disease following her relationship with the defendant over a period of some two years. Palles, CB denied her a remedy, saying 'the cause of an action here is a *turpis causa* incapable of being made the foundation of an action. The cause of action is the very act of illicit sexual intercourse'. It would appear, therefore, that the maxim *ex turpi causa* is not confined solely to contract. (For the contractual application see Chapter 16.)

## Remedies

The remedies available to a person who has suffered injury or loss by reason of the tort of another are *damages*, the granting of an *injunction*, and in some cases an order for *specific restitution* of land or chattels of which the claimant has been dispossessed.

## Damages – generally

Usually the damages awarded are *compensatory* and the underlying principle is that of *restitutio in integrum*, i.e. the damages awarded are designed to put the claimant in the position he would have been in if he had not suffered the wrong.

In the case of *personal injury*, e.g. loss of a limb, damages obviously cannot restore the claimant to his previous position. However, damages for personal injuries may be awarded under the following heads:

(*a*) pain and suffering;
(*b*) loss of enjoyment of life, or of amenity, as where brain damage causes permanent unconsciousness;
(*c*) loss of earnings, both actual and prospective.

As regards pain and suffering, the House of Lords held in *Hicks* v *Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65, a case arising from the Hillsborough disaster, that pain and suffering immediately prior to a rapid death was not recoverable.

As regards earnings, *Oliver* v *Ashman* [1962] 2 QB 210 decided that where a tortious act had reduced the life expectancy of the claimant, he could recover a sum representing loss of earnings for the reduced number of years for which he was likely to live but not for the lost years. In *Pickett* v *British Rail Engineering Ltd* [1979] 1 All ER 774, the House of Lords overruled *Oliver* and decided that earnings during the lost years should be taken into account, less, of course, taxation (see *Gourley* below) and the deduction of an estimated sum to represent the victim's probable living expenses during those years. Thus if A, aged 30, is injured by negligence and would have lived to 70 before but since the accident only to 50, then earnings from ages 30 to 50 and 50 to 65 (the lost years) must now be taken into account.

Although s 1(1)(a) of the Administration of Justice Act 1982 has abolished the claim for *damages* for loss of expectation of life, it leaves unchanged the right to claim *income* for the 'lost' years.

## Personal injury – the amount

There had been concern in the judiciary following the Law Commission's Report, *Damages for Personal Injury Non-Pecuniary Loss* (1999 Law Com No 257), that the sums being awarded for pain, suffering and loss of amenity were too low and the matter was dealt with by the Court of Appeal in *Heil* v *Rankin* [2000] PIQR Q187. The general effect of the case is that where the court intends to award damages for pain, suffering and loss of amenity below £10,000 there is to be no increase. However, awards above that should be increased in accordance with a sliding scale which in the most serious cases is to be as high as an increase of one-third.



## Deductions – tax

The House of Lords decided in *British Transport Commission* v *Gourley* [1955] 3 All ER 796 that the fact that the claimant would have paid tax on his earnings must be taken into account so as to reduce the damages awarded in regard to earnings. The money is not paid to the Revenue so it is a benefit either to the defendant or to his insurance company. However, the rule has some logic on the grounds that damages are *compensatory*, and gross salary must be reduced to net salary to achieve true compensation.

Reference should be made again to this case and the decision in *Shove* v *Downs Surgical plc* [1984] 1 All ER 7 which accompanies it to revise the precise nature of the tax deduction.

## Deductions – collateral benefits

The Law Reform (Personal Injuries) Act 1948, s 2 (as amended) requires deduction of the value of certain Social Security benefits, e.g. benefits payable for sickness and/or disablement

received by the claimant or likely to accrue to him for five years after the accident occurred, though if the claimant did not know that he had a right to a particular form of national insurance benefit, and had not acted unreasonably in failing to claim it, the sum which he might have received will not be deducted from the damages awarded (*Eley* v *Bedford* [1971] 3 All ER 285).

Many cases have come before the courts on the matter of deduction of a wide variety of collateral benefits. In general the policy is one of non-deduction and sums received from other forms of insurance are not taken into account, nor is a disability or state retirement pension (*Parry* v *Cleaver* [1969] 1 All ER 555 and *Hewson* v *Downes* [1969] 3 All ER 193).

## Classification of damages

It is possible to classify damages under a number of headings, and this classification applies to both contract and tort.

### *Ordinary damages*

These are damages assessed by the court for losses arising naturally from the breach of contract, and in tort for losses which cannot be positively proved or ascertained, and depend upon the court's view of the nature of the claimant's injury. For example, the court may have to decide what to award for the loss of an eye, there being no scale of payments, and this is so whether the action is in tort or for breach of contract.

