Law of Torts in Malaysia

Second Edition

Law of Torts in Malaysia
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by

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Foreword

Since the coming of the first Recorder to the Supreme Court in 1808 till the present day, Malaysia is blessed by numerous outstanding judges who contributed unswervingly to the judiciary and made it what it is today – a respected institution; a third arm of the government. Considered by many as one of the most prominent is Mr Justice Buhagiar, a Rhodes Scholar, who served in the High Court of Malaya from 1952 to 1957. His scholarly judgments have withstood the test of time and are still frequently cited as authority by lawyers in the present day. Despite his vast knowledge in the law, I was told that he had, as his constant companion in his judge's chamber, a complete set of student revision books on all compulsory subjects covered in the syllabus for a Bachelor of Laws degree. When inquired as to the reason for possessing these 'nutshells' on the law, his reply was that these books rendered him immediate recollection of the basic legal principles of the law, and from there, if necessary, he would proceed to more advanced legal text to carry out his research.

Finding such approach practical, I have adopted Mr Justice Buhagiar's style. But instead of nutshells published by foreign writers based on the common law, I prefer text meant for students by local academicians. They not only provide me with quick referrals on the basic legal principles on the subject under consideration but also in the Malaysian context. These volumes have been my constant companions on the Bench. For the law on torts, Dr Norchaya Talib's first edition of '*Torts in Malaysia*' is my selection for these series of tools.

Being a presiding judge in the civil division of the High Court at Kuala Lumpur, where cases involved are mostly tortious claims, I continually refer to her book. But over the last couple of years, the law on torts have advanced significantly both with persuasive authorities from Commonwealth countries as well as our own local courts. This is witnessed in the field of negligence where its wings have spread so wide that I doubt Lord Atkin, when he first expounded the concept of negligence in *Donoghue v Stevenson*, would have anticipated the extent of its application. Then there is the perpetual attempt to include new torts into this area of the law with the courts vigilantly guarding its admission into the family. Those successful are now referred to as the 'emerging torts'. These should be welcomed since they provide remedy to the needs of a changing society.

These and many other areas in the law of torts are covered in the second edition of '*The Law of Torts in Malaysia*'. Speaking for myself, I am indeed grateful for this new edition. It updates me on the current basic legal principles of the law and this volume will replace my worn-out copy of the first edition.

For students introduced to the law of torts for the first time, this book, in my opinion, will expose them to the arena of personal laws in a simple and uncomplicated manner. For practitioners of the law it is my considered view that this work will assist those whose practice is of a civil nature. As I have stated earlier, it not only reminds one of the basic principles but also the local position of the law. And now with an added element: the current situation.

With this, I must congratulate Dr Norchaya Talib for her untiring efforts in putting this work into print for the benefit of all of us – Syabas!

Justice Dato' James Foong
Judges Chambers
High Court
Kuala Lumpur

July 1, 2003

Dedication

I dedicate this work firstly to the following three persons who have touched my life in significant ways, more than they'll ever know – the late Professor Dato' Dr Mimi Kamariah Majid, Dr Molly Cheang and Professor Margaret Brazier OBE; secondly to the following three, for their patience, generosity and laughter throughout – Azmi, Ahnaf and Ali.

Preface

In June 1997 I handed in to the publisher (UM Press) for the final time; the proof to the first edition. Very soon after that I left the country to embark on the PhD. I came back in September 2000 and the first edition was already somewhat out-of-date in several areas!

In the six years that have passed since the first edition of this book, Malaysian tort law has developed significantly. Some of these developments are evidence of the Malaysian courts' continuous efforts to develop our very own common law jurisprudence. Notable among them are *Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants* [1997] 1 AMR 637, recently overruled by the Court of Appeal in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors* [2003] 2 AMR 6 on the recoverability of pure economic loss; *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors* [2003] 1 AMR 20 on the nature, scope and extent of the duty of care of a local authority in its capacity as landlord to the lawful invitees of his tenant; *Ling Wah Press (M) Sdn Bhd v Tan Sri Dato' Vincent Tan Chee Yioun & Ors* [2000] 3 AMR 2991; *Liew Yew Tiam v Cheah Cheng Hoc & Ors* [2001] 2 AMR 2320 and *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161 – the three most exciting defamation cases – the first for skyrocketing the amount of damages, the second for distinguishing the first case from any other, and the third for stabilising what can be described as a perplexing period in the law of defamation. In the area of medical negligence *Dr Soo Fook Mun v Foo Fio Na* [2001] 2 AMR 2205 held that the applicable test in determining whether a physician had reached the required standard of care in the provision of advice and information is the *Bolam* test and not the *Whitaker* test (Federal Court decision pending).

I have introduced a new chapter comprising of what I refer to in this edition as 'Emerging torts', not because they are indeed brand-new torts but simply because there has been increasing litigation in these areas over the past six years or so.

The most challenging aspect of this edition was to keep abreast with the dynamic changes in tort law that have taken place particularly in England, and the changes in Malaysia over the past six to eight years. Not all the changes in England have been reflected in Malaysian law (as yet) and the process of selecting which English decisions to include was most difficult!

I wish to thank the following persons without whose efficient assistance this work would not be in its readable form as it is now : Saadiah Bajuri for her expertise in deciphering my handwriting and hundreds of arrows and Saw Tiong Guan for reading through several draft chapters and making valuable comments and suggestions. I thank my colleagues in the faculty for their support and encouragement and a special thank you to my 2002/03 tort

students who pointed out typographical errors and identified areas in the first edition in which further clarification would be welcome.

My publisher has kindly accepted my not-very-minor insertions at proof stage – thank you to the legal editors in particular Aravind Subbiah.

Finally I am indebted to Yang Arif Dato' James Foong for very kindly agreeing to write the foreword for this book.

I have attempted to state the law as at May 15, 2003.

Norchaya Talib
May 15, 2003

About the Author

Norchaya Talib LLB (Hons), LLM, PhD is an Associate Professor at the Faculty of Law, University of Malaya. She has been teaching Tort for the past 13 years. Her other areas of expertise are Jurisprudence and Medical Law. She has published many articles in the field of Tort including its implication on other professions such as engineering and nursing.

Norchaya Talib is also the author of *Euthanasia – A Malaysian Perspective.*

Abbreviations

Burrows	Andrew Burrows, *Remedies for Torts and Breach of Contract*, 2nd edn, 1994, Butterworths.
Evans	Keith R Evans, *The Law of Defamation in Singapore and Malaysia*, 2nd edn, 1993, Butterworths Asia.
Fridman	GHL Fridman, *Textbook on Torts*, 1993, Waterlow Publishers.
Jones	Michael A Jones, *Textbook on Torts*, 4th edn, 1993; 7th edn, 2000, Blackstone Press Limited.
Mimi Kamariah Majid	Mimi Kamariah Majid, *Criminal Procedure in Malaysia*, 3rd edn, 1999, University Malaya Press.
Rogers	WVH Rogers, *The Law of Tort*, 2nd edn, 1994, Sweet & Maxwell.
Rutter	Michael F Rutter, *Occupiers' Liability in Singapore and Malaysia*, 1985, Butterworths.
Salmond & Heuston	RFV Heuston and RA Buckley, *Salmond & Heuston on the Law of Torts*, 20th edn, 1992; 21st edn, 1996, Sweet & Maxwell.
Street	Margaret Brazier, *Street on Torts*, 9th edn, 1993; 10th edn, 1999, Butterworths.
Winfield & Jolowicz	WVH Rogers, *Winfield & Jolowicz on Tort*, 14th edn, 1994; 15th edn, 1998, Sweet & Maxwell.

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Adsett v K and L Steelfounders and Engineers Ltd [1953] 1 WLR 137 361
AG v Cory Brothers Ltd [1921] AC 521 ..... 342, 346
AG v PYA Quarries Ltd [1957] 2 QB 169 300
AG of Hong Kong v Zauyah Wan Chik & Ors and another appeal [1995] 2 AMR 1955, CA 422
Ahmad bin Haji Abdul Majid v Lee Yat Cheong & Ors [1995] 4 CLJ 721 213
Ahmad bin Said v Zulkiflee bin Bakar & Yang Lain [1997] 5 MLJ 542 260
Aik Bee Sawmill v Mun Kum Chow [1971] 1 MLJ 81 161
Aiken v Kingborough Corporation [1939] 62 CLR 179 227
Aitkeen v Bedwell [1827] Mood & M 68 18
AJA Peter v OG Nio & Ors [1980] 1 MLJ 226 259
Al-Nakib Investments (Jersey) Ltd v Longcroft [1990] 3 All ER 321 119
Albert Chew v Hong Leong Finance Bhd [2001] 4 CLJ 419 283
Albert v Lavin [1982] AC 546 68
Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310; [1991] 4 All ER 907, HL 106, 109, 110, 113, 115
Alcock v Wraith [1991] 59 BLR 16 ..... 385, 386
Aldred v Nacanco [1987] IRLR 292, CA 380
Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 ..... 36, 46, 406
Alice Ang Etc v Mrs Lau Ek Cheng & Ors [1940] MLJ Rep 140 392

relationship between say, close friends, where the plaintiff would have a more difficult task to convince the court of the existence of such a close emotional tie.

(b) Psychiatric illness must be as a result of what the plaintiff himself perceives with his senses. Even a third party unrelated to the primary victim may claim if he sees a tragedy of exceptional horror. The test is whether a reasonable man who is not prone to distress would also suffer nervous shock in the same situation. The scope of duty as laid down in *McLoughlin* has in fact been extended beyond spouses and parent and child.

(c) There must be proximity between the plaintiff and the accident in terms of time and space. This means that the plaintiff must either see the accident, hear the accident, or be physically present at the scene of the accident immediately thereafter. What is 'immediate', depends upon the facts of each case. In *Alcock* for instance, the arrival of the plaintiff eight to nine hours after the accident did not satisfy the 'immediate aftermath' test.

(d) The means by which the plaintiff comes to know about the accident is relevant. Psychiatric illness as a result of being informed about the accident by a third party is outside the scope of liability. In *Alcock* itself it was held that a television coverage which did not specifically focus on any identifiable individuals would mean that the plaintiff did not see or hear the accident or its immediate aftermath.

(e) The plaintiff must suffer a medically recognised psychiatric illness. In this regard it has been held that the precise nature and extent of the psychiatric illness need not be foreseeable.[93] As long as the plaintiff is able to prove that a person of ordinary fortitude would have sustained shock in the circumstances, it does not matter that that particular plaintiff is extraordinarily sensitive.[94]

Psychiatric harm or illness is known to psychiatrists and the media as post-traumatic stress disorder (PTSD).[95] If the guidelines laid down in both *McLoughlin* and *Alcock* were to be adhered to, for a secondary victim to succeed in his claim for psychiatric harm, he must establish PTSD. This was not strictly the case in *Vernon v Bosley (No 1)*.[96] The plaintiff was called to the scene of an accident where he witnessed the unsuccessful attempts to rescue his children from a sinking car. His two children drowned. The plaintiff

93 *Brice v Brown* [1984] 1 All ER 997.
94 *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1 at 14.
95 See Street, 10th edn at p 204.
96 [1997] 1 All ER 577, CA.

became ill. His business and marriage failed. The defendant argued that the plaintiff's illness was not caused by the shock of what he witnessed, but by pathological grief at the loss of his children. The argument put forward was that pathological grief was not PTSD. The Court of Appeal allowed the plaintiff's claim. As a secondary victim, he had satisfied the requirements of close relationship with the primary victim and proximity to the accident. It did not matter that his illness consisted of grief[97] as well as PTSD.

4. Secondary and primary victims

The courts have allowed recovery for psychiatric illness to plaintiffs who did not have the requisite relationship of love and intimacy with the primary victims. These plaintiffs are usually rescuers and/or participants. Rescuers are generally accorded privilege by the law, perhaps because the moral weightiness of their act transcends any moral, social or policy reasons to restrict claims based on close emotional ties between the plaintiff and the primary victim.

(a) Rescuer

The privilege accorded by the law to rescuers was never greater than in the older cases. In *Chadwick v British Railways Board*[98] the plaintiff who witnessed a terrible railway accident went to the scene of the disaster to help rescue the victims. He subsequently suffered nervous shock as a result of witnessing the consequences of the disaster. The court allowed his claim as he was deemed to be within the reasonable contemplation of persons who might suffer nervous shock as a result of coming to the aid of the injured passengers.

In *Hale v London Underground Ltd*[99] the defendants were held liable for the psychiatric illness sustained by the plaintiff-fireman who assisted in the rescue operations during a fire at a London underground train station.

The justification for the imposition of a duty of care to rescuers is founded on the defendant's 'fault' for creating a situation which invites rescue.[100] Nowadays, *Chadwick* applies in favour of the rescuer where he is a member of the public.

Where however, he is a member of the emergency services such as firemen and ambulance crew, recovery is not automatic. In the English decision in *White v Chief Constable of South Yorkshire Police*,[101] policy considerations

97 Which by itself is irrecoverable.
98 [1967] 1 WLR 912.
99 [1993] PIQR Q30.
100 *Haynes v Harwood* [1935]1 KB 146, CA.
101 [1991] 1 All ER 1, HL.

played an effective role in disallowing claims by police officers for psychiatric illness suffered by them as a consequence of rescue operations during the Hillsborough disaster.

(b) Mere bystander

Psychiatric injury to a bystander who is unrelated to the primary victim is generally unforeseeable. In *Bourhill v Young*[102] where a pregnant woman suffered a miscarriage through the shock of seeing the aftermath of a road accident, the court held that as she was not within the area of foreseeable impact, the defendant owed her no duty of care.

(c) A bystander who is a participant

The rule differs slightly when the bystander is a participant. In *McFarlane v EE Caledonia Ltd*[103] the plaintiff was employed as a painter on an oil rig owned and operated by the defendants. One night while the plaintiff was on a support vessel some five hundred and fifty metres away from the oil rig a series of massive explosions occurred on the rig. The plaintiff witnessed the explosions and consequent destruction of the rig before he was evacuated by helicopter. The closest the plaintiff came to the fire was one hundred metres when the support vessel he was on moved towards the rig in an attempt to render assistance. The plaintiff claimed damages from the defendants for psychiatric illness suffered as a result of the events he had witnessed. The Court of Appeal, in holding that the defendants did not owe a duty of care to the plaintiff, laid down the following principles:

(i) For the purpose of recovering damages for nervous shock caused by fear of physical injury to himself in a horrific event, a person is a participant and *may* recover damages if he is in the actual area of danger created by the event, even though he escapes physical injury by chance or good fortune, or,

(ii) He reasonably thinks he is in danger due to the suddenness and unexpectedness of that event, or although he is not originally within the area of danger he comes into it later as a rescuer.

In any case the class of persons to whom a duty could be owed must be within the defendant's contemplation as foreseeable.

102 [1943] AC 92.
103 [1994] 2 All ER 1.

Thus a distinction must be made between a primary and a secondary victim. If the plaintiff himself suffers physical injury and consequently psychiatric illness, he is classified as a primary victim.[104]

If however, as a result of his own carelessness, a primary victim suffers from self-inflicted injuries, he owes no duty of care to a third party not to cause him (the third party) psychiatric injury. This was the decision in *Greatorex v Greatorex*[105] where a father who was also the rescuer fire-officer, suffered psychiatric illness as a result of rescue work involving his son, who was injured in a road accident caused by the son's own negligent driving. The court held that to impose such a duty is said to be a restriction on a person's self-determination. In truth, whatever the reasons cited, this principle is borne out of strong policy reasons – namely that of disallowing undesirable litigation within the family. Where one family member suffered psychiatric illness as a result of self-inflicted injuries of another family member, the psychiatric illness in itself might have an adverse effect upon family relationships which the law should be astute not to exacerbate by allowing litigation between those family members.[106]

If the plaintiff himself is involved in an accident but he has not suffered physical injury, yet the shock gives rise to psychiatric illness, again he is classified as a primary victim. In both these situations, recoverability is not problematic. *Page v Smith*[107] is illustrative of this second category: the plaintiff was involved in a car accident. He suffered no physical injury; but subsequently developed an acute form of chronic fatigue syndrome (ME) that he could not work. The House of Lords held that the plaintiff was a primary victim as it was foreseeable that he would be exposed to physical injury as a result of the accident. Once injury to a primary victim is foreseeable, he may recover for both physical harm and any recognised psychiatric illness arising from the accident.

If on the other hand, the plaintiff is a secondary victim, he must satisfy the tests in *Alcock*. If he is also a rescuer, then he must have been exposed to danger in the course of rescue *(McFarlane)* or was put in reasonable fear of danger *(Chadwick)*.[108]

5. Flexibility in the meaning of 'secondary victim'?

The rather compartmentalised distinction between primary and secondary victim was challenged in *W v Essex County Council*.[109] *P*, the plaintiffs who

104 *Dulieu v White* [1901] KB 669.
105 [2000] 4 All ER 769.
106 *Ibid* at p 784 *per* Cazalet J.
107 [1995] 2 All ER 736, HL.
108 *Greatorex v Greatorex* [2000] 4 All ER 769.
109 [2000] 2 All ER 237, HL.

had four young children, were adolescent foster carers. They told the defendant local authority, *D*, that they would not accept any child who was a known or suspected sexual abuser. *D* placed with *P*, a 15 year old boy, *G*, who was being investigated for alleged rape. These facts were known to *D* but were not communicated to *P*. *G* committed sexual abuse on *P*'s children. *P* sued *D* in negligence and claimed they had suffered psychiatric illness, including severe depression and post-traumatic stress disorder after learning of the abuse.

The House of Lords found that *P* need not necessarily be categorised as secondary victims (who would have had to satisfy the 'immediate aftermath' test.) In any case, although there had to be some temporal and spatial limitation on those claiming to be secondary victims, the concept of 'immediate aftermath' of the incident had to be assessed in the particular factual situation. The parents need not come across the abuser or the abused 'immediately' after the abuse had taken place. Furthermore it was unclear that what *P* had suffered was outside the range of psychiatric injury recognised by the law.

This case clearly shows that the boundaries of liability for psychiatric illness is not definite and is fraught with policy considerations.

6. Is recoverability limited to physical injury?

The cases discussed so far have all been psychiatric illness sustained due to personal injury, be it real or apprehended, to oneself or to another person. Liability for psychiatric injury is in fact broader and extends to psychiatric injury sustained due to damage to things or property.

In *Owens v Liverpool Corporation*[110] the plaintiff successfully recovered damages from the defendant when the latter negligently collided with a hearse, causing the plaintiff to fear for the state of the corpse.

In *Attia v British Gas*[111] the court allowed the plaintiff to recover damages for nervous shock upon seeing the destruction of her house and its contents by fire due to the defendant's employees' negligence.

In summary, Lord Ackner in *Alcock*[112] stated that the cases over the last century show that the extent of liability for shock-induced psychiatric illness has been greatly expanded. Cases of nervous shock establish that it is a claim in a category of its own. It is a separate kind of damage. Whatever may be the pattern of the future development of the law in this area of the

110 [1939] 1 KB 394.
111 [1987] 3 All ER 455, CA.
112 [1991] 4 All ER 907 at 916-7.

law, the principles discussed above illustrate that the simple application of the reasonable foresight test is today, far from being helpful or conclusive.

H. Economic loss

Another area in which the courts have been hesitant to impose a duty of care on the defendant is when the damage suffered by the plaintiff is in the form of *pure* economic loss.

Economic loss means pecuniary or financial loss. Economic loss which is suffered as a result of physical injuries or damage to property is recoverable. For instance, if *A* negligently collides into *B's* car and *B* suffers physical injuries which cost him RM10,000 in medical bills, this amount is recoverable. If as a consequence of his injuries *B* also loses three months earnings amounting to RM12,000, this loss is also recoverable as it is incurred as a result of *B's* physical injuries. If *B's* car is also damaged and *B* has to pay RM1,000 for repairs, this is economic loss as a consequence of damage to property and is recoverable.

The economic losses mentioned above are economic losses suffered as a consequence of physical injuries and damage to property and are non-problematic for purposes of recovery. If *B* however, has plans to leave his present job and intends to set up a *nasi lemak* stall which he has calculated would earn him, RM2,000 per month and he claims that because of his injuries he has lost RM6,000 in 'probable' income, this loss is termed *pure* economic loss. The courts will most likely deny him this claim as this 'probable' loss does not arise directly from his injuries or the damage to his car.

The case law, unfortunately, has not been as straightforward. The discussion that follows shows the role and influence of public policy in determining the existence of a duty of care, and so liability, in claims for pure economic loss.

Pure economic loss may be incurred either as a consequence of a negligent misstatement or a negligent act, for which different principles need to be considered.

1. Negligent misstatement

In the landmark case of *Hedley Byrne & Co v Heller & Partners Ltd*[113] E Ltd held an account with the defendant bank. E Ltd was also a client of the plaintiff, which was an advertising agency. The plaintiff and E Ltd wanted to

113 [1964] AC 465, HL.

enter into a contract that involved a sum of £100,000 per annum. The plaintiffs, through their own bank had requested the defendant to comment about E Ltd's financial soundness. The defendant replied in writing, and in that letter were these words: "Confidential. For your private use and without responsibility on the part of the bank or its officials." The letter advised that E Ltd was financially sound. Based on this information the plaintiff spent money on behalf of E Ltd and consequently suffered losses up to £17,000 when E Ltd went into liquidation. The plaintiff claimed that the defendant was negligent when they gave the advice as the defendant owed a duty of care to them.

The House of Lords held that the defendant bank, by the words which they employed, had effectively disclaimed any assumption of a duty of care. The disclaimer in their letter had therefore effectively precluded any duty of care on their part and they were accordingly not liable to the plaintiffs.

The court went on to examine the principles on which liability arises for careless statements. It held that a simple and straightforward application of the neighbour test was insufficient as it could expose a maker of careless statements to liability to an indeterminate class of plaintiffs. A duty of care would arise only when there is a special relationship between the plaintiff and the defendant. This special relationship is said to exist in the following situations:

> when 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.[114]

It was also stated[115]:

> If someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference ... in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.

