3. LIABILITY INSURANCE
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1. Negligent statements: the Caparo v Dickman principle.

The restrictions on the range of persons entitled to sue as a result of relying to their detriment upon negligent advice, created by the decision of the House of Lords in *Caparo Industries plc v. Dickman* (1990) 2 A.C.605, are exemplified in three cases this year.

The plaintiff in *Al-Nakib Investments Ltd. v. Longcroft* (1990) 1 W.L.R.1390 had (1) taken up a rights issue; and (2) bought further shares in the market, in reliance on a prospectus issued by directors in connection with the rights issue. It was accepted that a duty of care was owed in respect of transaction (1), but the claims in respect of purchases in the market were struck out as disclosing no reasonable cause of action. The reasoning was that the prospectus was addressed to shareholders for the particular purpose of inviting a subscription for shares, and if it was used for the different purpose of buying shares in the stock market, there was not a sufficiently proximate relationship between the directors and the shareholder for a duty of care on the directors to arise.

In *James McNaughton Papers Group Ltd v. Hicks Anderson* (1991) 2 Q.B.133 the defendant accountants who had prepared draft accounts at the request of the target company, for possible use in take-over negotiations, were held to owe no duty of care to the company which was contemplating the take-over. The accounts were prepared for the target company and not the plaintiffs, the accounts were merely draft accounts and the defendants could not reasonably have foreseen that the plaintiffs would rely upon them.

A contrary conclusion was reached by a differently constituted Court of Appeal in *Morgan Crucible Co.plc v. Hill Samuel Bank* (1991) Ch.295. The assumed facts were that during the course of a contested take-over bid the directors and financial advisers of the target company made representations concerning the financial state of the company, after an identified bidder had emerged and with the intention that the bidder would rely on them. In interlocutory proceedings it was held on those facts to be plainly arguable that there was sufficient proximity between each of the defendants and that plaintiff to give rise to the existence of a duty of care.

2. Nervous shock

The *Caparo* principles are not confined to cases of financial loss. Sufficiency of proximity also arises in the context of actions by persons who suffer nervous shock in response to perception of disasters. The leading cases on this topic are destined to be the Hillsborough disaster actions, reported as *Jones v. Wright* (1991) 3 All E.R.88, in which the Court of Appeal considered 15 test cases. Of these plaintiffs 4 had been present at the football match, while the remaining 11 had either witnessed scenes of the disaster live on television or seen the scenes later on recorded television or heard about the disaster on the radio. They were related to dead or injured victims in various ways. The Court of Appeal considered carefully the elements of proximity required to give rise to a duty of care on the part of those who were allegedly responsible for the disaster. Three important criteria emerged: (1) the category of those entitled to sue was ordinarily limited to those who fell within the relationship of spouse or parent of the victim; (2) the duty was confined to those who directly perceived the events to the exclusion of those who watched them on television; and (3) plaintiffs whose claims arose out of seeing their relative's body at a mortuary soon after the disaster could not succeed, since the process of identification of the body could not be regarded as part of the immediate aftermath of the disaster so as to bring those relatives within the defendant's foreseeable duty of care. In the result none of the test cases could succeed

The cases are to be considered by the House of Lords (i). As the law stands on the basis of the decisions of the Court of Appeal it is difficult to envisage the plaintiffs holding on to their judgments on appeal in either of the nervous shock cases decided at the first instance prior to *Jones v. Wright.*: these were *Hevican v. Ruane* (1991) 3 All E.R.65 and *Ravenscroft v. Rederiaktiebolaget* (1991) 3 All E.R.73. In the first of these cases a father, and in the second a mother, succeeded in their claims for damages in respect of nervous shock suffered as a result of hearing about fatal accidents to their children and, in the first case, visiting the mortuary and seeing the son's body and, in the second, visiting the hospital and being told of the death.

3. Volenti non fit injuria.

This much-loved defence is frequently pleaded but scarcely ever succeeds. It cannot succeed against a passenger in a road traffic accident because of the terms of what is now section 149 of the Road Traffic Act 1988, the Court of Appeal held in *Pitts v. Hunt* (1991) 2 Q.B.6. The court was, however, able to find against the plaintiff on the grounds of the application of the maxim *ex turpi causa non*

oritur actio, public policy and the fact that the circumstances excluded the existence of any duty of care. The circumstances were that the plaintiff, a pillion passenger on a motor cycle being driven by the deceased, encouraged the driver to ride in a fast, hazardous and reckless manner, deliberately intending to frighten members of the public, such that had a member of the public been killed, the plaintiff would have been a participant to manslaughter.

Absent the Road Traffic Act, the defence of *volenti* would clearly have prevailed in *Pitts v. Hunt*, as it did in the Court of Appeal four months later in the case of *Morris v. Murray* (1991) 2 Q.B.6. The plaintiff and the deceased, being drunk (autopsy subsequently demonstrated a blood alcohol level more than three times the legal limit for driving a car, equivalent to 17 whiskies), decided to go for a joyride in the deceased's light aircraft. They took off down-wind and uphill in conditions of poor visibility, when other flying at the aerodrome had been suspended. The plane crashed soon after take-off. Reviewing the authorities on *volenti* the court held that the risk being run was so extreme and glaring that the plaintiff had implicitly waived his right to damages.