### *Special damages*

These are awarded in tort for losses which can be positively proved or ascertained, e.g. damage to clothing; garage bills, where a vehicle has been damaged; doctor's fees; and so on. However, where it is difficult to determine the exact proportions of a claim for special damages, e.g. loss of profit not supported by accurate figures, the court must do its best to arrive at a fair valuation (*Dixons Ltd* v *J L Cooper Ltd* (1970) 114 SJ 319). In contract, the term covers losses which do not arise naturally from the breach, so that they will not be recoverable unless within the contemplation of the parties as described in Chapter 18.

### *Exemplary and aggravated damages*

The usual object of damages both in contract and tort is to compensate the claimant for loss which he has incurred arising from the defendant's conduct. The object of *exemplary* (*or punitive*) *damages* is to punish the defendant, and to deter him and others from similar conduct in the future. Thus, it was at one time thought that, if the court had arrived at a sum of money which would sufficiently compensate the claimant, it could award a further sum, not as compensation for the claimant, but as a punishment to the defendant, the exemplary damages being in the nature of a fine. An award of exemplary damages had always confused the functions of the civil and criminal law, and it would appear that since the judgment of Lord Devlin in *Rookes* v *Barnard* [1964] 1 All ER 367, an award of exemplary damages should only be made in certain special cases as follows:

**(a) Where there is arbitrary or unconstitutional action by servants of the state**, e.g. an unreasonable false imprisonment or detention by state authorities.

An example is to be found in *Kuddus* v *Chief Constable of Leicestershire Constabulary* (2001) *The Times*, 13 June, where the House of Lords ruled that exemplary damages could be awarded to the claimant based on the defendant chief constable's vicarious liability for the

oppressive, arbitrary or unconstitutional action of a police constable who had forged the claimant's signature on a statement which withdrew a complaint about the theft from his home of goods worth some £6,000.

**(b) Where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant.** Thus a newspaper may decide that the increased sales of the paper containing a libel will more than compensate for any damages which may have to be paid to the person libelled. In such a case exemplary damages may be awarded to the claimant, though the intention to profit must be proved. It is not enough that the newspaper has been sold and some profit necessarily made. An example of the application of this head is to be seen in *Cassell & Co Ltd* v *Broome* [1972] 1 All ER 801 where the House of Lords upheld an award of £25,000 exemplary damages against defendants who published a book containing defamatory passages where the right circumstances appeared to exist and a defence, if raised, would have failed.

**(c) Where exemplary damages are expressly authorised by statute.** It was decided by the Court of Appeal in *AB* v *South West Water Services* [1993] 2 WLR 507 that exemplary (or punitive) damages are not available in those cases where they had not been awarded prior to the *Rookes* decision in 1964. This meant that they were not available in claims for negligence or public nuisance (see Chapter 21).

*AB* v *South West Water Services* was overruled in *Kuddus* as wrongly decided. However, Lord Scott observed *obiter* that exemplary damages should not be available in claims for negligence and nuisance or where the defendant was merely vicariously liable though this did not affect the *Kuddus* decision because it was justified by the *Rookes* case.

***Exemplary or punitive damages*** were sometimes awarded in contract for breach of promise of marriage, particularly where a female claimant had allowed the defendant to have sexual intercourse with her on the promise of marriage. This action was abolished by the Law Reform (Miscellaneous Provisions) Act 1970, s 1 and examples of exemplary damages would seem in the main to be confined to actions in tort.

***Aggravated damages***, on the other hand, can be awarded (generally only in tort) where the defendant's conduct is such that the claimant requires more than the usual amount of damages to *compensate him* for the unpleasant method in which the tort was committed against him. However, an award of aggravated damages is still *compensatory*.



The state of the law may perhaps be illustrated by taking a hypothetical case. Suppose a tenant T is evicted from his flat by the landlord L before T's term has expired, and that in order to evict T the landlord uses excessive violence. The court may decide that in an ordinary case of trespass and assault T would be adequately compensated by an award of damages of, say, £750. However, if the court considers that L intentionally used particularly violent and unpleasant methods to achieve this eviction, it may increase the award by, say, £150 as the aggravated element because, on the facts of the case, this is necessary to compensate T. It would appear that the court cannot, since *Rookes*' case, go on and make a further award to T in order to punish and deter L.

The decision of the Court of Appeal in *Khodaparast* v *Shad* (1999) *The Times*, 1 December is to the effect that aggravated damages can be awarded for malicious falsehood. The defendant deliberately set out to injure the claimant by distributing throughout the Iranian community material suggesting that she provided services by way of telephone sex lines. She lost her job as a teacher in an Iranian school. She chose to claim malicious falsehood rather than libel because legal aid is available for such claims though not for libel. She received damages in a total award of £20,000. There is no split of the damages; the court simply makes a higher award. The Court of Appeal affirmed that aggravated damages are compensatory and will not be awarded unless the defendant acted deliberately. Thus, although they would seem to be

available for many intentional torts, e.g. trespass, they would not seem to be available in cases of negligence where there is no intentional conduct.