114 *Ibid* at p 583 *per* Lord Reid.
115 *Ibid* at p 594 *per* Lord Morris of Borth-Y-Gest.

Put simply, a duty of care will arise when there exists a special relationship between the plaintiff and the defendant, and this special relationship is determinable through the following three factors:

Firstly, the inquirer or plaintiff believes and relies on the defendant's information or advice; secondly the defendant knows, or ought reasonably to know, that the inquirer or plaintiff believes and relies on his information or advice; and thirdly, it is reasonable in the circumstances for the inquirer or plaintiff to believe or rely on, the defendant's information or advice.

An attempt to restrict liability under the *Hedley Byrne* principle was made in the case of *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[116] where the Privy Council in a majority decision held that a duty of care would only arise if the defendant is in the business of giving advice or information; or who professes to have expertise in a particular field. It must be clear and obvious that the circumstances are such that the plaintiff truly required the defendant's advice and opinion. Therefore whether it is reasonable or otherwise for the plaintiff to rely on the defendant's advice depends on the facts as well as the circumstances in each particular case. The minority opinion was that a duty of care may nonetheless arise when a person seeks advice from another person whilst the other person is conducting his business, and the person seeking the advice makes it known that he will rely on that advice. If the party who gives the advice does so without imposing any conditions he owes a duty of care to act reasonably in those circumstances.

In *Evatt*, the plaintiff, a policy holder with the defendant company asked the latter for some advice relating to the financial soundness of another company, P Ltd. On the basis of the incorrect advice that he received, the plaintiff invested in P Ltd. He lost his money. In a majority decision, the Privy Council found the defendant not liable as it was not in the business of giving advice and it therefore owed no duty of care to the plaintiff.

However it was the minority opinion in *Evatt* that was followed in *Esso Petroleum Co Ltd v Mardon*,[117] where even though the defendants were not in the business of giving advice, the court took into consideration that they were experienced and had special and expert knowledge in estimating the contents of petrol at a petrol station, compared to the plaintiff who did not possess the requisite knowledge, and a duty of care was imposed on the defendants.[118] Similarly in *Chaudhry v Prabhakar*[119] the defendant who held

116 [1971] AC 793, PC.
117 [1976] QB 801, CA.
118 See also, *Howard Marine & Dredging Co Ltd v Ogden* [1978] QB 574.
119 [1988] 3 All ER 718, CA.

himself out as an expert on motorcars was held liable to his friend who had relied on his advice which proved detrimental.

The application of this minority opinion in *Evatt* which in effect constitutes a liberal interpretation of what constitutes a 'special relationship' changed in 1989 in *Smith v Eric S Bush*.[120] The plaintiff applied to a building society for a mortgage to assist her in purchasing a house. The building society instructed the defendants, a firm of surveyors and valuers to report on the value of the house. The defendants gave a favourable report, which was in fact inaccurate. The mortgage application form and the valuation report contained a disclaimer of liability for the accuracy of the report covering both the building society and the valuer. A copy of the report was given to the plaintiff who had paid a fee for it. She relied on the report and purchased the house without obtaining any independent survey. This was in fact common practice – that of house purchasers relying on mortgagees' report without engaging their own surveyor. One of the chimneys of the house subsequently collapsed. In a claim from the plaintiff, the defendants relied on the disclaimer in the report and the application form. The House of Lords held that based on the Unfair Contract Terms Act 1977,[121] the defendants could not rely on the disclaimer to exclude liability. (Note that the Unfair Contract Terms Act referred to in *Smith* is not applicable in Malaysia, and there is no corresponding provision to the same effect in Malaysia). The relationship between the parties were such that it was fair to impose a duty of care. Thus a valuer who values a house for the purpose of a mortgage owes a duty to exercise reasonable care and skill to the prospective mortgagor and mortgagee, especially if he knows that the parties are relying on his report in order to effect the mortgage. This duty of care is however, limited to that purchaser and not to subsequent purchasers. Duty of care arose in this case based on the *deemed* assumption of responsibility on the part of the surveyors. They were aware of the identity of the plaintiff and knew that she would rely on their report.

In *Caparo Industries plc v Dickman*[122] the defendants auditors who acted for a public limited company prepared annual accounts which showed that the company was of sound financial standing. The plaintiff, relying on this report bought shares in the company and thereafter mounted a successful takeover bid. The accounts were in fact inaccurate. In an action against the defendants, the House of Lords held the defendants not liable. The principles of law derived from this case are as follows:

Firstly, the auditor of a public company's accounts owes no duty of care to a member of the public at large who relies on the accounts to buy shares in the

120 [1990] 1 AC 831; [1989] 2 All ER 514, HL.
121 Sections 2(2) and 11(3).
122 [1990] 1 All ER 568, HL.

company. This is because to deduce a relationship of proximity between the auditor and a member of the public would give rise to unlimited liability on the part of the auditor. An auditor also owes no duty of care to an individual shareholder in a company who wishes to buy more shares in the company because an individual shareholder is in no better position than a member of the public at large. It was on this basis that in the instant case the defendants did not owe a duty of care to the plaintiff either as shareholders or as potential investors in the company.

Secondly, there are three criteria for the imposition of a duty of care, namely, foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty. A relationship of proximity between the parties will exist if the particular damage suffered is of the kind which the defendant is under a duty to prevent. Reasonableness of the imposition of a duty of care will depend on whether the circumstances are such that the court can conclude that a duty of care exists; and this can be interpreted to mean that policy factors will play a role in determining the reasonableness or otherwise, of imposing a duty of care.

Thirdly, there will not be a relationship of proximity if the maker of the statement has no reason to anticipate that his statement might be relied on by strangers for any one of a variety of different purposes.

Fourthly, a relationship of proximity can exist if the maker of the statement knows that his statement will be communicated to the plaintiff, whether as a specific individual or as a member of an identifiable class.

Fifthly, proximity is established if the statement is made in connection to a particular transaction and the (identifiable) plaintiff is very likely to rely on the statement for the purpose of deciding whether to enter into that transaction.

Unlike in *Smith v Eric Bush*, the defendant in *Caparo* could not be said to be fully aware of what the plaintiff proposed to do as a result of their report. Following *Caparo* it has been held that directors of a company do not owe a duty of care to shareholders who rely on a prospectus for a different purpose than the intended distribution of the prospectus.[123]

Where both parties are equally knowledgeable, it will not be reasonable for one party to rely on the advice or information made by the other party without any prior investigation being made by the party seeking to rely on the advice, as he is in a position to protect his own financial interests.

123 *Al-Nakib Investments (Jersey) Ltd v Longcroft* [1990] 3 All ER 321.

In *James McNaughton Papers Group Ltd v Hicks Anderson & Co*[124] the plaintiffs were informed by the defendants that a company, MK, was breaking even and on this basis, a successful but consequently financially unprofitable takeover bid was made by the plaintiff. It was held that since the accounts were prepared for MK and not the plaintiffs, it was unreasonable for the plaintiffs to rely on the defendant's statement without seeking further independent enquiries or advice.

Liability under the *Hedley Byrne* principle has been extended beyond negligent misstatements to include situations where the defendant undertakes to perform a service or task to the plaintiff. A clear example is *Henderson v Merrett Syndicates Ltd.*[125] Due to the negligence of managing agents in advising their clients, 'Names' at Lloyds; with regard to underwriting contracts, the latter lost large sums of money. The defendant agents were held to have owed a duty of care to their clients as there was a plain assumption of responsibility on the part of the agents over the plaintiffs' financial affairs.

The converse is equally true – that where the defendant has not assumed responsibility (voluntary or deemed) and the plaintiff in fact did not rely on any undertaking by the defendant, there cannot be a special relationship between the parties and consequently, no duty of care.[126]

The requirement of 'reasonable reliance' allows the courts to control the scope of liability for negligent misstatements and tasks and services; as whether the plaintiff's belief and reliance on the defendant is reasonable depends on the facts of each case. For instance an impromptu advice given during a telephone conversation does not give rise to a duty of care.[127] If the defendant does not give any advice or opinion, generally no liability will arise except if the defendant has a duty to give advice or to act.[128]

Yet even where no reliance has been placed on the defendants, the courts have held the existence of a duty of care. The most relaxed approach to liability for negligent statements was laid down in *Ross v Caunters*[129] where the court held that *Hedley Byrne* had paved the way for pure economic loss claims arising out of negligent advice. Here the plaintiff who was a beneficiary in a will, was denied her entitlement as the solicitors did not inform the

124 [1991] 1 All ER 134, CA.
125 [1995] 2 AC 145, HL.
126 *Williams v Natural Life Health Food Ltd* [1998] 2 All ER 577, HL. Unfortunately the extent of liability under the *Hedley Byrne* principle is still unclear.
127 *Howard Marine & Dredging Co Ltd v Ogden & Sons (Excavations) Ltd* [1978] QB 574, at 591 *per* Lord Denning.
128 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, at 110.
129 [1980] Ch 297.

testator that the spouse of a beneficiary was not allowed to be a witness to the same will. The court held the defendants liable even though the plaintiff did not 'rely' on the defendants. Liability was imposed based on the neighbourhood principle, that there was proximity between the plaintiff and the defendant. The recognition of this type of loss, which was in fact a loss of 'expectation', was in fact novel at that time.

Despite decisions post – *Ross v Caunters* holding that the foreseeability and proximity test alone is insufficient to establish duty of care for recovery of pure economic loss (notably *Caparo*), and the general requirement of 'reasonable reliance' before imposing a duty of care on the defendant, *White v Jones*[130] managed to have 'escaped' these limitations. In *White v Jones* a testator disinherited his daughters after a quarrel. They were subsequently reconciled. The testator then instructed his solicitors to draw up a new will to include legacies to the daughters.

The defendant solicitors negligently delayed to draw up the new will. The testator then died with the result that the two plaintiffs were deprived of their inheritance. The solicitors were found liable. The decision in *White v Jones* does not fit squarely within the *Hedley Byrne* principle. Where is the reliance on the part of the plaintiffs upon the defendant solicitors? Yet the House of Lords held that there existed a special relationship between them by virtue of the defendants' assumption of responsibility to 'protect' the plaintiffs' economic welfare. Thus knowledge on the part of the defendant that the plaintiff is relying on his services to secure an economic gain is sufficient to give rise to a special relationship. The element of reliance is not necessary in every case for purposes of establishing a special relationship.

Opening the 'floodgates' was also a non-issue in this case as the plaintiffs and the sum involved were readily identifiable and determinable respectively. *White v Jones* is certainly not the best example of the application of the *Hedley Byrne* principle but it is a clear example of a wide interpretation of the *Hedley Byrne* principle.

Yet another example of a liberal interpretation of the *Hedley Byrne* principle is *Spring v Guardian Assurance plc*.[131] The defendants were found liable in negligence to their ex-employee, the plaintiff; for stating in their reference of him that he was dishonest, with the consequence that the plaintiff lost out on a job opportunity with a prospective employer. The House of Lords in a majority decision held that an employer owes a duty of care to employees and ex-employees not to cause economic loss by writing incorrect reference.

130 [1995] 2 AC 207, HL.
131 [1994] 3 All ER 129, HL.

The duty arises because the defendants had assumed responsibility to the plaintiff to prepare the reference with care, and the plaintiff in turn was relying on a reference carefully prepared. That his financial standing will be affected by the reference was obvious.[132]

Generally, to establish liability for negligent misstatements a plaintiff would have to satisfy the following criteria – that there is 'reasonable reliance' by the plaintiff and a voluntary assumption of responsibility by the defendant. The English courts have been more ready to pronounce the existence of a voluntary assumption of responsibility and so a duty of care, where the plaintiff is readily identifiable. So once it is established according to the criteria above that a special relationship exists, there is arguably no need to examine whether it is 'fair, just and reasonable' to impose a duty of care. As stated above, liability under the *Hedley Byrne* principle has also been extended beyond negligent misstatements to include tasks or services. (This of course brings into question the justification for a separate discussion on economic loss arising from acts).

In Malaysia *Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor, Dato' Au Development Sdn Bhd v Malayan United Finance Bhd & Anor*[133] held that the relationship between a solicitor and his client gives rise to a duty on the part of the solicitor to exercise that care and skill on which he knows his client would rely on. The solicitor also has a duty not to injure his client by failing to do that which he has undertaken to do and which, at the solicitor's invitation, the client relies on him to do.[134] A solicitor therefore owes a duty to take reasonable care to see that any representation made by him to the client is correct.[135] The elements of 'reasonable reliance' and voluntary assumption of responsibility are easily satisfied.

Similarly in *Chin Sin Motor Works Sdn Bhd & Anor v Arosa Development Sdn Bhd & Anor*[136] the defendant architect whose certification of the completion of the construction of a building was relied upon by the plaintiff to the latter's detriment was held liable as the architect knew or ought to have known that the plaintiff would rely on his certification. This case is a straightforward application of the *Hedley Byrne* principle, namely that a

132 The issue arose whether in allowing the claim in negligence, the protection accorded to a writer of reference in the law of defamation would be undermined. It was nonetheless held that public policy required that references should not be based upon careless investigations.

133 [1989] 3 MLJ 434. See also *Lim Soh Wah & Anor v Wong Sin Chong & Anor* [2001] 2 AMR 2001.

134 See also *Haji Saan bin Abdullah lwn Zubir bin Embong* [1995] 4 CLJ 179.

135 *Lam Tek Sen @ Lan Beng Chong & 3 Ors v SK Song* [1995] 2 AMR 1225.

136 [1992] 1 MLJ 23.

duty of care arises whenever a party reasonably relies upon another to provide information or advice and the person providing the information knows or ought to know that the inquirer is relying on him.

Certain relationships have been held to give rise to a special relationship, that any economic loss suffered would be foreseeable and recoverable.[137] Responsibility may however be excluded through a disclaimer.[138] There are a few local cases in which although the *Hedley Byrne* principle was applied, the basis of liability (or non-liability) differed. Consider *Nepline Sdn Bhd v Jones Lang Wootton*.[139] The defendant, a firm of registered real estate agents and chartered valuers, offered to let a particular premises to the plaintiffs for a specified sum of monthly rent. The plaintiffs alleged that the defendant had by their conduct or impliedly, represented that the owner or landlord of the premises had a good title to the premises, that the premises was not subject to any foreclosure proceedings or order for sale and that the plaintiffs could have a quiet and peaceful possession of the premises. In reliance upon the representations, they entered into a tenancy agreement with the landlord for a period of two years. They paid rental, maintenance deposits and renovated the premises. There was in fact a foreclosure proceeding in court in respect of the said premises at the material time, which the defendant was aware of but which they did not disclose to the plaintiffs. Soon after the plaintiffs commenced renovation work a proclamation for sale was put up on the premises. The plaintiffs through their solicitors immediately notified the defendant of their intention to rescind the tenancy agreement, and sued the defendant for their failure to ascertain the truth of the implied representations. They demanded the refund of the rental and maintenance deposits. The main issue in this case was whether the defendant owed a duty of care to the plaintiff to inform the latter of the forthcoming foreclosure proceedings at the material time.[140] The learned Sessions Court Judge found the defendant to be in breach of the duty of care he owed to the plaintiffs but since there was no privity of contract between the parties the plaintiffs were not entitled to the refund claimed for. The plaintiffs appealed. The court held that the provision of s 3(1) of the Civil Law Act 1956[141] was applicable, thus necessitating the determination of the common law of England on April 7, 1956 on negligent

137 For instance, as between a stockbroker and a purchaser in *Ho Kam Seong v Arab Malaysian Securities Sdn Bhd* [2000] 4 AMR 3947, merchant bankers and purchasers in *Malaysian International Merchant Bankers Berhad v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* [2001] 1 AMR 692, CA.

138 *Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor* [1998] 4 AMR 4225.

139 [1995] 1 CLJ 865.

140 The premises was subsequently auctioned and the plaintiffs purchased the premises at the auction.

141 Act 67, see above, Chapter 1.

whole rather than by the defendant alone as this would unfairly impose a greater burden on the defendant. Furthermore, imposing liability would only serve to open the floodgates for pure economic loss claims. His Lordship felt that the first and second types of damage were consequential upon damage to property, but the third type of damage suffered by the plaintiffs was a pure economic loss independent of physical damage, and was therefore irrecoverable.

Edmund-Davies LJ dissented and stated that all the losses suffered by the plaintiff were foreseeable and were a direct result of the defendant's negligence. As such the plaintiff ought to have been able to recover all his losses.

Another case in which pure economic loss arising from a negligent act was held to be irrecoverable was *Weller & Co v Foot and Mouth Disease Research Institute*.[148] The defendant negligently allowed cattle to become infected by foot and mouth disease. The plaintiffs who were auctioneers, suffered financially because they could not hold auction sales of cattle.

The court held that a duty of care was owed to cattle owners who suffered physical damage to their property, as cattle had to be destroyed. However, no duty was owned to the plaintiffs for their loss of profits. Although the loss was foreseeable, public policy required that that loss was irrecoverable for otherwise the potential claimants would be indeterminable. Thus the cut-off point was set at those suffering physical damage from the negligent act.[149]

The House of Lords went beyond the boundaries laid down in *Spartan Steel* in *Junior Books Ltd v Veitchi Co Ltd*[150] where it was held that since there was a relationship of proximity between the parties, pure economic loss was recoverable. Here the defendants were specialists in laying floors. They were in fact subcontractors under a contract between the plaintiffs and the main contractors. The floor was defective and the plaintiffs had to spend a large sum of money to relay the floor, which sum they claimed from the defendants. They further claimed for loss of profits due to the extra time spent in relaying the floor. What the plaintiffs suffered here was a defect in quality. The claim was allowed even though the floor did not pose any threat of imminent danger to the users of the building.

148 [1965] 3 All ER 560.

149 See also *British Celanese Ltd v Hunt* [1969] 2 All ER 1252 and *SCM (UK) Ltd v WJ Whittal & Son Ltd* [1970] 3 All ER 245, CA where economic loss consequent on physical damage to property was recoverable.

150 [1983] 1 AC 520, HL.

This case was in fact the first and last instance where the courts clearly imposed liability on a defendant for causing pure economic loss as a result of a negligent act. Many problems arose out of this case. For instance should a manufacturer be liable for producing a 'defective' product but which was not dangerous and did not affect the quality of the goods? If we both purchase a book by the same author but the print is lighter in my copy compared to yours, can I return the book and ask for a refund?

The retreat from the implications in *Junior Books* started with *Tate & Lyle Industries Ltd v Greater London Council*[151] where Lord Templeman held that there existed physical damage in *Junior Books* and that was the basis for allowing the claim.

The Privy Council in *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd*[152] held that some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic loss as a consequence of his negligence. *Junior Books*, it held, was limited to the special facts of that case.

This restrictive approach was adopted in three subsequent cases. In *Muirhead v Industrial Tank Specialities Ltd*[153] the plaintiff was a fish merchant who bought lobsters in the summer, with the plan to sell them for a profit at Christmas. The lobsters had to be stored in tanks and for this purpose he required some special pumps. The pumps proved to be defective as they were not suitable for use in the UK. The plaintiff sued the manufacturers for the loss of his lobsters, expenditure incurred on attempts to correct the fault as well as loss of profits on the whole business venture. The Court of Appeal only allowed the claim for the loss of the lobsters and profits from their sale as this was a reasonably foreseeable consequence if the pumps failed. The other types of losses were pure economic loss and such liability on the part of a manufacturer of defective goods would only arise if the plaintiff had placed real reliance on the manufacturer rather than the vendor who sold the pumps to him. There was no proximity between the plaintiff and the manufacturer.

In *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)*[154] a subcontractor contracted with the defendants for the latter to construct some glass panels which were to be installed in a building. These panels proved to be defective and the owner of the building withheld payment from the plaintiff, the main contractor. The plaintiff sued the defendants for their

151 [1983] 1 All ER 1159 at 1165.
152 [1985] 2 All ER 935.
153 [1985] 3 All ER 705, CA.
154 [1988] 1 All ER 791, CA.

economic loss. The claim was denied on the basis that there was no reliance placed on the defendants, and further they had not assumed any direct responsibility to the plaintiff for the quality of the glass. There was no physical damage to property belonging to the plaintiff, nor was there a contractual relationship between the parties. The court said it would not be just and reasonable to impose a duty on the defendants as to do so would be a mockery to contractual negotiations.[155] *Spartan Steel* was affirmed. Pecuniary loss unrelated to physical damage is irrecoverable, notwithstanding its foreseeability.

In *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd & Ors*[156] the defendants were engaged as subcontractors to provide piles for the extension of the plaintiff's office premises. As a result of the defendants' negligence, damage was caused to an adjoining building and work was suspended while a revised piling scheme was worked out. The defendants admitted liability for the damage caused to the adjoining building but denied liability for the economic loss suffered by the plaintiff due to the delay in the completion of the building. The court held that as a matter of policy the circumstances in which economic loss was recoverable in tort in the absence of physical damage was restricted to special cases or exceptional circumstances. Even though there was a close relationship of proximity and the loss was foreseeable, the defendants cannot be said to have assumed any responsibility as the parties had defined their relationship exhaustively in their contract, which did not provide for the defendants to be liable for the manner in which they executed the piling work, nor did it stipulate that the defendants were to be responsible for any economic loss suffered by the plaintiff.

The three cases above show that the post *Junior Book* attitude of the courts has been to revert back to the position in *Spartan Steel*. It has been stated earlier in *Anns*[157] that a local authority could owe a duty of care to the building owner if the defect constituted a present or imminent danger to the health or safety of the occupants of the building, and it was on this grounds that the plaintiff in *Anns* recovered the cost of restoring the building to a healthy and safe condition. However, a conflicting decision was seen in *D & F Estates Ltd & Ors v Church Commissioners for England & Ors*[158] where Lord Bridge[159] said that *Anns* was a case in which the only defendant was the

155 The contractors may claim in contract against the sub-contractors, who could in turn claim against the defendants.

156 [1988] 2 All ER 971, CA.

157 See *Anns v Merton London Borough Council* [1978] AC 728, above at p 88.

158 [1988] 2 All ER 992.