4. **Damages: disregard of benefits.**

The injury and disability pension arrangements for people such as firemen and police officers are so generous that, because of the *Parry v. Cleaver* principle, the reality is that plaintiffs injured on duty enjoy a considerable windfall in that their damages for loss of earnings are not reduced to take account of their benefits under the pension scheme. Many had thought that, in a changed climate, the House of Lords would, given the opportunity, depart from their decision in *Parry v. Cleaver* (1970) A.C.1. However, presented with just such an opportunity in *Smoker v L.F.C.D.A.* (1991) 2 W.L.R.1052, they reaffirmed the principle of non-deductibility without even calling on the plaintiff's counsel.

The decision of the Court of Appeal in *Stanley v. Saddique* (1991) 2 W.L.R.459 is a decidedly odd one. It holds that, in a fatal accident action, the fact of remarriage of a husband is to be disregarded when computing dependency for loss of a wife, on the basis that remarriage is a benefit accruing "as a result of the death" (Fatal Accidents Act 1976, s.4(1)). Gibson L.J. expressed "no great confidence that we have correctly understood the intention of Parliament", a reservation which many insurers will share. The bizarre consequences of decisions such as this and *Pidduck v. Eastern Scottish Omnibuses Ltd* (1990) 1 W.L.R.993 highlight the need for amendment of the Fatal Accidents Act 1976, in its current form.

5. **Interest on damages.**

Following the House of Lords decision in *Hunt v. Douglas (Roofing) Ltd.* (1990) 1 A.C.398 (to the effect that interest on costs runs from the date of judgment rather than taxation), plaintiffs who had obtained judgment for damages to be assessed argued that judgment debt interest should run from the date of the interlocutory judgment rather than the final judgment, following assessment. The argument ultimately failed in the House of Lords in the cases reported under *Thomas v. Bunn* (1991) 1 A.C.362, where it was held that the "judgment" referred to in s.17 of the Judgments Act 1838 was the damages judgment and not the interlocutory order establishing only the defendant's liability.

Corbett v. Barking Health Authority (1991) 1 All E.R.498 is a useful illustration of the court's power to disallow interest on damages on account of delay in bringing an action on for trial - four years' interest was disallowed where the trial took place 11+ years after the medical negligence in question, a significantly greater deduction than has previously been made in similar cases.

6. **Foreseeability of risk.**

"Neighbourhood" exposure to toxic substances, in particular asbestos, is a topic of great concern to insurers. It is virtually impossible for insurers to avoid liability for asbestos-related disease where this has been suffered by workmen directly exposed to asbestos (because very few employers took any significant precautions to avoid or reduce exposure during a period of about forty years in which the harmful effects of asbestos were well documented).

It is now apparent that cancer, in particular mesothelioma, can result from light exposure to asbestos, such as may have been experienced by, for example, the wife of a lagger or shipyard worker through shaking or cleaning his overalls. To extend the area of foreseeable risk to this class of plaintiffs would significantly increase the already large number of claims in this area. The (it is believed) first attempt to do so failed at first instance in *Gunn v. Wallsend Slipway and Engineering Co. Ltd.* (unreported), *The Times* 23.1.89. In *Hewett v. Alf Brown's Transport Ltd.*(1991) I.C.R.471 Otton J. rejected the claim of a wife suffering from lead poisoning, allegedly due to contact with the overalls of her husband, a lorry driver who had come into contact with lead oxide. However, the judge did not do so on the ground that she was outside the area of foreseeability, but rather on the basis that the degree of exposure of the husband was so slight as not to call for precautions by his employers. Had negligence on the part of the employers been established, plainly the plaintiff's action would have succeeded.

7. Limitation

In *Bell v. Peter Browne & Co.*(1990) 3 All E.R.124 the Court of Appeal appears to have resolved, in favour of defendants, a limitation point which has caused some difficulty. It derives from the fact that a cause of action for professional negligence, in this case against a solicitor, can be framed in contract or tort. Time starts to run in contract from the date of breach, whereas in tort it runs from the date of damage. Thus a plaintiff whose contract action is statute-barred will seek to allege that his damage occurred some time after the negligent act, so that he is still in time to sue in tort. In the instant case damage was held to have occurred at the time of the original breach of duty (failure to register an equitable interest), because the plaintiff had then suffered *prejudice* by being put in a less advantageous position than he would otherwise have been. Professional negligence will invariably cause damage, in this sense, with the result that it is difficult to envisage cases in future in which a plaintiff will be able to avoid a time bar in contract by framing his action in tort.

8. Trial by jury.

Finally, the spectre of jury trial in a personal injury action re-appeared in *H v. Ministry of Defence* (1991) 2 Q.B.103. There does not seem to have been a jury trial of a personal injury case in this country for 25 years. The application for a jury in the present case was founded on the exceptional nature and effects of the injuries, which were to the plaintiff's reproductive organs. It succeeded before a judge, but the exercise of his discretion was overruled by the Court of Appeal. In the judgment of the Master of the Rolls the injuries, although such as to justify prohibiting the reporting of the name of the plaintiff, were not such as to justify departure from the normal principle that jury trial is inappropriate in personal injury actions.

(i) The House of Lords has since affirmed the Court of Appeal decisions.