### Nominal damages

Sometimes a small sum (say £2) is awarded where the claimant proves a breach of contract, or the infringement of a right, but has suffered no actual loss.

### Contemptuous damages

A farthing was sometimes awarded to mark the court's disapproval of the claimant's conduct in bringing the action. Such damages may be awarded where the claimant has sued for defamation of character in spite of the fact that he has engaged in defamatory activities against the defendant. Since farthings are no longer legal tender, the decimal penny would now be used.

### Liquidated damages

These are damages agreed upon by the parties to the contract, and only a breach of contract need be proved; no proof of loss is required. Damages in tort are not normally liquidated.

### Unliquidated damages

Where no damages are fixed by the contract it is left to the court to decide their amount. In such a case the claimant must produce evidence of the loss he has suffered, as is normal in the case of tort.

Liquidated and unliquidated damages have already been considered in more detail (see Chapter 18).

### Structured settlements

These are considered in more detail in Chapter 18.

## Remoteness of damage

The consequences of a defendant's wrongful act or omission may be endless. Even so a claimant who has established that the defendant's wrong caused his loss may be unable to recover damages because his loss is not sufficiently connected with the defendant's wrong to make the latter liable. In other words, the loss is too remote a consequence to be recoverable. The decision of the Judicial Committee of the Privy Council in *Overseas Tankship (UK) Ltd* v *Morts Dock and Engineering Co Ltd* (1961) (see below) (generally referred to as *The Wagon Mound*) laid down the modern test for remoteness of damage in tort which is as follows:

**(a) Regarding culpability or responsibility for the harm.** The test is an objective test rather than a subjective one, because the law substitutes for the defendant a hypothetical reasonable man, and then proceeds to make the defendant only responsible for the damage which the reasonable man would have foreseen as a likely consequence of his act.

**(b) Regarding liability to compensate the claimant.** The law now requires the defendant to compensate the claimant only for the foreseeable result of his act. The defendant is not liable for all the direct consequences of his act, but only for those which, as a reasonable man, he should have foreseen. However, it appears from more recent decisions that the *precise* nature of the injury suffered need not be foreseeable: it is enough if the injury was of *a kind* that was foreseeable even though the form it took was unusual.

*The Wagon Mound*, 1961 – The test for remoteness of damage (**325**)
*Hughes* v *Lord Advocate*, 1963 – Precise chain of events need not be foreseen (**326**)

## *Status of* The Wagon Mound

Certain problems were raised by the decision in *The Wagon Mound*.

(**a**) Being a decision of the Judicial Committee of the Privy Council, it was not binding on English courts but was persuasive only.

In the event the House of Lords in *Hughes* v *Lord Advocate* (1963) (see above) treated the decision in *The Wagon Mound* as a correct statement of the law, subject in *Hughes*' case to an additional principle that the precise chain of circumstances need not be envisaged if the consequence turns out to be within the general sphere of contemplation and not of an entirely different kind which no one can anticipate.

(**b**) Before *The Wagon Mound* there was a well-established principle called the 'unusual plaintiff [now "claimant"]' rule. For example, if X strikes Y a puny blow which might be expected merely to bruise him, but in fact Y has a thin skull and dies from the blow, the law has regarded X as liable for Y's death. The same rule has been applied where the claimant is a haemophiliac, i.e. a person with a constitutional tendency to severe bleeding.

The courts have held that this principle is not affected by *The Wagon Mound* and remains as an exception to it. However, the 'unusual [claimant]' rule seems to apply only to disabilities existing before the accident and not to disabilities arising afterwards.

The test of remoteness of damage in tort as laid down in *The Wagon Mound* relies upon the foreseeability of a reasonable person both in respect of culpability and liability to compensate. It appears, therefore, that the law of remoteness of damage is not the same as in the law of contract. In *The Heron II* (1967) (see Chapter 18) it will be recalled that the House of Lords decided that a party to a contract is not liable for all foreseeable damage but only for that which is 'in contemplation'.

Finally, it is perhaps worth noting that *damage which is intended* is never too remote and in this connection there is an inference that a person intends the natural consequences of his or her acts.

*Smith* v *Leech Braine & Co Ltd*, 1962 – The thin skull rule survives (**327**)
*Martindale* v *Duncan*, 1973 – Poverty is within the unusual claimant rule (**328**)
*Morgan* v *T Wallis*, 1974 – There must be a prior disability (**329**)
*Scott* v *Shepherd*, 1773 – Intended damage never too remote (**330**)

## Novus actus interveniens: *a new act intervening*

A loss may be too remote a consequence to be recoverable if the chain of causation is broken by an extraneous act. The scope of this concept is as follows:

**(a)** When the act of a third person intervenes between the original act or omission and the damage, the original act or omission is still the direct cause of the damage if the act of the third person might have been expected in the circumstances (see *Scott* v *Shepherd* (1773)) or did not materially cause or contribute to the injury. There is a duty to guard against a *novus actus interveniens*.