159 *Ibid* at p 1001.

local authority and therefore the scope of the builder's duty of care and the measure of damages for any breach of that duty were not directly in issue.

The facts of *D & F Estates* are these: the defendants were the builders for the construction of a block of flats. They engaged a subcontractor, whom they reasonably believed to be skilled and competent to carry out some plastering work on the block. Fifteen years later and again three years after that the plaintiffs, who were lessees and occupiers of one of the flats discovered that the plaster in their flat was loose, due to the negligence of the subcontractor. The plaintiffs sued the defendants for the cost of remedying the defect as well as the estimated cost of future remedial work. The House of Lords dismissed the plaintiffs' claim and held that in the absence of a contractual relationship between the parties the cost of repairing a defect in a chattel or structure which was discovered before the defect had caused personal injury or physical damage to other property was not recoverable. This was because the loss was purely economic and not recoverable in tort. Thus since the cost of repairing the plaster was a pure economic loss, it was not recoverable. The defendant builders were not liable for the subcontractor's negligence as their only duty was to employ a competent plasterer, which they had done. The builder may only be liable, as a joint-tortfeasor, if in the course of supervising a subcontractor, he became aware of, and condoned the negligence on the part of the subcontractor.

In laying down the principles above Lord Bridge[160] said:

> If the hidden defect in the chattel is the cause of personal injury or of damage to property other than the chattel itself, the manufacturer is liable. But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the *Donoghue v Stevenson* principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.
>
> If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic.

160 *Ibid* at p 1006.

In *D & F Estates* it was clearly held that pure economic loss is irrecoverable where the economic loss is due to some defect in the quality of the goods.

Then in *Murphy v Brentwood District Council*[161] the House of Lords overruled *Anns* insofar as it decided that a local authority, in relation to their function in supervising compliance with building by-laws or regulations, owed a duty of care to avoid damage to property which causes a present and imminent danger to the health and safety of owners, or occupiers. In *Murphy*, the plaintiff in 1970, purchased a house which was constructed on an in-filled site on a concrete raft foundation. The plans and calculations for the foundation was submitted to the defendant council for approval prior to the construction of the houses. The defendant had forwarded these documents to independent consulting engineers and on their approval, the defendant accordingly approved the said plans and calculations. In 1981 the plaintiff discovered serious cracks in the walls of his house and wet patches appeared on the lawn. The plaintiff discovered that the raft foundation was defective as differential settlement beneath it had caused it to distort. In 1985 a gas pipe cracked and was replaced. The soil pipe leading to the main drain had also cracked and was leaking into the foundations. As he was unable to bear the cost of remedial works, the plaintiff sold his house in July 1986 for £35,000 less than the price it would have fetched if the house had been free from defect. The plaintiff claimed from the defendant council, the sum of £35,000 plus other expenses incurred in moving into a new house. He alleged the defendant liable for the consulting engineers' negligence and stated that his family had been exposed to imminent risk to health and safety.

The House of Lords held that the council owed no duty of care to the plaintiff when it approved the plans for the defective raft foundation. The following principles of law were laid down:

Firstly, the right to recover for pure economic loss not flowing from physical injury or damage to property does not extend beyond the situation where the loss is sustained through reliance on negligent misstatements.[162]

Secondly, a building owner can only recover the cost of repairing a defective building on the ground of the local authority's negligence in performing its function of approving plans or inspecting buildings if the scope of the local authority's duty of care is wide enough to embrace purely economic loss.

Thirdly, in the absence of any evidence that a local authority is to be liable for economic loss incurred by a building owner, if a local authority is negligent

161 [1990] 2 All ER 908.

162 *Ibid* at p 920, *per* Lord Keith.

in carrying out its statutory functions of exercising control over building operations, as a result of which a building owner or occupier incurs expenses to remedy a dangerous defect in the building, which defect is discovered before it causes any physical injury, the damage suffered is termed as pure economic loss. This economic loss may be loss of the expenditure incurred either in remedying the defect to avert the danger, or abandoning the property as unfit for habitation. A dangerous defect, once known, becomes merely a defect in quality and is not recoverable against the local authority. Lord Keith of Kinkel[163] stated that to permit the building owner or occupier to recover his economic loss would lead to an exceedingly wide field of claims.

The principles in *Murphy* were followed and applied in *Department of the Environment v Thomas Bates & Son (New Towns Commission, third party)*[164] where a builder was held not liable for the cost of remedying defects in a building in order to make it safe and suitable for its intended purpose where there was no damage to the building and no imminent danger to personal safety and health.

Murphy is a difficult decision to understand and there have been later cases in which the courts had to distinguish between what constituted physical damage to property as opposed to a merely defective property and allowing recovery if it was the former.[165] *Murphy* as the (English) authority on the liability for defective buildings has not been well received in other common law jurisdictions. Australia in *Bryan v Maloney*,[166] Canada in *Winnipeg Condominium Corporation v Bird Construction Co Ltd*[167] and New Zealand in *Invercargill City Council v Hamlin*[168] have declined to followed *Murphy* and have all allowed the claims of the plaintiffs, whose situation were analogous to Mr Murphy's.

One other category needs mention. In *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd*,[169] the House of Lords held that the plaintiff could not claim against the defendants for the latter's negligence, which caused the former damage to property (and consequential economic loss) unless the plaintiff had either legal ownership or a possessory title to the property at the time when the loss or damage occurred. The fact that the plaintiff was a prospective owner made no difference to his inability to sue in respect of damage caused prior to his becoming the owner.

163 *Ibid* at p 921.
164 [1990] 2 All ER 943, HL.
165 See for example *Jacobs v Morton* [1994] 72 BLR 92.
166 [1995] 128 ALR 163, HC.
167 [1995] 121 DLR (4th) 193, SC.
168 [1996] 1 All ER 756.
169 [1986] 2 All ER 145.

In Malaysia, *Murphy* was followed in *Kerajaan Malaysia v Cheah Foong Chiew & Ors.*[170] The plaintiff claimed damages resulting from the negligence of the defendants in superintending and supervising buildings constructed for the plaintiff by a construction company, SK Sdn Bhd. All the defendants were employees or agents of the consultant firm, SD Sdn Bhd, which was responsible for superintending and supervising the construction.

The plaintiff alleged that all the defendants had failed to carry out their duties to superintend and supervise the construction, causing the plaintiff to suffer losses in repairing the buildings in order to make them safe for occupation.

The plaintiff asserted that the third defendant, who was an assistant resident engineer and an employee or agent of SD Sdn Bhd was responsible and owed a duty of care to the plaintiff. It was further contended that the pure economic loss suffered by the plaintiff should be recoverable. In this regard the court was urged to take into account local policies in determining whether a person who has been negligent should be responsible for the pure economic loss suffered by the owner of the premises which were erected. Liability ought to be imposed on all parties, especially professionals, who are involved in the construction of a building which later causes the owner to suffer economic loss. The court held as follows:

- Firstly, pure economic loss is irrecoverable in tort based on *Murphy's* case.

- Secondly, tort decisions in England are accepted and applicable here and this cannot be denied or challenged.

- Thirdly, on the issue of policy, the practice in the construction industry is fashioned on the practice in England, therefore Malaysia adopts English policies in these matters.

- Fourthly, the defendant engineer was only answerable to his employer and not the plaintiff. Even if he did not carry out his duties properly, no tortious claim may be made against him unless he has caused injury to someone or damage to the property of another.

- Fifthly, it was not reasonable for an employee, including a skilled worker working under a person or a construction company, to be held liable to the owner of a building for his negligence which resulted in the non-completion of the building but which did not cause injury to a person or to the property of another.

170 [1993] 2 MLJ 439.

The plaintiff's claim was thus dismissed.

In *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors*[171] the plaintiff purchasers moved into a house which they had purchased from the defendants, in 1984. There were cracks on the walls, a leak in the bathroom and the ground was uneven. On being informed, the defendants carried out the necessary repairs. Two weeks later the back door could not be closed, the house was tilting to one side and was sinking with a long crack line between the kitchen and the lounge. In 1985 the plaintiffs moved out. The defendants admitted their liability to effect the repairs. In fact the neighbouring houses began to be similarly affected. The defendants attributed the problem of the cracks to the movement of soil underneath the land caused by a stream nearby due to the dry season. As more cracks appeared, the defendants wanted to carry out cement-grouting to remedy the problem. The plaintiffs wanted a guarantee that cement-grouting would effectively prevent further cracks. The defendants would not give such a guarantee. The plaintiffs refused to allow the cement-grouting to be done. The defendants claimed for a mandatory injunction against the plaintiffs so that they be allowed to carry out the cement-grouting. The plaintiffs counterclaimed, *inter alia*, for the negligence of the defendants' architects and engineers in the construction of the house.

The claim against the architects was for the failure to investigate the nature of the soil on the land on which the house stood, to supervise and inspect the construction of the foundations of the house, and for issuing the certificate of completion of the foundations. As against the engineers, the claim was for the failure to design adequate foundations, failure to design adequate piling, and failure to submit earthwork plans to the proper authority.

The court found that the claims were for pure economic loss, which was not recoverable. An architect or engineer, in the absence of any direct contractual relationship with the owner of a building, cannot be liable in negligence in a claim for pure economic loss, which in this case, was the defective condition of the plaintiffs' house.

Despite these two High Court decisions, in 1997 another High Court decision contradicted the then judicial trend that Malaysia should subscribe to the policy in England in disallowing claims based on pure economic loss. The case, which curiously has been overruled by the Court of Appeal in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors*[171a] is *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants & Ors*[172] and the

171 [1995] 2 MLJ 663; [1995] 2 AMR 1558.
171a [2003] 2 AMR 6, CA.
172 [1997] 1 AMR 637.

facts are these: the plaintiffs' house (Lot 3007) was situated near a river and was built on a slope. Three years after they moved in, landslide caused half the house facing the river to collapse. The collapse was due to several factors: careless assessment of the stability of the slope by D1, D4 and D5, the engineers who were responsible for the building and construction of the house; excavation works which were being carried out by D3 on a neighbouring land (Lot 3008); and heavy rainfall and erosion of the river banks bordering on Lot 3007.

The allegation against D1 and D4 was for the failure to properly examine the stability of the slope before recommending, planning and finally building a house on it.

The allegation against D2 was based on their failure to supervise the details of design and adequacy of soil test before giving approval to building plans submitted to them.[173] They were further alleged to be in breach of their statutory duties under the relevant statutes.

D3 were contractors who were building a bungalow on Lot 3008 and the allegation against them was for allowing seepage of water into the ground and/or allowing water to overflow onto Lot 3007 resulting in landslide which caused the collapse.

Dato' James Foong J dismissed the claim for negligence and breach of statutory duty against D2 as they were statutorily protected from any such suits. D3 were held to be in breach of their duty of care as their negligence in ensuring the discharge of water from Lot 3008 had caused an accumulation of rainwater which contributed to the landslide. D3 were held forty percent liable.

D1 and D4 were found to have breached their professional duties by failing to exercise the required standard of care and skill of competent professional engineers. They argued however, that since the claim was based on pure economic loss, the collapsed house being the defective product, damages were irrecoverable. The learned judge, having considered numerous cases which decided for, and against, the recovery of damages for pure economic loss, held that such a claim can be entertained in a claim for negligence. D1 and D4 were held to be sixty percent liable. The legal principles and important points arising from this case may be summarised as follows:

1. The fundamental rationale against allowing pure economic loss claims is to prevent the creation or extension of liability for an indeterminate amount for an indeterminate time to an indeterminate class. The learned

173 D2 was the town council which approved the building plans.

judge held that this rationale is a misconception and an unallied fear – in all the circumstances of the pure economic loss cases, the amount of damages claimed is not an indeterminate amount. They are the expenses and costs involved in repairing, making good or replacing the defective product, or cost in ensuring the defective product is of the condition that it should be in the first place.[174]

2. In respect of indeterminate time, the learned judge conceded that it may be true that liability to a subsequent owner might be greater than to a first owner but this issue of indeterminacy may be limited by the element of reasonableness both in the requirement that damage be foreseeable and in the content of the duty of care.[175] Thus the foresight test may be employed in order to limit endless number of claims for an indefinite period.

3. In respect of indeterminate class, the learned judge referred to the Australian decision, *Bryan v Maloney*[176] and held that the relationship both between the builder and the first owner, and the builder and a subsequent owner, is based on the assumption of responsibility on the part of the builder and likely reliance on the part of the owner. In both situations, it is clearly foreseeable that any defect in the building will lead to pure economic loss suffered by the actual owner (be it the first or subsequent owner).

4. Allowing claims for pure economic loss is in line with 'community's expectation and demand' that third parties should be bound to exercise due care and compliance with relevant by-laws. The deprivation of relief would not justify the loss suffered on the defective product, or the moral duty of the third party to exercise care. To impose a restriction on economic loss claims would be highly inequitable particularly in cases where the duty of care and the breach of such duty are found to be substantiated. A consequence of allowing recovery for economic loss will lead to inhibition of carelessness and an improvement in the standard of manufacturing and construction which will in fact support the values which society tries to achieve.

5. Adherence to old principles or awaiting Parliament to resolve this issue, is not a solution since the principles of negligence are founded on common law. Adopting the decisions in *Murphy* and *D & F Estates* which are based on foreign policy would result in the entire group of subsequent

174 [1997] 3 MLJ 546 at 564.
175 *Ibid.*
176 [1995] 128 ALR 163.

purchasers to be without relief against errant builders, architects and engineers and other related parties. On the question of the probable encumbrance placed on local authorities by allowing recovery, the learned judge stated:[177]

> If there is any fear that this approach may encumber the local authorities to pay out substantial claims due to their negligence in granting approvals or inspecting building works, there is s 95 of the Street Drainage and Building Act 1974, Act 133, which prohibits such authorities to be sued.

6. A claim for pure economic loss is not merely confined to defective buildings and structures, but is extended to include all situations by analogy.[178] (The court however, did not elaborate on these other analogous situations).

In short, *Dr Abdul Hamid* decided that pure economic loss is recoverable based on the foresight test and in the absence of any Malaysian policy to the contrary.[179]

That the local courts were bravely struggling to formulate a Malaysian common law on the recoverability of pure economic loss was evident, for less than a year later, *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor*[180] decided that pure economic loss is irrecoverable. The plaintiff sent his damaged car to be repaired in a workshop appointed by the defendant insurers. The car took 59 days to be repaired and the plaintiff sued the defendants in negligence for the delay and claimed for all expenses incurred during the period of repair. The court identified first and foremost, that the loss suffered by the plaintiff was pure economic loss as it did not involve any physical damage or threat of physical damage to property. This being the case, the court held that 'the established legal position in regard to this is to preclude such claims even when foreseeable'.[181] *Dr Abdul Hamid* was not referred to in *Pilba*. *Pilba* was clearly decided on policy grounds, more than

177 [1997] 1 AMR 637 at 659.

178 *Ibid.*

179 The 'foreseeability test' in determining the existence of a duty of care in a claim for pure economic loss was adopted in *Champion Motor (1975) Sdn Bhd v Tina Travel & Agencies Sdn Bhd* [1997] 1 AMR 809. However this decision is perhaps not the best authority or indeed the clearest example of why economic loss should be recoverable on the basis of foreseeability. In this case it was held that a seller is under a tortious duty to ensure that there is no defect in title to his goods, breach of which entitles the buyer to claim for any economic loss as such loss is foreseeable.

180 [1998] 2 MLJ 53.

181 *Ibid* at p 61. The court relied on *Muirhead, D & F Estates* and *Greater Nottingham Co-operative Society*, already discussed above at pp 127-128.

on the foreseeability test. *Pilba* has since been laid to rest for good when together with *Dr Abdul Hamid,* it was overruled in *Arab-Malaysian Finance.*

The same learned judge in *Dr Abdul Hamid* reiterated his judgment in *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors.*[182] The plaintiffs were apartment owners of Blocks 2 and 3 of Highland Towers. They had to evacuate their apartments for fear of instability of the buildings when Apartment Block 1 collapsed in which 48 persons died.

The plaintiffs sued ten defendants in negligence, nuisance and liability under *Rylands v Fletcher* for causing or contributing to the collapse of Block 1, thereby forcing them to leave their apartments. In relation to recoverability for pure economic loss, the court held that the claim was recoverable for the same reasons as held (and already laid out earlier) in *Dr Abdul Hamid.*

The defendants appealed to the Court of Appeal.[183] On the issue of the recoverability of pure economic loss, the earlier decision in favour of the plaintiffs was affirmed. The court laid down the principle that pure economic loss is recoverable, subject to the foreseeability test. This in turn, is determinable on two factors; firstly, whether there is sufficient proximity between the plaintiff and defendant, and secondly; whether pure economic loss as a type of damage, is foreseeable.

On the strength of this Court of Appeal decision, pure economic loss as a result of negligent acts is recoverable in Malaysia.

What is puzzling and less than clear from this decision is that *Arab-Malaysian Finance* overruled both *Dr Abdul Hamid* and *Pilba.* No clear reasons were given. It was stated however, that the trial judge, in reliance on *Dr Abdul Hamid,* had allowed the plaintiffs' initial claim for pure economic loss on policy grounds, and not on the foresight test. Thus the reason for the trial judge's finding was wrong.[184] The overruling of *Pilba* is more understandable as the pure economic claim was denied on the basis of English policy, although damage was foreseeable in that case.

182 [2000] 3 AMR 3567.

183 *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 2 AMR 6, CA.

184 It is submitted however, that *Dr Abdul Hamid* was not decided on policy grounds alone. In fact pure economic loss was held to be recoverable on the foresight test and further that on policy grounds there was no reason to deny recovery.

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CHAPTER SEVEN

NEGLIGENCE: BREACH OF DUTY

Once it is established that the defendant owes the plaintiff a duty of care, the next step is to consider whether the defendant has breached that duty. Put simply, breach occurs when the defendant does something that is perceived to be below the minimum standard of care required of him, which is measured through the standard of a reasonable man.

A. The *'reasonable man'* test

In *Blyth v Birmingham Waterworks Co*[1] it was stated that negligence is the omission to do something which a reasonable man would do, or doing something which a reasonable man would not do. A breach of duty is determinable through the reasonable man test. The question is: would a reasonable man have acted as the defendant has done if the reasonable man was faced with the same circumstances as the defendant? The standard of care required is not that of the defendant's himself, but of this 'reasonable man'. Who then, is the reasonable man? Is he the same man irrespective of different situations, or is there a 'different' reasonable man, depending on the defendant in each case? The standard of the reasonable man may be better understood according to the varied circumstances in the following discussion.

1. The 'usual hiccups in life'

Reasonableness does not mean perfection. The reasonable man need not be a model citizen nor perfect in every aspect. Lord Macmillan in *Glasgow Corporation v Muir*[2] stated:

> The standard or foresight of the reasonable man ... eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.

Personal characteristics of the defendant will not be taken into account, but the usual norms and activities in a particular society or a particular profession

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1 [1856] 11 Ex 781 at 784 *per* Alderson B.

2 [1943] AC 448 at 457.

will be considered in determining the reasonableness of the defendant's conduct. It is also very much up to the judge to determine what is the course of action that would be taken by a reasonable man in every situation, as well as to decide what should have been foreseen by the defendant.

What may seem to be reasonable, normal and thus acceptable to one judge may be something unreasonable, absurd and unacceptable to another. For instance, in *Nettleship v Weston*[3] the lower court held that the defendant, a learner-driver was not liable for the injury she caused to the plaintiff as she had tried to control the car to the best of her ability. On appeal, the Court of Appeal held that the standard of care required of a learner-driver was the same as other experienced drivers. The defendant's lack of experience was irrelevant and as the way in which she drove fell below the required standard of care, she was liable. The court further stated that it would indeed be difficult if courts had to take into account the different levels of experience of each defendant.

In *Glasgow Corporation v Muir*[4] the defendant spilled hot tea on some children, and the issue faced by the court was whether the defendant should have foreseen that injury would occur when he brought a big container of tea through the corridor of the premises. The court answered in the negative as a reasonable man would not have foreseen such an accident in the circumstances. The court also distinguished between things that are naturally dangerous and those which are not. If the object or thing that gives rise to the negligence is naturally dangerous it is more likely that liability will be imposed and vice versa.

The courts have generally made allowances for what may be described as 'the usual hiccups in life'. Good examples are cases which involve parental or quasi-parental duties.

In *Carmarthenshire Country Council v Lewis*[5] the defendant council's failure to ensure that a school compound was secure enough so that schoolchildren could not easily wander onto the nearby road, was a breach of duty. Yet at the same time those in charge of small children need not keep a watchful eye on them all the time.[6]

In *Chen Soon Lee v Chong Voon Pin & Ors*[7] a schoolgirl drowned at sea during a picnic organised by the school. It was proven that no one was

3 [1971] 2 QB 691, CA.
4 [1943] AC 448.
5 [1955] 1 All ER 565, HL, see above at p 102.
6 *Ibid* at p 573, *per* Lord Reid.
7 [1966] 2 MLJ 264.

aware that the particular area of the beach where the child was playing was dangerous. In an action by the father against the school, the court found that the school had taken all the reasonably necessary steps to safeguard the safety of the children and thus the school was not liable.

Quite often, what is regarded as reasonable behaviour varies according to the circumstances of the case. Consider these two cases.

In *Government of Malaysia & Ors v Jumat bin Mahmud & Anor*[8] a pupil who was sitting behind the plaintiff, pricked the plaintiff's thigh with a pin. The plaintiff turned around and his eye came into contact with the sharp end of a pencil which the pupil was holding. The eye was badly injured and had to be removed. The High Court held the form mistress liable in negligence. On appeal, the Federal Court held that in considering whether or not the defendants were in breach of their duty of care it was necessary to consider whether the risks of injury to the plaintiff were reasonably foreseeable. Assuming it was, the next question was whether the defendants had taken reasonable steps to protect the plaintiff against those risks. In this case the court found that the particular form mistress did not expose the plaintiff to injury that was reasonably foreseeable. Further, constant vigilance in the classroom would not have prevented the injury sustained by the plaintiff. The defendants' appeal was accordingly allowed.

In *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors*[9] the plaintiff was injured by a hoe wielded by a fellow pupil during a practical gardening class. The plaintiff alleged that the defendants had failed to give adequate supervision and instructions with regards to the use of gardening tools. The Federal Court distinguished this case from *Jumat's* case and held the defendants negligent as they had failed to take reasonable steps to prevent injury to the plaintiff who was under their care. The teacher had failed to examine the tools. She should have appreciated that the boys were handling dangerous instruments and she ought to have given sufficient warning as to the use of the tools. Further, she ought to have taken steps to see that the pupils were positioned within such distance between them as to avoid injuries from being inflicted. Accordingly the school had failed to provide a safe system and environment of gardening techniques.[10]

2. Level of intelligence and knowledge

The reasonable man is not expected to be a perfect man – what level of intelligence and/or knowledge is he expected to have?

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8 [1977] 2 MLJ 103, FC.
9 [1981] 2 MLJ 27, FC.
10 See also *Lau Chee Kuan v Chow Soong Seong & Ors* [1955] MLJ 21.

In *Hall v Brooklands Auto-Racing Club*[11] Greer LJ described the reasonable man as ... the person concerned is sometimes described as 'the man on the street', or the 'man on the Clapham Omnibus', or the 'man who takes the magazine at home and in the evening pushes the lawnmower in his shirt sleeves'. Is there a difference between the two 'reasonable man' referred to above? Is it the case that the level of intelligence and knowledge that the reasonable man is expected to have depends very much on what is deemed to be the ordinary and average person in a given society? Drawing from the quotation above, might it be that in the context of the Malaysian society the reasonable man is the man who drives a Proton Saga and who spends his weekend strolling in a shopping mall with his family? More importantly, what is the level of intelligence and knowledge that this reasonable man ought to possess? Street[12] states that the defendant's actions must conform to the criteria expected of a person of normal intelligence. It is no good if the defendant has done his 'best', if his 'best' is below that of the reasonable man.[13] Similarly, if the defendant is of higher intelligence than the reasonable man, he will not be expected to reach that personal higher level of intelligence to a given situation. The standard against which his conduct is measured remains that of the reasonable man.

The imposition of a higher standard seems unfair to the 'slow and below-average' defendant but perhaps it may be justified on the basis that it is not possible to ascertain with accuracy the exact level of a person's intelligence, and conduct that is reasonable for that particular level of intelligence. It is nonetheless felt that one should not measure the reasonableness or otherwise, of the 'below-average' defendant's conduct with the hypothetical reasonable man whose level of intelligence is higher than the defendant. The fact that the defendant possesses intelligence below a particular level may well categorise him as an idiot and if this be the case, then the standard of care applicable should be the standard of care required of an idiot in those circumstances, and not a higher standard of care. This argument is strengthened by the fact that a plaintiff who has a physical disability is judged by the standard of persons who suffer from the same physical disability,[14] and it follows that to impose a higher standard of care on a defendant with below-average intelligence would be a blatant discrimination against such persons.

However, if the defendant is a person who, by virtue of his status, is deemed to possess particular knowledge about a specific situation, the standard of care applicable to him is that of the reasonable man in that position.[15]

11 [1933] 1 KB 205, CA at 224.
12 10th edn at p 239.
13 *Vaughan v Menlove* [1837] 3 Bing NC 468 at 474 *per* Tindal CJ.
14 See *Haley v London Electricity Board* [1965] AC 778, where the plaintiff was blind.
15 See *Caminer v Northern and London Investment Trust* [1950] 2 All ER 486, HL.

3. The defendant who has or professes expertise in a particular field

When a person professes to have a special skill or expertise in a particular field, he will be judged as against other persons who possess those same skills.

For instance, in *Philips v William Whiteley*[16] it was held that the standard of care required of a jeweller when piercing a person's ears for purposes of wearing earrings is that of a skilled and competent jeweller doing such work, and not that of a competent surgeon. The jeweller in this case was found not liable when the plaintiff contracted a disease which she would not have contracted if her ears had been pierced by someone with medical skills.

Sometimes though, a higher standard of care is imposed on a person even though he does not profess to have those higher skills. Admittedly, policy plays a significant role in these situations. One such situation is the standard of care required of a learner-driver. In *Nettleship v Weston*,[17] the plaintiff was teaching his friend, the defendant, to drive. The latter negligently hit a lamp-post as a result of which the plaintiff suffered a broken kneecap. The defendant was found liable. A learner-driver must drive in a manner as a driver of skill, experience and care, and his 'incompetent best' is insufficient.

In *Wilsher v Essex Area Health Authority*[18] a premature baby was given excess oxygen due to an error in monitoring its oxygen supply. A junior doctor inserted a catheter into a vein instead of an artery and this caused an inaccurate reading of the oxygen level. The doctor administered more oxygen to the baby with the consequence that the baby became blind. In a claim for negligence, the doctor raised the fact that he was a junior and inexperienced doctor and so the standard of care applicable to him ought to be the standard of care of another doctor with the same level of limited experience. In a majority judgment the Court of Appeal held that the standard of care should be related to the 'post' of the defendant and not his individual level of experience or competency and in this case it was a person who filled the post of a skilled and competent doctor.[19]

An ordinary person who conducts his own repair works which in fact requires a certain degree of skill, is expected to reach and exercise the standard of

16 [1938] 1 All ER 566.

17 [1971] 2 QB 691; [1971] 3 All ER 581, CA.

18 [1987] QB 730; [1986] 3 All ER 801, CA; reversed on a different point in [1988] 1 All ER 871, HL.

19 In *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 it was held that a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality.

care of a reasonably skilled person performing these repair works. In *Wells v Cooper*[20] the plaintiff was leaving the defendant's house and as he pulled the back door shut, the door-handle came away in his hand, and he fell four feet to the ground from the top of the back steps. The door-handle had been fixed by the defendant himself, who frequently did his own repair work. The court held that the standard of care required of the defendant was the standard of a reasonably competent carpenter. Fixing the door-handle with three-quarter inch screws was not something unusual for a reasonably competent carpenter in those circumstances, and the defendant was accordingly held not liable to the plaintiff.

If a person represents himself as having the skill and experience which he in fact does not have, the courts will expect him to demonstrate the standard of care which he claims to have.

In *Chaudhry v Prabhaker,*[21] the plaintiff relied on her friend, the defendant, to find a suitable second-hand car for her to buy. She had stipulated that the car should not have been involved in an accident. The defendant found a car which he recommended the plaintiff to buy, and which she did. It was subsequently discovered that the car had been involved in a serious accident, had been poorly repaired and was in fact unroadworthy. The court allowed the plaintiff's claim on the basis that the defendant had chosen to be the agent of the plaintiff and since he had elected to take on the particular task, even though he was not an expert or a professional in the matter, he was expected to have a sufficient degree of knowledge to complete the task competently.

In *Ang Tiong Seng v Goh Huan Chir*[22] the plaintiff injured his hand due to the negligence of D1 and D2. They brought the plaintiff to see D3, a sinseh. D3 bandaged the plaintiff's hand together with three sticks of bamboo. On the second day, the plaintiff experienced some pain and went to see D3, who gave some ointment to the plaintiff and told him that the pain would get worse on the third day, which was true. The plaintiff went back to D3 as he was in great pain, and the latter brought the plaintiff to a hospital. Gangrene had set in, and the hand had to be amputated.

The issue in this case was the standard of care required of a sinseh. The court unfortunately, did not answer this question. Even though the standard of care required of D3 was not the same as the standard of care required of a doctor, he was nevertheless held liable as he was careless in his treatment of the plaintiff.

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20 [1958] 2 All ER 527.
21 [1988] 3 All ER 718.
22 [1970] 2 MLJ 271.

Where a person is registered under the Medical Act 1971, it has been held that the standard of care and skill required of him is at par with that of a medical practitioner. So a traditional eye healer who is registered under the Medical Act 1971 would be in breach of his duty of care if he adopts the 'couching' method to remove cataracts as such method would not be one adopted by a competent medical practitioner.[23]

In any case, the standard of care of a defendant is to be assessed on the basis of what a reasonably skilled competent man undertaking that activity would do or would not do in order to avoid harm to his neighbour. What conduct is reasonably expected of him under the circumstances, and whether he had measured up to the required standard, is determinable from all the circumstances.[24]

4. The defendant with an incapacity or infirmity

The general principle as stated above, is that the defendant's personal characteristics are not taken into account in assessing whether he has acted reasonably or otherwise in the particular circumstances. What then, is the position of a defendant who has an incapacity or who is infirm?

It is unclear whether the action or omission of a defendant who has an incapacity or infirmity should be judged through the perception of an ordinary and reasonable 'normal' person or an ordinary and reasonable person who has the same incapacity or infirmity as the defendant. The general rule is that the defendant's action must conform to the standard expected of a person with normal intelligence. So a man whose level of intelligence is below average would have to satisfy a higher standard of care in his actions.[25]

Consider these cases: In *Roberts v Ramsbottom*[26] the defendant was completely unaware that he had suffered a stroke before getting into his car. He was later involved in a collision resulting in injury to the plaintiff. The court held him liable despite his being unaware of his impaired consciousness at the time of the accident.

In *Mansfield v Weetabix Ltd*[27] the defendant who was driving, went into a hypoglycaemic state induced by a malignancy. He partially lost consciousness but was completely unaware of these events, which resulted

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23 *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623.
24 See *Wu Siew Ying v Gunung Tunggal Quarry & Construction Sdn Bhd & Ors* [1999] 4 CLJ 339 at 354; *Hj Hasan b Manap v Petrodril (B) Sdn Bhd* [1988] 1 MLJ 388.
25 See also Street, 10th edn at p 238.
26 [1980] 1 All ER 7.
27 [1998] 1 WLR 1263.

in a collision with the plaintiff. The Court of Appeal held that since the defendant was not and could not reasonably have been aware of his condition, this disability or infirmity must be taken into account in determining whether the defendant had met the objective standard of care.

The role of policy is evident here. Street's[28] logical explanation is:

> A person who causes an injury to another because he suffers from some disability or infirmity will nonetheless usually be negligent, not because of want of care at the time of the accident, but because, being aware of his disability, he allowed himself to be in the situation; a motorist with seriously impaired eyesight who collides with another car because she fails to see an approaching vehicle is not negligent because she is partially sighted, but because, given her defective vision, she is negligent in electing to drive as to endanger others.

Yet where the defendant is unaware of his disability and could not reasonably be aware of it, perhaps *Mansfield* should be the initial guidance for the courts. Only if the facts and circumstances of the whole case justify it, should policy dictate the application of the higher standard as applied in *Roberts v Ramsbottom*.

5. The child defendant

It is settled law that children fall into a special category. The standard of care required of a child defendant is the foresight of a child the same age.

In *McHale v Watson*[29] the defendant aged twelve, threw a piece of welding rod which had been sharpened at one end, at a wooden post. The rod ricocheted off the post and hit the plaintiff. The High Court of Australia, applying the foresight and prudence of an ordinary boy of twelve, found the defendant not liable.

In *Mullin v Richards*,[30] the Court of Appeal in England adopted the Australian test in relation to a child defendant. Two 15-year-old schoolgirls were fencing with plastic rulers during a mathematics lesson. One of the rulers broke and entered one of the girls' eye. She became blind. Holding the defendant not liable, the court stated that a 15-year-old, unlike an adult, could not be expected to foresee the risk of her behaviour. Some degree of irresponsibility is expected of children playing together.

28 10th edn at p 238.
29 [1966] 115 CLR 199.
30 [1998] 1 All ER 920.

As with adults with an incapacity or infirmity, the same unanswered question arises with children: Is the test objective, merely taking into account the age of the child defendant; or does it extend to include the child's maturity and experience?

6. Driver of a vehicle

An established exception to the general rule that a defendant is judged by the standard of the reasonable man[31] lies in cases where the defendant drives a vehicle. In *Roberts v Ramsbottom*[32] the driver was found liable in negligence even though when the accident occurred his consciousness was impaired by stroke. The court felt that he ought to have been aware that he was unfit to drive, and so the standard of care required was that of a skilled driver.[33] Note however, the 'lower' standard of care applied in *Mansfield v Weetabix Ltd.*[34]

Malaysian cases have not been quite specific and to a certain extent, less clear in holding the principle applicable in determining the required standard of care of drivers of vehicles. Certainly where the driver is not under any disability or infirmity, the standard applied is that of the ordinary skilled driver.

In *Ho Kiong Chan v Patipet*[35] Choor Singh J said:[36]

> There is a very strong duty on the part of a driver to keep a good look out while driving ... a driver should always anticipate the possible presence of others on the road and should always be able to stop within the range of his permitted vision ... it must be borne in mind that the duty of care incumbent upon the driver is very high because he is in charge of a vehicle capable of doing great damage ...

In *KR Taxi Service Ltd & Anor v Zaharah & Ors*[37] it was held that the duty of a driver was only to exercise reasonable care and a driver is not under a duty to be perfect in the sense of being able to anticipate the negligence of others.

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31 Or if the defendant is a professional, by the standard of the reasonable professional; or if the defendant has a particular skill, by the standard of a reasonably skilled man.

32 [1980] 1 All ER 7, for facts see above p 145.

33 The same standard was applied in the earlier case of *Nettleship v Weston* [1971] 3 All ER 581, above at p 140.

34 See above pp 145-146.

35 [1966] 1 MLJ 159.

36 *Ibid.*

37 [1969] 1 MLJ 49.

In *Wong Li Fatt William (an infant) v Haidawati bte Bolhen*[38] the court held that a driver must be in reasonable control of the vehicle he is driving at all times and if the driver knows or ought to know that the area in which he is driving is inhabited, then he must anticipate that he may be put in an emergency situation at any time while passing that area. This also means that the driver must be prepared to halt the vehicle in the event of such an emergency occurring.

A case which seems to advance the imposition of a higher standard of care for drivers, thus lending approval to Choor Singh J's *dicta* in *Ho Kiong Chan v Patipet* is *Zainab bte Abdul Majid v Gan Eng Hwa & Ors.*[39] Here *T* and three of his passengers were killed in a collision between the car driven by *T* and an Express bus. It was found that a car which was driving in front of *T*, suddenly halted when a lorry, which was parked on the left side of the road facing the opposite direction, obstructed the path of that car. In order to avoid colliding with that car, *T* had pulled out to the right into the path of the oncoming Express bus. Richard Talalla J held that *T* was negligent for driving at an excessive speed, which was why he was faced with the emergency situation when the other car halted. As for the defendants, who were the lorry driver and owner respectively, they were also negligent as the lorry was parked in such a way as to cause obstruction and peril to other road-users. The lorry-driver should have reasonably foreseen that a collision such as that which had occurred would occur when he parked the lorry in the way he did. It was further held that parking the lorry on the wrong side of the road constituted a trap for overtaking vehicles which proceeded along the road. The Express bus was found not liable. The decision is sound on the facts of the case. What may be interpreted as a 'higher' standard of care or the 'appropriate' standard of care perhaps is not crucial where the defendant is a normal person with no disability.

The issue is crucial when the defendant is for instance, the elderly or is otherwise less capable than the average normal person. Perhaps the 'proportionate' standard of care as adopted in *Mansfield v Weetabix* ought to be the starting point in Malaysia, rather than the 'higher' standard as applied in *Roberts v Ramsbottom*.

7. The professional defendant

Bankers, doctors, accountants, lawyers, architects, engineers and all who specialise in particular skills are considered professionals and they are bound to exercise the care and skill of ordinary competent practitioners in that

38 [1994] 2 MLJ 497.
39 [1995] 1 MLJ 801.

profession.[40] The standard of care required of these professionals is that of a reasonable professional. Thus someone who professes to have a special skill will not be judged in the same category as an ordinary person. The standard of care required of a professional is naturally of a higher level than that required of the ordinary man on the street.

The test in determining the standard of care of a professional defendant was laid down in the case of *Bolam v Friern Hospital Management Committee.*[41] In this case the plaintiff's pelvis was broken during an electro-convulsive treatment (ECT) and the plaintiff alleged negligence on three grounds; firstly because the defendant did not warn the plaintiff of the risks involved in an ECT, secondly, because the defendant did not give the plaintiff any relaxant before the shocks were given to him, and thirdly because the defendant did not hold down the plaintiff's body whilst the treatment was being administered.

With regards to the third ground on which the claim was made, there were in fact two conflicting views, one view holding that during an ECT, the patient's body must be held down, the other view was that that was not necessary.

Mc Nair J[42] in his direction to the jury stated:

> ... I must explain what in law we mean by 'negligence'. In the ordinary case which does not involve any special skill, negligence ... means ... failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case ... you judge (it) by the action of the man in the street. He is the ordinary man ... but where you get the situation which involves the use of some special skill or competence ... the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill ... it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art ... in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time ... there may be one or more perfectly proper standards; and if (he) conforms with one of those proper standards, then he is not negligent.

The defendant was found not liable as he had conformed to the standard of reasonable doctors and his not holding down the body of the plaintiff was in fact not an improper course of action.

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40 *Swamy v Matthews & Anor* [1968] 1 MLJ 138, FC.
41 [1957] 2 All ER 118.
42 *Ibid* at p 121.

The principle in *Bolam* was approved in *Whitehouse v Jordan*[43] where the issue was whether the defendant had used forceps for too long and had applied too much pressure, with the result that the plaintiff suffered brain damage upon birth. The House of Lords found that even though there was a miscalculation in the use of forceps in this case, this miscalculation did not of itself, render the defendant negligent as the defendant's action was in accordance with the practice accepted as proper by a body of responsible, skilled, medical men. An error of clinical judgment is not necessarily indicative of negligence.

Bolam was also approved in *Sidaway v Bethlem Royal Hospital Governors*[44] where the plaintiff underwent an operation on her vertebrae, which operation carried the risk of damage to her spinal cord. This risk was in fact very small, but if it materialised, could be severe in nature. The surgeon did not inform her of this risk. The plaintiff's spinal cord was damaged without any negligence on the defendant surgeon's part. The plaintiff claimed on the basis that she was not given any warning as to the risks involved in the operation.

The lower court found the defendant not liable for not disclosing to plaintiff the risk of injury to her spinal cord as the surgeon had acted in accordance with accepted medical practice. The Court of Appeal upheld the judge's decision. The House of Lords affirmed the Court of Appeal decision. Applying the *Bolam* test, the hospital and surgeon were not liable as the surgeon had reached the required standard of care, even though he did not inform the plaintiff of the risks involved. Note however, Lord Scarman's dissenting judgment that the *Bolam* test is applicable in determining whether a doctor has discharged his duty to warn his patient of risks inherent in a particular treatment.[45]

Bolam was applied in *Gold v Haringey Health Authority*.[46] The plaintiff claimed damages against the health authority for the doctor's failure to warn her that the success of the sterilisation operation might not be absolute. The defendant was held not liable as it was found that as many as fifty per cent of doctors would not have given such warning in the same circumstances.

Bolam has long been the criterion in Malaysia in assessing a doctor's level of competency. In *Chin Keow v Government of Malaysia & Anor*[47] an amah was given a penicillin injection at a clinic. She died about an hour later. The Privy Council overturned the decision of the Federal Court and agreed with

43 [1981] 1 All ER 267, HL.
44 [1985] 1 All ER 643 at 663, HL.
45 *Ibid* at p 649.
46 [1987] 2 All ER 888; [1988] QB 481, CA.
47 [1967] 2 MLJ 45.

the High Court that the doctor had been negligent as it was expressly written on the patient's card that she was allergic to penicillin.

In *Elizabeth Choo v Government of Malaysia & Anor*[48] Raja Azlan Shah J (as he then was) stated that a professional will not be deemed to be negligent if he has taken steps that would normally be taken by others who are in the same position.[49] However, a professional who takes a different view from another professional in the same profession is not necessarily in breach of his duty of care provided that his opinion is still in accordance with what is regarded as proper by a body of similarly skilled professionals.[50]

In *Kow Nan Seng v Nagamah & Ors*[51] the plaintiff was involved in an accident and his left leg had to be plastered. The plaster was tight and the plaintiff complained of pains. The doctors did not act on the complaints immediately. When they eventually did, the plaintiff's leg had turned gangrenous and consequently had to be amputated. The Federal Court held that the duty of a doctor towards his patient was that he must adhere to the reasonable standard of care and expertise. If there were differences in opinion in terms of the types of plasters that may be used, the defendant would not be liable in negligence as long as he opted for a treatment that was generally accepted within the profession. The court applied the *Bolam* test and held that in this case, the defendant was liable as all doctors were aware of the fact that if plaster was applied blood circulation would be affected. The doctor was also negligent in merely prescribing painkillers when the plaintiff complained of pains. The reason given, that of all doctors being busy on that day as it was 'surgery-day', was not accepted as a valid defence.

Then in *Kamalam a/p Raman & Ors v Eastern Plantation Agency (Johore) Sdn Bhd & Anor*[52] the court introduced a different test to determine breach of duty. The facts are these: One Mr D (the deceased) was employed by D1 at the time of his death and was staying on the estate owned by D1. Mr D was taken to the estate clinic one day due to giddiness and having fainted at work. The attending doctor, having examined Mr D, prescribed medication and discharged him. On two subsequent occasions thereafter Mr D was attended to by D2. Eight days after the first visit to the clinic, as a result of giddiness and fits, Mr D was taken to a hospital for emergency treatment and was subsequently transferred to another hospital. He died the next day, the cause of death being a stroke which was not, but could and should have

48 [1970] 2 MLJ 171.
49 See also, *Inderjeet Singh a/l Piara Singh v Mazlan bin Jasman & Ors* [1995] 3 AMR 2201.
50 *Liew Sin Kiong v Dr Sharon DM Paulraj* [1996] 2 AMR 1403.
51 [1982] 1 MLJ 128.
52 [1996] 4 MLJ 674.

been diagnosed much earlier. The court found D1 and D2 liable for their failure to provide an efficient ambulance service at the material time and for failure to admit Mr D into hospital earlier, respectively.

Although the same decision might have been reached applying the *Bolam* test, the court chose to distinguish *Bolam* and *Elizabeth Choo* and was of the view that the standard of care of a skilled person cannot be determined solely by reference to the practice supported by a responsible body of opinion in the relevant profession or trade. The ultimate question is whether it conforms to the standard of reasonable care demanded by the law, which is a question to be decided by the court and not delegated to any profession or group in the community. The principle laid down in *Rogers v Whitaker*[53] was followed. This departure from the *Bolam* test was reiterated in *Hong Chuan Lay v Dr Eddie Soo Fook Mun*[54] where it was held that although the standard of care required in matters pertaining to diagnosis and treatment was still subject to the *Bolam* test, in respect of the provision of advice and information, it is the court rather than a body of medical opinion that will determine whether the doctor has breached his duty. Medical opinions are however still required to assist the court in its deliberations. *Rogers v Whitaker* was also given the seal of approval in *Tan Ah Kau v The Government of Malaysia*[55] where the court held that since the risk of paralysis in this case was real, the doctor was under a duty to warn the patient of that material risk, particularly if the patient, if warned of the risk, would have considered it to be significant.

The possible expansion of this different standard of care in respect of the provision of advice and information was rather quickly quashed by the Court of Appeal in *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal*[56] where it was affirmed that the *Bolam* test is the applicable principle in determining the standard of care of doctors – as to change this might lead to defensive medicine.[57]

The *Bolam* test also applies to those practising alternative medicine. In *Shakoor (deceased) v Situ*[58] the deceased consulted the defendant, a practitioner of traditional herbal medicine, about a skin condition. The orthodox 'western' treatment for the condition is surgery. The defendant prescribed the deceased

53 [1992] 175 CLR 479.
54 [1998] 7 MLJ 481.
55 [1997] 2 CLJ Supp 168.
56 [2001] 2 AMR 2205, CA.
57 *Ibid* at p 208 *per* Gopal Sri Ram JCA. See also *Hor Sai Hong dan satu lagi lwn Universiti Hospital dan satu lagi* [2002] 5 MLJ 167; *Chelilah a/l Manickam & Anor v Kerajaan Malaysia* [1997] 2 AMR 1856; *Dr Chin Yoon Hiap v Ng Eu Khoon & 2 Ors* [1997] 4 AMR 4204.
58 [2000] 4 All ER 181.

a course of herbal remedy. After taking nine out of the ten doses, the patient suffered acute liver failure and died. The cause of death was the herbal remedy which had produced a rare and unpredictable 'idiosyncratic' reaction. The deceased's widow brought proceedings against the defendant. Evidence was adduced that publications in orthodox medical journals suggested that such herbal remedies gave rise to the risk of liver damage and had in the past, caused death. The defendant's argument was that he was unaware of these publications but that he believed the remedy was completely safe.

The issue was the standard of care of the defendant. The court held that since the defendant was not holding himself out as a practitioner of orthodox medicine, that standard did not apply. At the same time it was not enough to judge him by the standard of similar practitioners in his art. Due to the fact that he was practising alternative medicine in a community where orthodox medicine is the general norm and more importantly, where from the perspective of orthodox medicine reports would be made on the effectiveness of alternative therapies, the alternative medicine practitioner should be aware and take into consideration these reports, in his treatment. On the facts, he was not in breach of this duty.

The *Bolam* test is also applicable in other professions, notably in cases involving the negligence of engineers and architects. In *Greaves & Co v Baynham Meikle*[59] it was held that a professional man – be it a medical man, a lawyer, an accountant, an architect or an engineer, must use reasonable care and skill in the course of his employment. Reasonable care and skill is to be determined through the *Bolam* test, where the defendant professional's conduct will be compared with that of reasonably competent men exercising the particular art.

Practice and knowledge at the time of the alleged breach

The required standard of care of a professional is judged according to the practice and knowledge available at the time of the alleged breach.

In *Roe v Minister of Health*[60] the plaintiff was paralysed from the waist down after an operation because the solution which was used for the required injection was mixed with phenol, another solution that was placed around the container containing the injection solution. Evidence showed that the container containing the injection solution was cracked, but that it could not have been detected according to the state of knowledge at that time. The Court of Appeal found that the doctor knew of the consequences of a

59 [1975] 1 WLR 1095.
60 [1954] 2 QB 66, CA.

phenol injection, and he had examined the injection solution before giving the injection. The doctor was not aware of the possibility of undetectable cracks on the container. Had he been aware of the fact, he would have added another chemical to the phenol to detect any contamination. Lord Denning held the doctor not negligent in not testing the phenol as the possibility of cracks occurring in such a situation was only discovered in the medical field in 1951, whereas this incident took place in 1947. The standard of care must therefore be based on current medical knowledge at the time of the alleged breach, and not at the time of the trial.

Similarly in *Thompson v Smiths Shiprepairers (North Shields) Ltd*[61] the defendants, as employers of the plaintiffs, were held not liable for not providing effective ear-protectors to the plaintiffs until 1963, when the Ministry of Labour published a pamphlet on the dangers of noise for workers. The defendants were only liable for the extent by which the hearing problems of the plaintiffs had been exacerbated after 1963.

In *Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals*[62] the plaintiff became blind as a result of excessive oxygen being administered to him. The High Court initially found that the paediatrician was negligent for failure to inform the plaintiff's parents of the possibility of loss of vision through the administration of excess oxygen. At the Court of Appeal it was found that in late 1975 or early 1976 during which time the plaintiff received treatment, there was no preventive or curative treatment available for the plaintiff's condition. This being the case, the doctor's failure to alert the plaintiff's parents would not have made a difference. The doctor's appeal was thus allowed.

The standard of the 'reasonable man', as indicated above; is not without its difficulties. Although objective in theory and principle, in practice the distinction between the 'hypothetical man' and the attributes of the defendant might be blurred in some cases.

B. The concept of risk

The standard of care is a measure that is imposed by the law but its determination is largely dependent on the facts of the case. There must be a balance between the degree or magnitude of the risk and the required level of responsibility on the part of the defendant, of what should or should not be done by the defendant in the circumstances. If damage is not reasonably foreseeable the defendant is not required to take steps to prevent injury, as

61 [1984] QB 405.
62 [1998] 1 MLJ 57; [1997] 4 AMR 4204, CA.

one is only required to take precautionary measures against foreseeable and probable damage or injury. Therefore in assessing the reasonableness of the defendant's conduct, reasonable foreseeability of damage to the plaintiff must also be considered.

The conduct of the reasonable man is subject to the concept of risk, or what is sometimes known as the risk test. The court, having considered the facts and all the circumstances of a case, will pose the question: what is the chance of harm or risk caused, to the plaintiff, as a result of the defendant's conduct? This question may alternatively be rephrased as follows: is it reasonably foreseeable that the defendant's conduct will cause damage to the plaintiff? If the answer is "yes", then the defendant will be required to exercise a proportionate degree of care to avoid the harm from materialising.[63] In assessing risk, the courts have traditionally been guided by four factors, namely the magnitude of the risk, the practicability of precautions, the utility of the act of the defendant and the general and approved practice.

1. Magnitude of the risk

The degree of care required of the defendant must be weighed against the magnitude of risk or the degree of risk created by the defendant's conduct. The magnitude of risk may be divided into two factors namely the probability of the injury occurring, and the seriousness of the injury.

(a) Probability of the injury occurring

In *Bolton v Stone*[64] the plaintiff was hit by a cricket ball which had been hit out of a cricket ground. The incident was in fact foreseeable as the defendant knew that cricket balls had been hit out over the fence on previous occasions, although very rarely. The House of Lords held that the distance between the place where the ball was hit to the edge of the field which was surrounded by a seven foot wall made injury to the plaintiff rather remote. It was further held that although a reasonable man may foresee many risks, life would be inconvenient if precautionary measures are to be taken for all foreseeable risks. A person must only take reasonable steps against risks that may materialise. Thus the cricket club was held not liable for allowing cricket to be played without having taken extra precautions, such as increasing the height of the fence.

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63 In *Fardon v Harcourt-Rivington* [1932] 146 LT 391 the court stated that a defendant is not expected to foresee fantastic possibilities, he is merely expected to guard against reasonable probabilities. See also, *Tan Kia Chee & Ors v Chan Kian Wah & Anor* [1970] 1 MLJ 205.

64 [1951] AC 850.

In contrast, in *Miller v Jackson*[65] cricket balls were hit out of the fence of the cricket field about eight to nine times per season, and the plaintiff's property had been damaged several times. Even though there was a high fence surrounding the field, there was only a short distance between the fence and the pitch, the place where the ball was hit. The court found that the risk of injury to the plaintiff was high and the defendant was liable each time the cricket ball damaged the plaintiff's property. The precautionary measures adopted by the defendant were insufficient to overcome the risk of injury to the plaintiff.

Similarly in *Hilder v Associated Portland Cement Manufacturers Ltd*[66] the plaintiff who was riding his motorcycle was killed when a football went onto the highway and caused him to have an accident. The occupier of the land was found liable in negligence for allowing children to play football on his land, as the likelihood of injury to passers-by was much greater than in *Bolton's* case.

(b) Seriousness of the injury

The second factor to be considered in assessing the magnitude of risk is the seriousness or gravity of the injury risked to the plaintiff as a result of the defendant's conduct.

In *Paris v Stepney Borough Council*[67] the plaintiff who was blind in one eye worked for the defendant and the working conditions were such that there was risk of injury to the eyes. A piece of metal hit his good eye when he was working and he was completely blind afterwards. The House of Lords held that the employer had a duty to take reasonable care to ensure the safety of the working environment of his employees. He must take into account the probability of injury occurring to the particular employee as well as the gravity of the consequences to that particular employee if an accident did occur. Goggles should have been provided for the plaintiff as the gravity of the consequences of any accident to him would result in his losing his eyesight. This case has in fact been criticised for distinguishing between a person with one good eye and others with two good eyes. It was suggested that even an employee with two good eyes should have been provided with safety goggles as the risk created through an injury is equally serious as with an employee with one good eye. The principle that is derived from this case is that if the defendant knew or ought to know that the risk of injury to the plaintiff is higher than usual, then he must take extra precautions to avoid the potential injury. Thus an authority which conducts repair works on highways should

65 [1977] QB 966.
66 [1961] 1 WLR 1434.
67 [1951] 1 All ER 42.

foresee that blind persons too, use the highway; so that if adequate precautions to protect them from harm are not taken, with the result that they injure themselves, the authority will be held liable.[68]

This means that if the defendant has actual knowledge of the circumstances of the plaintiff and the defendant has a duty to protect the welfare of that plaintiff, the measure of care undertaken must be proportionate to the individual needs of that plaintiff.

In *Johnstone v Bloomsbury Health Authority*[69] the plaintiff, a junior hospital doctor was required by the defendant to work forty hours per week and to be available for overtime of up to forty-eight hours per week on average. The plaintiff claimed that he was deprived of sleep, his health was damaged, his patients' safety was at risk and he suffered from stress and depression. The defendant health authority was found to be in breach of their duty of care. Stuart Smith LJ said:[70]

> ... the duty of care is owed to the individual employee and different employees may have different stamina. If the authority in this case knew or ought to have known that by requiring him to work the hours they did, they exposed him to risk of injury to his health, then they should not have required him to work in excess of those hours that he safely could have done.

By contrast, the defendant was held not liable for the injury sustained by the plaintiff in *Eastman v South West Thames Regional Health Authority*[71] when the plaintiff, who was accompanying a patient in an ambulance, was thrown out of her seat due to her not wearing a seat-belt. A notice in the ambulance which instructed passengers to wear seat-belts was held to be an adequate precaution in the circumstances.[72]

2. *Practicability or cost of precautions to the defendant*

The risk must be measured against the precaution that needs to be taken, and all precautionary measures undertaken by the defendant will be taken into account in determining the reasonableness of the defendant's conduct.

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68 *Haley v LEB* [1965] AC 778. See also, *Pape v Cumbria County Council* [1992] 3 All ER 211 where providing rubber gloves to employees was an inadequate precaution. The employer should have forewarned the employees of the risk of dermatitis unless the gloves were worn.

69 [1991] 2 All ER 293, CA.

70 *Ibid* at p 299.

71 [1991] 2 Med LR 297.

72 The outcome of this case might well have been different if the plaintiff was sick or a confused elderly lady.

In *Latimer v AEC*[73] the defendant's factory was flooded due to heavy rain. The mixture of water and oil caused a part of the floor of the factory to be very slippery and sawdust was placed over the slippery parts. Not all of the slippery area was fully covered and the plaintiff employee slipped and fell. The plaintiff contended that the defendant should have shut the factory down.

At the lower court it was held that the defendant should have shut down the factory and they were found liable. The House of Lords held that the risk of injury was insufficient to warrant the shutting down of the factory.

What is reasonable needs to be balanced with other factors. If the risk may be considerably reduced with a rather low cost, then the defendant would be unreasonable if he does not incur this low cost in order to reduce the risk. On the other hand if the risk of injury is low, it would be unfair to require a lot of expense on the part of the defendant to reduce the risk. If however, the risk is low and no extra costs is required to reduce the risk, the defendant will be acting below the required standard of care for not taking precautions to reduce the risk. In any case the courts have to consider the practicability of precautions as against the disadvantages of halting the activity altogether.

In *Knight v Home Office*[74] a mentally disturbed prisoner who was known to have suicidal tendencies hanged himself despite being observed every fifteen minutes by the attending prison officers. The prison authorities were held not negligent for failing to provide the same level of staffing as would be provided in a private psychiatric prison hospital. The lack of financial resources in this case was taken into account and the defendants were held to have taken all the reasonably necessary precautions within the allocated budget. This 'defence' of lack of resources would not extend however, to the point where there was no available funds at all.

Sometimes it can be difficult to draw the line between what is reasonable precaution or otherwise. In *Hamzah & Ors v Wan Hanafi bin Wan Ali*[75] the plaintiff, who was a passenger on a train hopped off and injured himself before the train fully stopped. The court held that the Malayan Railway Administration and its officers were negligent for not taking steps to ensure that no passengers were standing near the doors, as the defendant should have known that passengers liked to jump off from a train before it fully stopped. The Federal Court however held that the defendant had indeed done all that was reasonable and sufficient to safeguard the passengers' safety and they were accordingly held not liable. There were written notices and

73 [1953] AC 643.
74 [1990] 3 All ER 237.
75 [1975] 1 MLJ 203, FC.

oral warnings by the defendant that passengers were not to stand near the train doors or to jump off before the trains fully stopped. The train service is a cheap and efficient form of transport and if the defendant is required to take extra precautionary measures, this would mean placing a guard at every single door on the trains. This would be rather extreme and would incur a very high cost.

3. *The importance of the object to be attained*

Sometimes the social importance or utility of the defendant's actions will allow him to incur risks of injury in his undertakings. For instance, in *Daborn v Bath Tramways Motor Co Ltd*[76] the defendant drove a left-hand drive car and due to his negligence in signalling, an accident occurred. The defendant was found not liable as the car was used as an ambulance during the war period. The social importance of the defendant's act outweighed the importance of his duty of care to others. However, this does not mean that for the purpose of saving life, any risk will be justified, such as in order to save *A*, *B* and *C* are trampled upon! In *Ward v London County Council*[77] a fire-engine driver was held liable for not stopping at a red light. It is difficult to reconcile the decision in this case with that in *Daborn*. It is submitted that were the facts of *Ward* to present itself again, perhaps the court will reach a different conclusion.

In *Watt v Hertfordshire County Council*[78] the plaintiff was a fireman who answered an emergency call for a woman who was trapped under a lorry. The fire-engine which usually carried the jack was not available and so the jack was brought onto a normal fire-engine. On the way to the emergency scene, the jack fell and hurt the plaintiff. The plaintiff's employer was held not liable as the risk had to be measured against the importance of the object to be attained. If the object involves the saving of another's life, the existence of a high risk may still absorb the defendant's possible liability.

Therefore, if there was an emergency situation and the defendant conducted himself in such a way which later turned out to be the wrong course of action as well as a negligent act, the court will take into account the emergency situation in order to determine whether the defendant's course of action was reasonable in the circumstances.[79]

For instance in *Mahmood v Government of Malaysia & Anor*[80] a police officer was alleged to have unlawfully and negligently shot the plaintiff. The court

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76 [1946] 2 All ER 333.
77 [1938] 2 All ER 341.
78 [1954] 2 All ER 368, CA.
79 See also, *Govinda Raju & Anor v Laws* [1966] 1 MLJ 188.
80 [1974] 1 MLJ 103.

held that the police was not negligent in shooting the plaintiff as the police had reasonable suspicion that an offence was being committed at the particular scene of the accident. The shots were justified in order to effect the arrest of the plaintiff as well as to prevent him from escaping. This decision might well have been due to policy considerations, in that the police must be given certain immunities if they are to be able to carry out their functions effectively.[81]

4. General and approved practice

The general rule is that if a defendant does as a reasonable man would do in the same situation, then the defendant will have acted reasonably. It follows that a defendant who has acted in accordance with the common practice of those similarly engaged in the activity will be strong evidence to suggest that he has not been negligent. Sometimes however, conduct that constitutes a general practice of a particular group of persons will still be considered negligent by the courts and so evidence of general practice is not always decisive.[82] A person is expected to be flexible and to adjust to changes in society as well as to adjust to new discoveries in his field.

A defendant who acts differently from the general and usual practice will give rise to the presumption that he is negligent but this need not necessarily be so, especially if there are a few courses of action that may be taken in a particular situation and the defendant chooses to exercise one of the available options.[83]

In *General Cleaning Contractors v Christmas*[84] the plaintiff window cleaner was cleaning a window twenty-seven feet above the ground. The plaintiff fell from the ledge on the window which was six and a quarter inches in width and injured himself.[85] The House of Lords held that even though standing on the window ledge was a common practice for window cleaners, this was a dangerous practice and the defendant as the employer was liable for not providing a safer system of work. The principle which emerges is that even if an act is a general and common practice, liability will still be imposed if the act is dangerous and gives rise to a considerable degree of risk of injury.

81 See *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

82 See *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201.

83 See *Luxmoore-May v Messenger May Baverstock* [1990] 1 WLR 1009; *Sidaway v Bethlem Royal Hospital Governors* [1985] AC 871, *Whitehouse v Jordan* [1981] 1 WLR 246.

84 [1953] AC 180.

85 The High Court held both the employer and owner of the building liable. This decision was reversed by the Court of Appeal and the House of Lords finally settled the matter and confirmed the High Court's decision.

An established standard practice may well be the practice of reasonable and prudent persons in the defendant's position, but it may fall below or surpass the standard required by law of a reasonable and prudent person.[86]

In *Aik Bee Sawmill v Mun Kum Chow*[87] the plaintiff did not use a crossbar to lift planks onto a lorry, with the result that the planks fell onto him. The general practice was that a crossbar would normally be used to lift the planks. The court held that since the plaintiff was never taught how to use the crossbar, the defendant was liable.

When the nature of a particular job is dangerous, then a person need not follow the given instructions wholly. The defendant who does not take extra precautions when instructing a dangerous job will be liable if the worker suffers injury. The defendant may act more than what a reasonable man would do, but not less than what a reasonable man would do.

The factors that the court need and might take into account in determining whether the defendant has reached the required standard of care are many. Although the standard of care is a question of law, a judge's reasons for finding that the defendant has met or not met that standard are matters of fact.

86 *Thean Chew v The Seaport (Selangor) Rubber Estate Ltd* [1960] 26 MLJ 166 at 169 *per* Ong J.

87 [1971] 1 MLJ 81.

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Chapter Eight

NEGLIGENCE: DAMAGE

The third element of negligence that the plaintiff needs to prove is that damage was caused by the defendant's breach of duty. Two issues need to be addressed in determining whether the damage suffered by the plaintiff is the consequence of the defendant's breach of duty. The first issue is causation in fact and the second, causation in law. Causation is relevant in all torts, in that the plaintiff must prove that the defendant has caused his loss.

A. Causation in fact

The question that arises is whether the defendant's conduct has in fact caused the damage suffered by the plaintiff. The test used is the 'but-for' test: but-for the defendant's breach of duty, would the plaintiff have suffered the injury or damage? If the answer is 'yes' then it may be concluded the defendant's breach did not cause the plaintiff's injury and *vice versa*.

1. The but-for test

This test was laid down in *Barnett v Chelsea & Kensington Hospital Management Committee*.[1] Three security guards went to the defendant's hospital when they started vomiting after drinking some tea in the early morning. One of the security guards was the plaintiff's husband. The nurse on duty telephoned the doctor who instructed the nurse to tell the three men to go home and to call their own doctors. Later that afternoon the plaintiff's husband died of arsenic poisoning, and the plaintiff sued the hospital for negligence for its failure to treat her husband. The court held that the doctor had breached his duty of care for not treating the patient. It was however found that the breach did not cause the plaintiff's husband's death as evidence showed that the patient would still have died even if the doctor had treated him. The defendant was accordingly held not liable.

Similarly in *Robinson v Post Office*[2] a doctor who did not conduct tests to find out whether the plaintiff was allergic to anti-tetanus injection was not

1 [1969] 1 QB 428.
2 [1974] 2 All ER 737.

liable when the latter contracted encephalitis as a reaction to such injection, as even if a test had been done, the allergy would not have been discovered in time.

In *Swamy v Matthews & Anor*[3] the plaintiff went to see D1, a doctor who was in the employment of D2, for an itch on his hands and legs. He was given an injection of 5 cc acetylarsan which was alleged to have caused paralysis of the hands and legs. The High Court dismissed the plaintiff's claim for negligence on the basis that the plaintiff failed to establish that the injection caused his paralysis. On appeal, the Federal Court upheld the earlier decision on the same grounds: that the paralysis was not caused by the injection and D1 was not negligent in giving the injection. Ong Hock Thye FJ dissented and held that the dosage was massive as compared to the recommended dosage of 1 cc to 3 cc by the manufacturers and since the plaintiff suffered paralysis within a few days of the injection, there was sufficient nexus between the injection given by D1 and the paralysis suffered by the plaintiff.[4]

The but-for test is generally satisfactory if the plaintiff is suing only one defendant or even two defendants, if one of them may be vicariously liable for the other's negligence. The test will not provide any conclusive answers where there may be more than one party who might be the cause of the final damage sustained by the plaintiff, or if there are concurrent breaches of duty.

2. Multiple causes

Whenever there are two concurrent breaches, where each breach by itself may be the cause of the damage, logically both breaches of duty may be the cause of the damage. The but-for test does not provide a satisfactory solution in this instance as the test would in fact negate the liability of both parties. Applying the question: but-for the first defendant's conduct, would the plaintiff suffer any damage? The answer would be 'yes', as the second defendant too has caused the injury and therefore 'absolving' the first defendant's liability. One would get the same reply when the test is applied to the second defendant. The courts have thus adopted a different approach in these kinds of situations.

3 [1968] 1 MLJ 138.

4 See also *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal* [2001] 2 AMR 2205, CA and *Payremalu a/l Veerappan v Dr Amarjeet Kaur & Ors* [2001] 3 AMR 3305: in both cases the plaintiffs' cases failed as they could not establish causation in fact.

In *Bonnington Castings Ltd v Wardlaw*[5] the plaintiff contracted pneumoconiosis due to inhaling silica dust at his place of work. The dust came from a pneumatic machine which did not give rise to any breach on the part of the defendant. Some of the dust also came from a grinding machine for which the defendant was at fault for not ensuring that the dust-absorber machine was functioning properly. There was no evidence as to the exact percentage of dust inhaled from either the pneumatic machine or the grinding machine, but most of the dust came from the pneumatic machine. The plaintiff could not prove that he would not have contracted the disease if the dust-absorber machine was functioning, in the sense that he could not prove causation using the 'but-for' test. The House of Lords nevertheless held the defendant liable, as the dust from the grinding machine constituted one of the causes of the disease. The plaintiff was not required to prove that that dust was the sole or main cause of his illness. He only had to prove, on a balance of probabilities that the dust from the grinding machine was an important cause of his disease, and since he had proven this, he was entitled to be fully compensated for his illness.

The principle that arose from this case is that a plaintiff need not prove that the defendant's breach of duty is the sole or main cause of the damage, as long as the breach is an important cause of the damage. What needs to be proved is that the breach is a 'material contribution' to the plaintiff's damage.[6]

In *McGhee v National Coal Board*[7] the plaintiff contracted dermatitis as a result of exposure to brick dust. Due to inadequate washing facilities at the defendant's factory, this meant the plaintiff was still in contact with the dust whilst he was cycling home. The defendant was not guilty of exposing the plaintiff to the dust during working hours but they were held liable for the prolonged exposure due to the inadequate washing facilities at their factory. The plaintiff in this case could not prove through the 'but-for' test that he would not have contracted dermatitis if he had been able to shower after work but it was established that his disease was due to the brick dust. It was sufficient for the plaintiff to prove that the defendant's breach had materially increased the risk of injury to him.

As a result of *Bonnington Castings* and *McGhee* the question arose as to whether a plaintiff who has proved that his damage was due to the defendant's conduct in 'materially contributing' to the risk of his incurring the damage,

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5 [1956] AC 613.

6 See *McWilliams v Sir William Arrol & Co* [1962] 1 All ER 623 where the defendant-employers were held not liable as it was found that even if they had provided a safety-belt to the plaintiff, he would not have worn it.

7 [1972] 3 All ER 1008.

has in effect discharged the burden of proof required of him.[8] In *Wilsher v Essex Area Health Authority*[9] the House of Lords held that *McGhee* did not establish any new principle of law. The burden of proof lies with the plaintiff throughout and the plaintiff must prove, at the very least, that the defendant's breach of duty is a 'material contribution' to his damage, and there should be no distinction between 'material contribution' to injury and 'material increase in risk' of injury.[10]

Therefore in the absence of conclusive evidence that it is in fact the defendant's breach which causes the plaintiff's damage, and there is uncertainty with regards to the actual and specific cause of the damage, the 'material contribution' factor will be taken into account. It follows (or it should) that if the degree or level of the defendant's contribution is known then he will only be liable to the extent of his contribution and no more. For instance in *Thompson v Smiths Shiprepairers (North Shields) Ltd*[11] the plaintiff suffered progressive hearing impairment due to industrial noise. The defendant was only liable for that part of the deafness occurring after the exposure to noise became a breach of duty.

McGhee was distinguished in *Hotson v East Berkshire Area Health Authority*.[12] The plaintiff injured his hip in a fall and went to a hospital run by the defendant health authority. The injury was incorrectly diagnosed and the plaintiff was sent home. After five days of severe pain the plaintiff went back to the hospital where the nature and extent of his injuries were then discovered and he was given an emergency treatment. The nature of the hip injury caused the plaintiff permanent deformity of the hip joint, restricted mobility and general disability. In an action against the defendant it was admitted that the delay in diagnosis when the plaintiff was first examined amounted to a breach of duty, but they denied that the resulting delay had caused the plaintiff the disabilities that he was suffering from. At the House of Lords, it was concluded that the crucial question of fact was whether the plaintiff's injury was caused by the fall or the defendant's negligence in making an incorrect diagnosis and delaying treatment. If the fall had caused the injury then the defendant's negligence was not a cause of the injury: and this question had to be decided on a balance of probabilities. The trial judge found that

8 See *Clark v MacLennan* [1983] 1 All ER 416 where it was held that if a defendant failed to safeguard against a specific risk to the plaintiff, as a consequence of which the plaintiff suffered the kind of damage that the extra precaution on the part of the defendant would have prevented, then the burden of proof shifted to the defendant to show that he was not in breach and even if he was, that the breach did not cause the resulting damage.

9 [1988] 1 All ER 871, HL.

10 For a more detailed analysis of this point, see Jones, 4th edn at pp 141-3.

11 [1984] 1 All ER 881.

12 [1987] 2 All ER 909.

even with prompt and correct diagnosis and treatment when the plaintiff first arrived at the hospital, there was a 75% chance that his condition would have developed and therefore the delay by the defendants caused only 25% of his illness. Thus the defendant's damages was assessed at 25% of the compensation which would have been payable if they were 100% liable. The House of Lords quashed this decision. As it was the accident itself rather than the defendant's delay which was more likely to have caused the plaintiff's illness, the defendant was not liable. Questions concerning the loss of a chance could not arise where there had been a positive finding that before the duty arose on the part of the defendant the damage complained of had already been sustained or had become inevitable.[13]

McGhee was again distinguished in *Kay v Ayrshire and Arran Health Board*.[14] Here the plaintiff's son contracted meningitis and was admitted to a hospital managed by the defendant health authority. During the course of treatment he was negligently given an overdose of penicillin, the immediate effects of which were counteracted by remedial treatment. He subsequently recovered from the meningitis but suffered from deafness. In an action by the plaintiff for damages the defendant testified that there had been no recorded case of an overdose of penicillin causing deafness, while deafness was a common sequela of meningitis. On appeal to the House of Lords the plaintiff contended that the overdose was a material contribution to the deafness and the defendant ought to be liable on the principle that if a defendant engaged in conduct of a kind which created or increased the risk of injury, the defendant was to be taken as having caused the plaintiff's injury even though the existence and extent of the contribution made by the defendant's conduct could not be ascertained.

It was held that where two competing causes of damage existed and in this case they were the overdose of penicillin and the consequences of meningitis, the law could not presume in favour of the plaintiff that the tortious cause was responsible for the damage. It must first be proved that it was an accepted fact that the tortious cause was capable of causing or aggravating such damage. As an overdose of penicillin had never been known to cause deafness, the plaintiff's deafness had to be regarded as resulting solely from the meningitis. The plaintiff failed to establish causation.[15]

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13 The difference between this case and *McGhee* is that here the defendant's alleged breach could not have been a cause of the plaintiff's final injury, whereas in *McGhee* the defendant's alleged breach in not providing washing facilities could well have increased the chances of the plaintiff contracting dermatitis.

14 [1987] 2 All ER 417.

15 In *McGhee*, the plaintiff was exposed to brick-dust which was a known cause of dermatitis, whereas in this case an overdose of penicillin was not a known cause of deafness.

The principle in *McGhee* again came up for consideration and was distinguished in the case of *Wilsher v Essex Area Health Authority*[16] where the plaintiff's blindness could have been caused either by the negligent administration of excess oxygen by the doctor or by any one of five other conditions which afflicted the plaintiff at the time. The House of Lords held that where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach and the plaintiff's injury did not give rise to the presumption that the defendant had caused the injury. The burden of proof remained on the plaintiff to prove that the defendant's breach of duty caused his injury. In this case, since the plaintiff's blindness could have been caused by any one of a number of different agents and it was not proved that the blindness was caused by the failure to prevent excess oxygen being given to him, the plaintiff had failed to discharge the burden of proof required of him.

It has been said[17] that *Hotson, Kay* and *Wilsher* were attempts by the courts to restrict or narrow the path opened by *McGhee*, which made the test for determining causation easier for the plaintiff as he need not prove that the defendant did in fact cause the damage, but that it was sufficient if he could prove that the defendant's breach 'materially or substantially contributed' to the damage or that it 'materially increased' the risk of injury to the plaintiff. However, might it not be argued that the facts and circumstances in the trilogy of cases above were different than the facts and circumstances in both *Bonnington Castings* and *McGhee?* Whichever way one views these cases, it is clear that the plaintiff must prove, either that the defendant did in fact cause the damage suffered by the plaintiff, or that the defendant's conduct materially contributed to the plaintiff's damage, or that the defendant's conduct materially increased the risk of damage to the plaintiff, and in all of these three situations, all the facts and circumstances of the case will be taken into consideration.

In Malaysia it seems that the *McGhee* requirement of *material* contribution is applicable, as opposed to the defendant's breach of duty merely being a contributory factor to the plaintiff's loss.[18] The distinction made by the House of Lords between *McGhee* and *Wilsher* has also been adopted in *Dr KS Sivananthan v The Government of Malaysia & Anor.*[19] The plaintiff was injured in a road accident and sought treatment first at Hospital A and then at Hospital B. At Hospital A a plaster of paris (POP) was applied to his wounded leg.

16 [1988] 1 All ER 871, HL.

17 See Fridman, at pp 334-6.

18 *Wu Siew Ying v Gunung Tunggal Quarry & Construction Sdn Bhd & Ors* [1999] 4 CLJ 339.

19 [2000] 4 AMR 3767.

Dissatisfied with the care he received there, he discharged himself and sought treatment at Hospital B. The attending doctor split the POP and performed an operative procedure on the leg. A week later the plaintiff received further treatment by way of an internal fixator from the same doctor. Nine months later the leg had to be amputated due to ischaemia. The court held that since the plaintiff's leg was at a severe level of ischaemia when he has admitted into Hospital B, the attending doctor could not be said to be negligent in delaying treatment at that stage. Although the doctor could have opted to treat the plaintiff in a number of alternative treatments rather than the internal fixator, this method of treatment was acceptable as a recognized choice of treatment in the circumstances (thus satisfying the required standard of care). Thus the doctor at Hospital B could not be concluded as being the causative factor of the plaintiff's final injury. *Wilsher* was cited with approval – that where a plaintiff's injury was attributable to a number of possible causes, one of which included the defendant's breach of duty, this in itself does not give rise to the presumption that the defendant had caused the injury. The plaintiff must prove that the defendant's negligent conduct has more probably than not, caused the plaintiff's end damage.

On the facts, the government was held liable for the negligent treatment provided at Hospital A.

3. Concurrent causes[20]

Where two or more tortious acts result in damage, and any one of the acts could have produced the same damage, the party responsible for each act will be held liable for the whole damage. This is because each act is a substantial cause of the final damage. The same applies where the plaintiff suffers damage as a consequence of two independent negligent acts, such as where two ships negligently collide, causing the injury to the plaintiff.[21]

In *Fitzgerald v Lane*[22] D1 hit the plaintiff as he was crossing a pelican crossing. The impact threw the plaintiff onto the bonnet of the car and back onto the road where another car driven by D2 struck him. The plaintiff was severely injured but it could not be established which of the two cars caused his injury. Both D1 and D2 were held jointly liable.

Where there are concurrent causes, all parties will be liable if and only if it can be established that his act has caused the damage.[23]

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20 See also Street, 10th edn at p 273.
21 See *The Koursk* [1924] P 140, CA.
22 [1988] 2 All ER 961, HL.
23 See *Hale v Hants and Dorset Motor Services Ltd* [1947] 2 All ER 628, CA.

4. Consecutive or successive causes

In *Performance Cars Ltd v Abraham*[24] the defendant's car collided into the plaintiff's car, and the damage required part of the plaintiff's car to be resprayed with new paint. Prior to the accident with the defendant, that very same part of the car was already damaged caused by an earlier accident, and this first damage had not been repaired. The court held the defendant not liable for the cost of respraying as he had damaged a car which was already damaged, and therefore his negligence did not cause the damage.

In *Carslogie Steamship Co Ltd v Royal Norwegian Govt*[25] the plaintiff's ship was damaged in a collision with the defendant's ship. The collision was due to the negligence of the defendant. Temporary repair work allowed the ship to sail and it was sent to the United States for permanent repair. On the way the ship suffered further extensive damage due to bad weather. The damage caused by both the collision and the bad weather was repaired at the same time which took fifty-one days. The damage caused by the collision should have taken only ten days to repair. The plaintiff claimed damages for loss of hiring profits during the ten days attributable to the collision damage. Denying the plaintiff's claim, the House of Lords held that the plaintiff could only claim for any loss of profits which was caused by the defendant's wrongful act. However, during the time the ship was in dock for repairs, the ten days required for repairs for collision damage was also used for repairs for the bad weather damage. The defendant was not liable for the bad weather damage as it was not a foreseeable consequence of the collision. Thus the plaintiff's ship ceased to be a profit-earning machine during that ten-day period as the bad weather damage had rendered her unseaworthy.

The principle that arises is this: if there are two occurrences and the first incident is a tort, the second incident may wipe out or erase the earlier wrong. It is not easy to understand the reasoning in this case. Perhaps liability ought to be imposed for at least the first ten days of repair and the cost of sailing the ship to the United States. After all, the ship would not have had to sail to the United States if the defendant had not been negligent in the first place.

Where there are two torts and two tortfeasors, then the principle in *Baker v Willoughby*[26] applies. Here the plaintiff's leg was injured due to the defendant's negligence, and the plaintiff had to look for another job. He was later shot

24 [1962] 1 QB 33.
25 [1952] AC 292.
26 [1969] 3 All ER 1528; [1970] AC 467, HL.

by some robbers in the same leg which consequently had to be amputated. The plaintiff claimed from the defendant, who contended that the second incident had wiped out his liability. The House of Lords held that if the plaintiff had been able to claim from the robbers, the compensation would have been the difference between an injured leg and having no leg. If the defendant's contention was accepted, the plaintiff would not receive any compensation in the period after the robbery for the 'difference' between a sound leg and an injured leg. Lord Reid[27] stated that a person was compensated, not for the physical injury that he has sustained, but for the loss that he suffered due to that physical injury. The plaintiff in this case was losing out, not so much due to an injured leg *per se*, but the inability to enjoy those amenities which depended on freedom of movement, and the inability to work and earn as much as he could have. The second injury did not lessen his suffering, and therefore it should not 'wipe out' the defendant's liability.

However, in *Jobling v Associated Dairies Ltd*[28] the defendant's breach of duty caused injury to the plaintiff's back and three years later, before the trial, the plaintiff contracted myelopathy which was in no way related to the first accident. The plaintiff could not work thereafter. The defendant claimed that his liability for loss of earnings stopped when the plaintiff contracted the disease. The plaintiff argued that *Baker v Willoughby* applied in the circumstances. The House of Lords unanimously held the defendant not liable as when a disease or an injury occurred after the tort had caused a person to be incapable of working, this showed that even if the plaintiff had not been injured by the tort, his capability to work would still have been affected in any case. If the defendant was to be liable for the plaintiff's disability to work then the plaintiff would be in a better position than he would have been in, if he had never suffered the injury to his back. Therefore the defendant was only liable up until the time the plaintiff contracted the disease.

The House of Lords distinguished *Baker v Willoughby* thus: *Baker* was a case on successive torts but here there was a tort followed by a greater injury arising from an independent natural cause.

More importantly, the House of Lords cast doubts on the decision in *Baker*[29] and said that the decision must be confined to its facts.[30]

27 *Ibid* at p 492.

28 [1981] 2 All ER 752,HL.

29 *Ibid* at pp 757, 759 *per* Lord Edmund-Davies, at pp 763-4 *per* Lord Russell of Killowen.

30 Note it was held that the basis of Lord Reid's judgment in *Baker v Willoughby* in reliance on *Harwood v Wyken Colliery Co* [1913] 2 KB 158 was incorrectly applied – [1981] 2 All ER 752 at 757, 759, 763, 768.

B. Causation in law/Remoteness of damage

A defendant will only be liable if it is reasonably foreseeable that his conduct will result in some damage to the plaintiff. A negligent act may give rise to different types of damage, but the law does not and will not impose liability on the defendant for every single damage that occurs due to his act or omission. The law places a limit and the problem has always been the determination of this limit. No specific guidelines may be given and the final decision is ultimately in the hands of the individual judge who may consider moral, economic and social and even political factors in arriving at his decision. Winfield & Jolowicz states:[31]

> Since 1850 two competing views of the test of remoteness of consequence have been current in the law. According to the first, *consequences are too remote if a reasonable man would not have foreseen them;* according to the second, if a reasonable man would have foreseen any damage to the plaintiff as likely to result from his act, then *he is liable for all the direct consequences of it suffered by the plaintiff, whether a reasonable man would have foreseen them or not.*

The first test (the reasonable foresight test) was first propounded by Pollock CB in *Rigby v Hewitt*[32] and the second test (the direct consequence test) by Lord Sumner in *Weld-Blundell v Stephens.*[33] In 1921, the Court of Appeal settled English law in favour of the second test.

1. Direct consequence test

The application of the second test mentioned above can be seen in *Re Polemis and Furness, Withy & Co Ltd*[34] where a chartered ship anchored at Casablanca to unload some things and due to the negligence of the stevedores of the charterer, a plank fell into the hold of the ship. Part of the cargo was tins of benzine. The tins had leaked and when the plank fell on some of the tins, the resulting sparks caused a fire and the ship was completely destroyed. The Court of Appeal held the charterers liable for all the loss which was a direct consequence of the negligence which amounted to US$1 million even though the loss could not have been foreseen. It was foreseeable that some damage would occur as a result of the plank falling and thus the plaintiff had succeeded to prove breach of duty on the part of the defendant. However the causing of

31 15th edn at p 209.
32 [1859] 5 Ex 240 at 243.
33 [1920] AC 956 at 983-4.
34 [1921] 3 KB 560, CA.

the spark could not reasonably have been anticipated from the falling of the plank.[35]

The direct consequence test involves two stages: firstly, whether damage is foreseeable as a consequence of the defendant's conduct, and if the answer is in the affirmative, the second stage will come into effect – that the defendant will be liable for all the direct consequences of his conduct, even though the type or extent of the damage is unforeseeable. The test rests on the 'fault' principle rather than 'compensation', whereby once a person is established to have committed a tort, he has to bear all the losses that arise as a consequence thereof.

2. *Reasonable foresight test*

In *The Wagon Mound*[36] the defendant chartered the ship, *"The Wagon Mound"*, which was anchored at C Oil Co for refuelling. Due to the negligence of the defendant's stevedores, some oil had spilled onto the water and the oil spread to the plaintiff's wharf which was about 600 feet away. Two ships were anchored at the plaintiff's wharf for welding works. The manager at the plaintiff's wharf, upon seeing the oil, ordered the welding work to be stopped. He enquired with C Oil Co whether it was safe to continue the welding works. C Oil Co advised that it was safe to do so. The manager himself believed that the oil on the surface of the water was not dangerous and accordingly instructed the repair works to be continued. He however reminded the workers to be careful not to drop any flammable material into the water. Two days later the oil caught fire and the plaintiff's jetty was extensively damaged.

Two important findings of fact arose at the trial: firstly, expert evidence was tendered that it was unforeseeable that fuel oil on the surface of the water would catch fire. Secondly, it was foreseeable and indeed had materialised, that damage by way of oil seeping into various parts of the plaintiff's jetty and affecting usage of those same parts would occur. Thus it was contended that although damage was foreseeable, the type of damage which had in fact materialised was not foreseeable. However, since damage was foreseeable, the trial judge and the appeal court held the defendant had breached their duty of care and was thus liable for all the direct consequences of that breach of duty. On appeal to the Privy Council, it was ruled that *Re Polemis* should not be considered good law. The test should be whether a reasonable man in the defendant's position would foresee the damage that

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35 This decision was affirmed by the same court in *Thurogood v Van den Burghs and Jurgens* [1951] 2 KB 537.

36 [1961] AC 388.

has occurred. In this case since it was not foreseeable that the defendant's breach of duty would cause a fire the defendant was held not liable.

The reasonable foresight test involves two principles; firstly, damage must be foreseeable as a consequence of the defendant's conduct, and secondly, the type of damage must be foreseeable. It follows that if the damage that occurs is of a different nature than what is foreseeable, the defendant will not be liable. The test is based on the 'compensation' principle in that liability is only extended to reasonably foreseeable damage.

In *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd, The Wagon Mound (No 2)*[37] the owner of the ships which were destroyed in the same fire claimed from the defendant. The plaintiff succeeded in this case on the basis that damage in the form of fire was foreseeable, even though the risk was only very slight. It follows from this case that if damage to the plaintiff is foreseeable, it is irrelevant whether the risk of damage is high or otherwise. A reasonable man would only neglect such a risk if he had some valid reason for doing so, such as it would involve considerable expense to eliminate the risk.

The test in *The Wagon Mound* is the accepted test in England and thought to be the correct one. In Malaysia, the case of *Government of Malaysia v Jumat bin Mahmud & Ors*[38] approved the principle in *The Wagon Mound*. What must be foreseeable is the type of damage and not necessarily the exact nature of the damage.

In *Jaswant Singh v Central Electricity Board & Anor*[39] fire buffaloes and a dog which belonged to the plaintiff died as a result of being electrocuted by a telephone wire belonging to D2, the government of Malaysia. The wire had snapped three days prior to the accident and was lying on the ground and resting on top of the aerial electricity lines belonging to D1. In a claim for negligence against both defendants or their servants the court held that the defendants owed a duty of care to the plaintiff as the plaintiff was a 'neighbour' of the defendant. It was further held that when electricity was carried overhead by wires or cables great care must be taken in addition to any precautions required by statute, to see that it was not likely to become a source of danger. The defendants had breached their duty in allowing the wire to remain resting on the electric cables for a long time, and the damage was not too remote for if the danger of the telephone wire becoming live

37 [1967] 1 AC 617, PC.
38 [1977] 2 MLJ 103.
39 [1967] 1 MLJ 272.

with electricity was reasonably foreseeable, then death or serious injury to any person or animal coming in contact with it was also reasonably foreseeable.

3. *Relevant factors associated with the reasonable foresight test*

Foreseeability of damage is subject to certain factors and these are discussed below.

(a) The type of damage must be foreseeable

The general principle is that the damage must be of the same type, kind or class as what is foreseeable.[40] If the damage that materialises is of a different type than what is reasonably anticipated then it is regarded as too remote and the defendant will not be liable. The problem lies in determining the type of damage that ought to be foreseen. Should it be divided into three broad categories of damage to property, injury to person or economic loss; or should different types of particular damage within each of these categories be differentiated as well? Two cases illustrate this point.

In *Bradford v Robinson Rentals Ltd*[41] the defendant had asked his employee, the plaintiff to run an errand. The van which the plaintiff was driving did not have a heater, with the consequence that the plaintiff suffered frostbite. In a claim against the defendant, the court held that frostbite was a type of illness that was foreseeable as a consequence of exposure to cold weather and as such the defendant was liable.

By contrast, in *Tremain v Pike*[42] the plaintiff who worked on the defendant's field on which there were many rats contracted Weil's disease. The court held that this illness, which was caused by contact with rat urine was extraordinary. The illness that was foreseeable was rat-bites and food poisoning and not Weil's disease. The defendant was not liable as the damage that materialised was different in kind to what was foreseeable. (This case was in fact criticised for limiting the scope of liability to only specific illnesses.)[43]

In *Crossley v Rawlinson*[44] the plaintiff rushed to the defendant's burning lorry with a fire-extinguisher and in his haste he did not notice a hidden hole. He

40 *Jaswant Singh v Central Electricity Board and Anor* [1967] 1 MLJ 272; *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103, PC.
41 [1967] 1 All ER 267.
42 [1969] 3 All ER 1303.
43 See *Dias* [1970] CLJ 28 (Cambridge Law Journal).
44 [1981] 3 All ER 674.

fell into it and injured himself. The court held that the injury was too remote and unforeseeable as the plaintiff had not even reached the lorry.[45]

(b) Extent of damage is irrelevant

The extent of damage is irrelevant as long as the type of damage is foreseeable in the circumstances.[46]

In *Vacwell Engineering Co Ltd v BDH Chemicals Ltd*[47] the defendant had sold a chemical to the plaintiff without informing him that it might explode if it came in contact with water, but what was foreseeable was a small explosion. The plaintiff placed several test-tubes containing the chemical in a sink and while washing the test-tubes one of them fell and broke. A huge explosion ensued, killing the plaintiff. The defendant was held liable, even though the damage was far more serious than what was initially foreseeable, as the type of damage, which was damage through an explosion, was foreseeable.

The general principle that the defendant will be liable for the albeit unforeseeable physical extent of the damage needs to be considered in the following two situations.

(i) Eggshell skull rule

Sometimes a defendant's conduct causes a much more severe damage to the plaintiff than is reasonably anticipated. *The Wagon Mound* does not affect the maxim that 'a tortfeasor must take his victim as he finds him.' The defendant cannot argue that the plaintiff's injury would be less if the plaintiff did not have an unusually thin skull or a weak heart, and this principle is commonly known as the thin-skull or egg shell skull principle.[48] The rule applies to any weakness or predisposition of the plaintiff to a particular injury or illness regardless of the defendant's knowledge.[49] What must first be

45 Usually the courts are more sympathetic towards rescuers but perhaps in the instant case the decision may be justified on the basis that the plaintiff was not yet a rescuer when he sustained the injury?

46 In *Sivakumaran a/l Selvaraj & 2 Ors & Anor v Yu Pan & Anor* [1995] 1 AMR 490 the court held that the test for damage is that the kind and extent of the damage should be foreseeable in general. It is respectfully submitted that the learned judge was wrong with regards to foreseeability for the extent of damage.

47 [1971] 1 QB 88.

48 This principle is also applicable in cases of nervous shock, as long as it is reasonably foreseeable that the defendant's conduct would expose the plaintiff (as a primary victim) to personal injury, whether physical or psychiatric: see *Page v Smith* [1995] 2 All ER 736, HL.

49 *Brice v Brown* [1984] 1 All ER 997.

established is that the defendant has breached his duty of care and some harm is foreseeable as a consequence of that breach.

In *Smith v Leech-Brain & Co Ltd*[50] due to the defendant's negligence the plaintiff's husband was burned on the lip by a piece of molten metal. The plaintiff in fact had a tendency to contract cancer and the burn caused a cancerous growth from which he died three years later. The defendant was liable even though an ordinary healthy person would not have developed cancer in the same circumstances, on the principle that a tortfeasor has to take his victim as he finds him.

Lord Parker CJ said:[51]

> The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim.

In *Robinson v Post Office*[52] the defendant was held liable for the allergic reaction suffered by the plaintiff when the latter went to a hospital for medical treatment as a consequence of the defendant's initial negligence. The court stated that a person should be able to foresee that the victim of his negligence would require medical treatment and so he may be liable for the consequences of that medical treatment.

The eggshell skull rule has even been extended to eggshell personality, as in *Malcolm v Broadhurst*[53] where the defendant's negligent driving caused injuries to the plaintiff and her husband. The plaintiff's husband's personality consequently became unpredictable and at times violent due to his injuries, and the plaintiff, who herself had a pre-existing nervous disturbance became extremely affected by the changes in her husband's behaviour that she could not work for seven months. In an action against the defendant for the loss of wages the court held that the exacerbation of the plaintiff's nervous condition was foreseeable as the defendant must take the plaintiff as he found her. There was no difference in principle between an eggshell skull and an eggshell personality. It was reasonably foreseeable that if the husband was severely

50 [1962] 2 QB 405.
51 *Ibid* at p 415.
52 [1974] 2 All ER 737, CA.
53 [1970] 3 All ER 508.

injured when the wife was temperamentally unstable, her instability might be adversely affected by the injury done to her husband.[54]

Whether suicide may entitle the plaintiff to invoke the egg-shell skull principle is debatable. The case law has not been very clear on this point.

In the local case of *Sivakumaran & Ors v Yu Pan & Anor*[55] the plaintiff's husband was seriously injured in a collision with the defendant's lorry, and nine months after the accident he committed suicide. In a dependency claim against the defendants, it was argued on behalf of the defendants that death through suicide was unforeseeable; the plaintiff argued that the maxim that a tortfeasor must take his victim as he finds him was applicable in the circumstances. KC Vohrah J held that the issue was whether suicide was a normal reaction to the deceased's injuries and finding the answer to be in the negative, suicide was therefore a remote and unforeseeable consequence. The second issue that arose was if suicide was an abnormal reaction, whether it could fall within the eggshell skull rule. Evidence showed that the deceased did not suffer from any psychological predisposition towards depression before the accident and therefore the rule was inapplicable.[56]

It is uncertain whether the principle applies to property damage. In England the answer seems to be in the affirmative. The Court of Appeal[57] held that although the foreseeable result of the defendant's negligence in failing to install a proper ventilation system in a hopper used to feed pigs was merely food poisoning, the defendants were nonetheless held liable when the pigs unforeseeably died of a rare disease. The application of the rule has even been extended to include *external* (as opposed to *internal*) physical circumstances.[58] So if the defendant is negligent, and the resulting damage is of a foreseeable type, it does not matter that the damage which in fact ensues is of a greater extent than what is foreseeable.

54 See also *Meah v McCreamer* [1985] 1 All ER 367 where the defendant was liable to compensate the plaintiff for the imprisonment undergone by the latter, which imprisonment was caused by the commission of offences induced by injuries sustained for the defendant's negligent driving.

55 [1995] 1 AMR 490.

56 Court of Appeal decision pending at the time of writing. Compare the decision in this case to *Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807, where on similar facts, the plaintiff's claim succeeded. There was however, evidence that prior to the accident the deceased had a tendency to "worry about certain matters". See also, *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246, CA – widow of clinically depressed man who killed himself in prison could claim from police. This, however, was not a case on the egg-shell skull principle, but more on failure to fulfil the duty to inform about the deceased's suicidal tendencies.

57 In *Parsons v Uttley Ingham* [1978] 1 All ER 525, CA.

58 See *Great Lakes Steamship Co v Maple Leaf Milling Co* [1924] 41 TLR 21.

(ii) The plaintiff's impecuniosity

The rule in *The Wagon Mound* however does not protect a plaintiff whose damage is made worse through lack of financial resources.

In *Liesbosch Dredger v Edison SS*[59] the defendant, through his negligence, caused the plaintiff's dredger to sink. The plaintiff, who was in a contractual relationship with a third party claimed for the following three losses; firstly, the cost of hiring another dredger, as the plaintiff due to their own impecuniosity, could not afford to buy their own dredger which cost would be lower than the sum total of the hiring cost. Secondly, the loss of profit for failing to complete their contractual obligations to the third party, and thirdly, for the loss of their dredger. The House of Lords allowed the second and third claims but not the first. The plaintiff could not claim for this additional cost as it was not an immediate physical effect of the defendant's negligence but was in fact due to the plaintiff's own impecuniosity and was thus an external factor which made this damage remote. The defendant is not required to accept the plaintiff as he is in financial matters. Although this decision is difficult to reconcile with the cases which come under the eggshell skull rule, can it somehow be explained on the basis that here, the plaintiff's loss is a pure economic loss and in such cases, only if it is foreseeable can damage be recovered, and not otherwise.

(c) The method by which the damage occurs is irrelevant

The general rule is that once the type of damage is foreseeable, the way or method by which the damage occurs is not important.

The leading case is *Hughes v Lord Advocate*[60] where due to the negligence of some post office workers, a manhole was left uncovered. A tent was erected over the manhole and kerosene lamps were placed around the tent to serve as a warning to passers-by. Two boys played with the lamps. While they were doing so, one boy stumbled over one of the lamps. It fell into the manhole and caused a loud explosion and the boy was seriously burned. The explosion was caused by the vaporisation of the kerosene, which the flame from the lamp ignited. The House of Lords held that it was not foreseeable that an explosion would occur in these circumstances, although injury as a result of a fire was foreseeable. Since the type of injury was foreseeable, the defendant was held liable. Furthermore, leaving the manhole uncovered constituted a breach of duty on their part. They should have foreseen that

59 [1933] AC 449.

60 [1963] AC 837. See also *Jolley v Sutton London Borough Council* [2000] 3 All ER 409, HL.

children might bring the lamps into the hole and if the lamps were to fall and break, someone would be injured. The lamp was a dangerous object even though the way in which the damage occurred was not foreseeable.

Therefore the precise sequence of events need not be anticipated for the harm to be foreseeable. The harm or damage itself, may not be a specific illness, it is sufficient if the damage is of a kind within the general range of what is reasonably foreseeable.

A case on point is *Wieland v Cyril Lord Carpets Ltd*[61] where the plaintiff sustained injuries caused by the defendant's negligence. A contraption was fitted to her neck, which restricted her head movements. She was also unable to wear her bifocal spectacles and due to all these factors she fell down some stairs and sustained further injuries. The injury and damage caused by the second accident were held to be attributed to the original negligence of the defendants. Eveleigh J[62] said:

> It can be said that it is foreseeable that one injury may affect a person's ability to cope with the vicissitudes of life and thereby be a cause of another injury and if foreseeability is required, that is to say, if foreseeability is the right word in this context, foreseeability of this general nature will, in my view, suffice.[63]

A case that does not seem to fit in with this principle and perhaps should be limited to the facts of the case is *Doughty v Turner Manufacturing Co Ltd.*[64] The facts are these: the plaintiff's co-worker inadvertently knocked an asbestos cover into some hot molten liquid. The heat from the liquid caused some chemical change in the asbestos, which began to spray water which then turned to steam, and about two minutes later caused an eruption of the molten liquid. The plaintiff was injured by some of this liquid. At the time of the accident it was not known that heat would cause such a change in asbestos. In an action against his employers for negligence, the Court of Appeal denied the plaintiff's claim because the eruption was unforeseeable, although risk by splashing was foreseeable. Lord Pearce[65] said:

> ... the evidence showed that nobody supposed that an asbestos cement cover could not safely be immersed in the bath ... counsel for the

61 [1969] 3 All ER 1006.
62 *Ibid* at pp 1010-1.
63 See also, *Stewart v West African Terminals Ltd* [1964] 2 Lloyd's Rep 371; *Draper v Hodder* [1972] 2 All ER 210; *Malcolm v Broadhurst* [1970] 3 All ER 508; *The Trecarrell* [1973] 1 Lloyd's Rep 402.
64 [1964] 1 All ER 98.
65 *Ibid* at p 100.

> plaintiff concedes ... that if the defendants had deliberately immersed this cover in the bath as part of the normal process, they could not have been held liable for the resulting explosion. The fact that they inadvertently knocked it into the bath cannot of itself convert into negligence that which they were entitled to do deliberately. In the then state of their knowledge ... the accident was not foreseeable.

4. Intervening acts

There are instances where, after the breach of duty by the defendant, another 'happening' takes place and this 'happening' is referred to as an intervening act. An intervening act may break the chain of causation and the final damage is said to be attributable to the intervening act and not as a result of the defendant's breach. The 'happening' may be considered reasonable and foreseeable in the circumstances so that the intervening act does not break the chain of causation, in which case the defendant may be held liable for the final damage sustained by the plaintiff. In essence, if the intervening act is unreasonable and unforeseeable, it constitutes a *novus actus interveniens* and the defendant will not be held liable.

There are three different types of intervening acts, namely intervention by natural causes, intervention by a third party and intervention by the plaintiff.

(a) Intervention through a natural event that is independent of human conduct

This type of intervention will absolve the defendant of liability if the breach of duty does not increase the probability of risk of damage to the plaintiff.

In *Carslogie Steamship Co Ltd v Royal Norwegian Government*[66] the defendant was not liable for the damage to the plaintiff's ship caused by bad weather as this damage was not a consequence of the first collision. The second damage was a natural intervening event and thus the defendant was not liable.

For the act of nature to break the chain of causation, it must be overwhelming and unpredictable and in no way linked to the defendant's negligence.[67]

(b) Intervention by a third party

The defendant will also be liable if his breach of duty causes a third party to act, which act subsequently causes the final damage. If however, the defendant's breach of duty gives an opportunity to the third party to act

66 [1952] AC 292, above at p 170.
67 See Street, 10th edn at p 270.

which he does on his own accord and independently, this constitutes a *novus actus interveniens* and the defendant will not be held liable for the third party's conduct.

In *Scott v Shepherd*[68] the defendant threw a lighted squib into a market place and two other persons, one after the other, picked up and threw the squib where it finally hit and injured the plaintiff. The court held that the act of the third party who last threw the squib was an act of self preservation which was reasonable and foreseeable, and therefore the injury to the plaintiff was caused by the defendant's initial act.

In *The Oropesa*[69] there was a collision between *"The Oropesa"* and *"The Manchester Regiment"*. Both ships were at fault but the damage to the latter was more severe. The captain of *"The Manchester Regiment"*, together with nine of his crew took a boat to cross over to meet the captain of *"The Oropesa"* to discuss the incident. Unfortunately the boat capsized before it reached *"The Oropesa"* and the plaintiff's son who was on the boat, died. At the trial the question was whether his death was caused by *"The Oropesa"*, or whether the captain's act of bringing his crew on board the boat constituted a *novus actus interveniens*. The court held that the death could not be seen as an isolated incident, independent of the collision. It was stated that in order to break the chain of causation it must be proven that the second incident was an independent and separate act, that was not a normal consequence of the initial breach, something that was unreasonable.

In *Rouse v Squires*[70] D1 had driven a lorry negligently, causing an accident with another vehicle on the highway. D2, who was also driving another lorry negligently, subsequently collided with both vehicles. The plaintiff, who was assisting at the scene of the first collision died as a result of the second collision. The Court of Appeal held that D1's negligence had contributed to the cause of the plaintiff's death, as if D1 had not been negligent in the first place, the accident would not have happened and D2 would not have collided with the other two vehicles. In the circumstances D1 was 25% liable and D2, 75% liable.

This decision must be compared to *Knightley v Johns*[71] where as a result of negligent driving D1's car overturned in a one-way tunnel. D2, a police inspector, had forgotten to close the tunnel contrary to the standing orders for road accidents in tunnels. He later instructed the plaintiff, a police constable.

68 [1773] 2 Wm Bl 892.
69 [1943] 1 All ER 211.
70 [1973] QB 889.
71 [1982] 1 WLR 349.

to close the tunnel and the plaintiff had to go against the flow of traffic in order to carry out this instruction. D3, who was coming into the tunnel, hit the plaintiff. On the facts D3 was found not to have been negligent. The Court of Appeal held that even though it was foreseeable that the police would arrive at the scene and that they might commit a mistake, as well as there being a risk to safety, D2's act was a *novus actus interveniens* which broke the chain of causation between D1's negligence and the plaintiff's injuries. The accident between the plaintiff and D3 was a remote consequence of D1's negligence. D2 was held liable for not closing the tunnel in the first place and for instructing the plaintiff to drive against the flow of traffic.

In *Wright v Lodge*[72] D1's vehicle broke down and she failed to remove it from the highway with the consequence that D2's lorry collided with the car. P1, who was a passenger of D1 was injured and D1 was held liable to P1. The lorry careered off onto the opposite carriageway and collided with several other vehicles, injuring P2 and P3. It was proven that the lorry driver was driving in a reckless manner and his reckless driving constituted a *novus actus interveniens* which denied P2 and P3 compensation from D1.

In *Lamb v Camden Borough Council*[73] due to the defendant's negligence in breaking a water main outside the plaintiff's house, the foundations of the house subsided and the house was inhabitable. The house was subsequently inhabited by some squatters and by the time they were evicted the plaintiff had suffered a substantial loss due to the state of disrepair of the house. In a claim against the defendant, the court held that even though squatting was foreseeable, nevertheless policy dictated that the damage be held too remote.[74] By contrast in *Ward v Cannock Chase District Council*[75] the facts of which are similar to those in *Lamb*, the defendants were held liable for delaying repairs to the plaintiff's property with the result that vandals and thieves caused further damage to the property. The risk of vandalism was also higher in this case and therefore foreseeable. Certainly policy plays a large role in determining the remoteness of damage in these two cases and in the area of remoteness generally.

(c) Intervening act of the plaintiff

If the plaintiff's act or omission, together with the breach by the defendant cause the final damage, the plaintiff is usually said to be contributorily

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72 [1993] 4 All ER 299.

73 [1981] 2 All ER 408.

74 See also *Smith v Littlewoods Organisation Ltd* [1987] 1 All ER 710, above at p 101. Can it not be argued that the presence of the squatters was merely an unforeseeable method by which the foreseeable damage occurred?

75 [1985] 3 All ER 537.

negligent.[76] If the plaintiff's act or omission causes the damage, then that act or omission constitutes a *novus actus interveniens*. The act or omission in this instance must essentially be unreasonable.

In *McKew v Holland & Hannen & Cubitts (Scotland) Ltd*[77] due to the defendant's negligence the plaintiff sustained some injuries on his leg, as a result of which he sometimes lost control and fell. A few days after the accident, the plaintiff went to a block of flats where the staircase had no handrail beside it. As he was descending these steps, he suddenly lost control and in order to avoid from falling, he jumped down, and fractured a bone. The House of Lords held that to jump in an emergency situation did not necessarily break the chain of causation, but in this case the plaintiff had broken the chain of causation as he had placed himself in that emergency situation. His conduct though foreseeable, was unreasonable. In *Emeh v Kensington and Chelsea and Westminster Area Health Authority*[78] the defendant was negligent in performing a sterilisation operation with the consequence that the plaintiff became pregnant. The court held that the plaintiff's refusal to have an abortion was not a *novus actus interveniens*, as the court would not regard a woman's refusal to have an abortion as an unreasonable act. Furthermore the plaintiff was already 20 weeks pregnant when she became aware of her pregnancy.

Damage sustained by a plaintiff in an attempt to rescue a person who was put in danger due to the defendant's act was also held not to be a *novus actus interveniens*.[79]

As a conclusion, the general guideline in determining whether there has been a *novus actus interveniens* is to consider whether the resulting or subsequent act or omission to the first breach is unreasonable or foreseeable.

If the intervention is reasonably foreseeable in that it may be anticipated although an unintended consequence of the initial breach, then *novus actus interveniens* would not be established and *vice versa*.

C. Proof of negligence

There are two stages in a civil trial – the determination of legal issues, and that of the facts of the case. Both these issues will be determined by the

76 See below, Chapter 9.
77 [1969] 3 All ER 1621.
78 [1985] QB 1012.
79 *Ogwo v Taylor* [1987] 3 All ER 961; *Cutler v United Dairies (London) Ltd* [1933] 2 KB 297.

judge, and the judge will conclude, from the evidence tendered in court, whether there is proof that negligence has occurred. A *prima facie* case exists when sufficient evidence is adduced in favour of the plaintiff.[80]

In Malaysia civil trials are not tried by a jury and therefore questions of law and of fact are decided by the judge.[81] The problem then lies in determining the boundary between law and fact. In the case of *Qualcast (Wolverhampton) Ltd v Haynes*[82] the court stated that even though all issues of law and fact must be taken into consideration in determining the defendant's liability in negligence, in the end the reasonableness or otherwise of the defendant's act depends on the facts of each case.

The burden of proof lies on the shoulder of the party making the claim, which is the plaintiff.[83] Section 101 of the Evidence Act 1950[84] places the burden of proof on the plaintiff. The standard of proof is on a balance of probabilities.[85] This means that the plaintiff's evidence must prove that it is more probable than not, that the accident occurred due to lack of care on the part of the defendant.[86] If the plaintiff fails to reach this standard, then his action will fail. So if the evidence against the defendant is equally balanced, in that the plaintiff's injury could have resulted either from the defendant's negligence or not, (such as there is an inherent risk in a particular surgery that could materialize even without negligence on the part of the surgeon) the plaintiff would have failed to establish his case.[87]

The plaintiff must also prove specific acts or omissions of the defendant, that are alleged to be negligent. In *Neo Chan Eng v Koh Yong Hoe*[88] the plaintiff was hit by a lorry driven by the defendant. Evidence of the plaintiff and

80 In *PP v Chin Yoke* [1940] MLJ 47 at 48, Gordon-Smith Ag JA said, "In *Mozley and Whiteley's Law Dictionary* (5th edn) it states: a litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side." See also *Arulpragasan a/l Sandaraju v PP* [1997] 1 AMR 329.

81 Even for criminal cases, jury trials have been abolished with effect from February 17, 1995, see Act A908/95.

82 [1959] 2 All ER 38.

83 *Krishna Murthey & Anor v Law Lye Chua* [1992] 1 CLJ 684; *Sundram a/l Ramasamy v Arujunan a/l Arumugam & Anor* [1994] 3 AMR 2125.

84 Act 56.

85 *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182.

86 See *Miller v Minister of Pensions* [1947] 2 All ER 372 *per* Lord Denning and *PP v Yuvaraj* [1969] 2 MLJ 89.

87 *Ashcroft v Mersey Regional Health Authority* [1983] 2 All ER 245, affirmed [1985] 2 All ER 96n.

88 [1960] MLJ 291.

defendant were contradictory and the learned judge disbelieved both parties. He stated that he could guess what actually happened, but that he had no right to do that, and concluded that the party asserting his case must prove his case as the burden of proof lies on that party. If no evidence can be given in his favour, then the defendant will not be liable.

Sometimes the court will be prepared to draw an inference of negligence even though there is no outright evidence as to the defendant's act or omission. This inference may be made when the plaintiff invokes the maxim *res ipsa loquitur*.

D. *Res ipsa loquitur*

In order to discharge the burden of proof, the plaintiff must prove that the defendant has acted in a particular way or that he has omitted to do something; but this requirement is not absolute. The judge may nonetheless conclude that the defendant has been negligent without hearing the facts of the case in greater detail, such as if a needle has been left in a child's stomach after an operation, there arises a presumption that the surgeon has been negligent. If the defendant is unable to explain the incident or tender any evidence to the contrary, this means the plaintiff has successfully discharged the burden of proof. This however, does not necessarily mean the defendant will automatically be liable, as he has a right to rebut the presumption and give evidence and further proof that his act or omission was reasonable in the circumstances.

When the plaintiff raises the maxim *res ipsa loquitur*, he is asserting that based on the evidence tendered, he has proven *prima facie*, that the defendant is negligent. *Res ipsa loquitur* means 'the thing speaks for itself' and the maxim must be expressly raised. The main purpose of the maxim is to avoid injustice to the plaintiff as otherwise the plaintiff would be required to prove the details of the cause of the accident, which he may not know.

As stated by NH Chan JCA in *Teoh Guat Looi v Ng Hong Guan*:[89]

> ... *res ipsa loquitur* was in essence no more than a common sense approach to the effect of the evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where (i) it is not possible for him to prove precisely how the accident happened, but (ii) on the evidence as it stands, he manages to show that the accident could not have happened without negligence on the part of the defendant.

89 [1998] 4 AMR 3815 at 3821, citing Megaw LJ in *Lloyde v West Midlands Gas Board* [1971] 2 All ER 1240 at 1246.

Two questions often arise in relation to *res ipsa loquitur*, namely:

1. How and when is the maxim applicable, and

2. What is the consequence or effect of its application.

1. How and when is the maxim applicable?

The most important requirement is that the damage or injury that has occurred must give rise to the presumption that the defendant has been negligent. This presumption must be clear and non-contradictory. If more than one version of the accident is probable the maxim is inapplicable. This requirement is usually further divided into three requirements.

In *Scott v London and St Katherine Docks Co*[90] the plaintiff who was standing near the door of the defendant's warehouse was injured when several sugar bags fell on him. The defendant was held liable as the facts were sufficient to give rise to the inference that the defendant was negligent. Erle CJ laid down the rule for the application of the maxim of *res ipsa loquitur* as follows:[91]

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident was such as in the ordinary course of things would not have happened if those who had the management had used proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

The three requirements are:

(a) the thing that causes the damage must be under the control of the defendant or his servants, and

(b) the damage is something that will not ordinarily happen if the defendant takes adequate precaution, and

(c) the cause of the accident is not known.

(a) Control

The defendant or his servants must be in control of the thing that causes the damage. The defendant need not have complete control over all the

90 [1865] 3 H & C 596.
91 *Ibid* at p 601.

circumstances leading to the plaintiff's injury, it is sufficient if he has a mere right to control, what more if he has actual control over the events leading to the injury."[92] The degree of control required in order for the maxim to apply are illustrated in these two cases: in *Gee v Metropolitan Ry*[93] the plaintiff fell out of a train when the door that he was leaning against suddenly opened just after the train had moved. The court held the defendant liable in negligence.

By contrast, in *Easson v LNE Ry Co*[94] the plaintiff, a child aged four years old, fell off a train when the doors suddenly opened seven miles after the train had left its last stop. The defendant was found not to have full control over the incident for the application of *res ipsa loquitur*. It was unreasonable to expect the train to be under the control of the defendant for the whole journey. The negligence in the instant case might have been caused by either the defendant or any of the passengers on the train.

The criterion is therefore, whether outside interference may be expected. If so, then the defendant cannot be said to have sufficient control, whereas if interference is improbable, then the defendant may be said to have sufficient control."[95]

In *Ward v Tesco Stores Ltd*[96] the plaintiff slipped on some spilt yoghurt at the defendant's supermarket. The court held the maxim to be applicable even though there was no evidence as to how long the yoghurt had been on the floor.

In *Teoh Guat Looi v Ng Hong Guan*[97] the plaintiff/appellant's husband was killed when the defendant/respondent reversed his car into the rear of another car, near which the deceased was standing. A single eyewitness who was standing near the driver's side of the car reversed into claimed that although he did not see the actual collision, he heard a crashing sound. He then turned and saw that the defendant's car was backed into the rear of his car and the deceased was lying on the ground in between the two cars. The plaintiff relied on *res ipsa loquitur* in her claim for damages in negligence against the defendant. The High Court dismissed the plaintiff's claim as he did not believe the eyewitness's account of the accident.

92 *McGowan v Stott* [1923] in [1930] 143 LT 217, CA.
93 [1873] LR 8 QB 161.
94 [1944] KB 421.
95 *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749.
96 [1976] 1 All ER 219.
97 [1998] 4 AMR 3815, CA.

On appeal NH Chan JCA[98] held *res ipsa loquitur* to be applicable. The circumstances of an accident may raise the presumption of negligence under the maxim, and one such circumstance is where the defendant's car is in a position where in the ordinary course of things, it has no right to be.[99] This would include circumstances where a car had mounted the pavement.[100]

In cases where one of two or more persons is in control[101] and an employer is the party sued for the negligence of one of his employees, but the particular employee is not identifiable, *res ipsa loquitur* still applies for purposes of establishing the employer's vicarious liability.[102] Similarly if a surgeon is sued in negligence for injury occurring to a patient during an operation and it could not be established who amongst the operating theatre staff inflicted the injury, *res ipsa loquitur* would apply in an action against the surgeon.[103] Obviously if it cannot be proved that the negligence occurred during the time and concerning the particular task in which the surgeon had control, the maxim does not apply.[104]

Where the plaintiff is able to prove that one or other of the defendants, D1 and D2; or both have been negligent, then a *prima facie* case has been made out against either D1 or D2 or both.[105]

Where however the plaintiff establishes that the damage to him was caused either by the negligence of D1 or D2, but not both, a *prima facie* case in his favour arises only if D1 and D2 refuse to give an explanation as to how the damage occurred.[106]

The applicability of the maxim has even been extended to the negligence of an independent contractor in *Walsh v Hoist & Co Ltd*[107] where *res ipsa loquitur* was successfully raised against both the defendant and his independent contractor who was performing work delegated to him.

98 Ahmad Fairuz JCA concurring.

99 Mokhtar Sidin JCA dissented on the ground that since the eye-witness account of how the accident happened was rejected, there was thus no evidence that the defendant's car actually knocked into the deceased. Thus, it followed that the maxim was inapplicable.

100 Following *McGowan v Stott* [1923] in [1930] 143 LT 217, CA.

101 See Street, 10th edn at p 261.

102 *Cassidy v Ministry of Health* [1951] 1 All ER 574, CA.

103 See *Mahon v Osborne* [1939] 1 All ER 535, CA (Scott LJ dissenting).

104 *Morris v Winsbury-White* [1937] 4 All ER 494.

105 *Roe v Minister of Health* [1954] 2 All ER 131, CA. See also *France v Parkinson* [1954] 1 All ER 739, CA.

106 See *Cook v Lewis* [1952] 1 DLR 1 and *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472, CA.

107 [1958] 3 All ER 33, CA.

(b) The damage is of a kind that would not ordinarily happen if the defendant had taken adequate precaution

All the facts of the case will be taken into account and the facts will be judged through the ordinary experiences of man. For instance if a car hits a pedestrian at a pedestrian crossing or a car is driven on the wrong lane, everyone knows that these incidents will not happen if proper care was taken.

In *Byrne v Boadle*[108] a bag of flour fell from a factory window injuring the plaintiff. The court held that this would not have happened without any negligence on the part of the defendant.

Defendants have been held liable where a stone was found in a bun,[109] where a scaffolding collapsed,[110] where an aircraft crashed upon taking off,[111] or where a vehicle hit a person on a pavement.[112]

On the other hand, in *Sochacki v Sas*[113] the defendant was not liable when a fire in his grate spread and damaged the neighbouring rooms as the spreading of fire could occur without negligence on anyone's part. Similarly losses in commodity futures trading need not necessarily be through the negligence of the broker concerned.[114]

In *Cassidy v Ministry of Health*[115] it was held that even in situations where the defendant's activity was outside the realm of common experience, meaning that some kind of expertise was involved, the maxim would still be applicable. This principle was contrary to the decision in *Mahon v Osborne*[116] where Scott LJ in a dissenting judgment held that the maxim did not apply in cases of surgical operations, as the judge would not have enough knowledge of the circumstances to draw an inference of negligence. In this case the defendant was held to be *prima facie* negligent when a swab was left in the body of a patient after an abdominal operation. The court held that the plaintiff was entitled to call expert witnesses to show that the accident would not have occurred without the negligence of the defendant.

108 [1863] 2 H & C 722.
109 *Chapronière v Mason* [1905] 21 TLR 633.
110 *Kealey v Heard* [1983] 1 All ER 973.
111 *Fosbroke-Hobbes v Airwork Ltd and British American Air Services Ltd* [1937] 1 All ER 108.
112 *Richley (Henderson) v Faull* [1965] 1 WLR 1454.
113 [1947] 1 All ER 344.
114 *Stafford v Conti Commodity Services Ltd* [1981] 1 All ER 691.
115 [1951] 2 KB 343; [1951] 1 All ER 574, CA.
116 [1939] 1 All ER 535.

(c) The cause of the accident is not known

Once the cause of the accident is known and may be explained, the thing ceases to 'speak for itself' and the maxim becomes inapplicable, as there is no longer a question of drawing an inference.

In *Barkway v South Wales Transport Co Ltd*[117] the plaintiff who was a passenger on the defendant's bus was killed when the bus was involved in an accident. It was found that the cause of the accident was a faulty tyre which might have been discovered if the defendant had frequently required the drivers to make relevant reports. The House of Lords held that since the cause of the accident was known, *res ipsa loquitur* did not apply. However the defendant was still found liable on the facts of the case.

This principle has been reiterated in a local case, *Noor Famiza bte Zabri & Anor v Awang bin Muda & Anor.*[118] There was a collision between a truck driven by the defendant and a car driven by the plaintiff's husband, who died in the tragedy. The accident occurred on the deceased driver's side of the road and the plaintiff sought to rely on the principle of *res ipsa loquitur*, whereas the defendant claimed the deceased was contributorily negligent. Abdul Malik Ishak JC quoted the *dictum* of Ong CJ in *Lai Kuit Seong v PP*[119]:

> ... the doctrine does not apply where the cause of the accident is known ... the *res* speaks because ... where the accident stands unexplained, the known facts and circumstances, however meagre, may be such that want of reasonable care is safely attributable to the person but for whose negligence the accident could not have happened ... conversely *res ipsa loquitur* cannot be relied on where the *res* is ambivalent.

The evidence showed glass fragments on the deceased's side of the road, which meant the defendant had encroached into the deceased's path. It was also highly probable that the defendant was speeding as the damage to the deceased's car was extensive. Since the cause of the accident was known, *res ipsa loquitur* was inapplicable but the defendant was nevertheless found liable based on the evidence adduced.[120]

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117 [1950] 1 All ER 392, HL.

118 [1994] 1 AMR 679.

119 [1969] 1 MLJ 182.

120 See also *Joginder Kaur & Anor v Malayan Banking Ltd & Anor* [1971] 1 MLJ 98; *Palaniayee & Anor v Toh Whye Teck Realty Ltd & Anor* [1973] 1 MLJ 34; *Bong Miew v Patrick Ting* [1981] 2 MLJ 209 where the court held that whenever the cause of the damage was known, *res ipsa loquitur* was inapplicable and the plaintiff must prove negligence in the usual way, through establishing duty, breach and resulting damage.

2. What is the effect of its application?

The effect of the maxim is that the plaintiff has successfully proven that *prima facie*, the defendant has been negligent. The onus then shifts to the defendant[121] to rebut the inference. He may do so by giving evidence or explanation as to how the accident occurred and without his negligence. The nature of evidence required from the defendant in rebuttal will depend on the strength or cogency of the inference against him and the standard of care called for in the circumstances. If the defendant fails to rebut the inference of negligence, this will entitle, though not require, a finding for the plaintiff. Yet a plaintiff is not necessarily entitled to 100% damages when a defendant fails to tender evidence to rebut the presumption of negligence on his part.[122] If the defendant is able to give evidence that explains how the accident could have occurred without negligence, or gives a reasonable explanation which is equally consistent with the accident happening without his negligence as with his negligence, the onus shifts back to the plaintiff who has to prove negligence in the usual way.[123]

In *Henderson v Henry E Jenkins & Sons*[124] the plaintiff's husband was killed when a lorry which was descending a hill failed to brake. The failure was due to a dysfunction in the hydraulic brakes of the defendant's lorry. The brake failure was caused by an erosion to the brake pipe at a spot which could not have been detected through normal visual inspection. However the corrosion could have been discovered if the defendant had instructed the pipe to be removed from the lorry during inspection. The vehicle was in fact regularly inspected and the manufacturer as well as the Road Transport Department did not suggest that the pipe was to be removed for inspection. The defendant claimed that the damage was latent and would not have been discovered even if reasonable inspection had been made. The majority of the House of Lords held the defendants liable as they were not able to rebut the inference of negligence raised against them. Furthermore the defendants could not show that they had made a reasonable inspection of the heavy lorry which was regularly sent on a journey involving the descent of a steep hill.

A case often cited to explain the effect of the maxim is *Ng Chun Pui v Lee Chuen Tat*,[125] which held that the burden of proof does not shift to the defendant

121 *National Chemsearch Corpn (SEA) Pte Ltd & Anor v Hotel Ambassador (Malaysia) Sdn Bhd* [1975] 2 MLJ 193.

122 *Mustapah bin Puteh v Basit bin Mohammad* [1999] 2 AMR 1172.

123 *Wong Choon Mei & Anor v Dr Kuldeep Singh & Anor* [1985] 2 MLJ 373.

124 [1970] AC 282, HL.

125 [1988] RTR 298, PC.

but remains with the plaintiff. The burden for the defendant is only to give evidence to rebut the *prima facie* case raised by the plaintiff. In this case, a coach veered across a road and collided with a bus which was coming from the opposite direction. These facts alone raised an inference of negligence against the defendant. The defendant however testified that another car had suddenly overtaken their coach and the coach driver had to brake which subsequently caused the coach to veer onto the other side of the road. It was held that in such a situation of emergency, the coach-driver was not in breach of his duty when he braked, even though that reaction caused damage to the plaintiff.

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Chapter Nine

DEFENCES TO NEGLIGENCE

Even if the plaintiff succeeds in proving all the elements of negligence this does not necessarily mean that he will win the case, or receive the full amount of damages prayed for. The defendant may raise defences which effect may absolve him from liability. Defences which are usually raised in a negligence suit are *volenti non fit injuria*, contributory negligence, and mechanical defect and inevitable accident. Another defence that may be, but is rarely used is that of a valid exclusion clause.

A. *Volenti non fit injuria*

This is a Latin maxim which means the plaintiff has consented or voluntarily assumed the risk of injury. In *Lee Geok Theng v Ngee Tai Hoo & Anor*[1] the principles on which *volenti non fit injuria* applied were explained thus:

> *Volenti non fit injuria* simply means that to which a man consents cannot be considered an injury. No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it. No one can enforce a right which he has voluntarily waived or abandoned. Consent must be real and given without force, fear or fraud. Mere knowledge of a risk does not amount to consent.

The learned judge further stated that when raising the defence, the defendant must plead:

(i) that the facts of which the plaintiff was fully appraised, gave rise to the injury; and

(ii) the plaintiff understood the risk of injury; and

(iii) that the plaintiff voluntarily undertook to be responsible for the risk.

The terminology *volenti non fit injuria* is usually adopted in negligence cases, and consent; in intentional torts. 'Assumption of risk' has however gained popularity in recent years. The defence has three requirements.

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1 [2000] 4 MLJ 42 at 44 *per* KN Segara J.

1. Consent or assumption of risk

Generally, if the plaintiff has an agreement with the defendant that the latter will not be liable if he is negligent, this agreement will allow the defendant to raise the defence of *volenti non fit injuria* successfully.

Therefore if no express agreement has been made between the parties, the courts will examine the facts of the case and determine whether there is an implied agreement to the effect that the plaintiff has consented to, or assumed the risk of injury, so that the defendant will not be liable for any subsequent injury suffered by the plaintiff.

In *Nettleship v Weston*[2] the plaintiff agreed to give the defendant driving lessons and was subsequently injured when the defendant hit a lamp-post due to her inexperience. The defence of *volenti* was rejected as there was no evidence that the plaintiff had agreed to assume the risk of injury. (It has been questioned[3] why an implied agreement was not inferred in the case).

The reluctance of the courts to readily impose the existence of an implied agreement to run the risk of injury, can also be seen in *Slater v Clay Cross Co Ltd.*[4] In this case the plaintiff was walking along a tunnel on a railway track which was owned by the defendants when due to the negligence of a train driver she was injured. Lord Denning said that even though the plaintiff could be said to have voluntarily assumed the risk of danger, she could not be said to have agreed to the risk of negligence by the driver.

Winfield & Jolowicz[5] states that a quite extraordinary situation will have to exist before the court holds that the plaintiff has consented generally to lack of reasonable care by the defendant. Salmond & Heuston[6] states:

> The issue is whether the plaintiff has consented to run the risk, or consented to the lack of care which produces the risk, at his own expense ... the issue is not whether the plaintiff voluntarily and rashly exposed himself to the risk of injury, but whether he agreed that if injury befell him the loss should be on him and not on the defendant.

Consenting to the lack of reasonable care may be construed as consenting to there being no duty of care or alternatively, no breach of duty on the part of the defendant. It follows therefore that *volenti non fit injuria* is a complete defence for the defendant as he either owes no duty of care or if he did, he

2 [1971] 2 QB 691.
3 See Winfield & Jolowicz, 14th edn at pp 731-2.
4 [1956] 2 QB 264.
5 14th edn at p 730.
6 20th edn at p 487.

did not breach that duty of care to the plaintiff; so how can he be found liable?

2. The consent or assumption of risk must be voluntary

In *Bowater v Rowley Regis Corporation*[7] it was held that a person is said to be voluntarily assuming the risk if he is in a position where he has a choice. He must have full knowledge of the circumstances in which he has to make the choice, so that he may make a reasonable choice. He must not be subject to any restrictions, coercion or duress so as to make his choice forced and unreasonable. This means that the plaintiff's consent must be given freely and voluntarily.[8]

3. Full knowledge

Mere knowledge of the existence of the risk is insufficient. What is important is full knowledge of the nature and extent of the risk of injury. If the plaintiff does not know of the risk but that he should have known about it he is not said to be *volenti* but may alternatively be contributorily negligent.[9]

It is not always easy to determine whether in the circumstances the plaintiff had mere or full knowledge of the risk, the former narrowing the possibility of a successful defence of *volenti* and the latter, otherwise. If I decide to ride as a pillion rider on my friend's motorbike, suspecting but not absolutely certain that he might want to 'show-off' his daredevil stunts, can my friend raise *volenti* in the event I sustain injury during a particularly daring stunt? The *dicta* in *Lee Geok Theng v Ngee Tai Hoo*[10] is a useful guide: that a motorcyclist is not entitled to raise *volenti* merely on the ground that his pillion knew of the risk and was willing to run the same risk – it must be shown that the pillion accepted for himself the risk of injury arising from the rider's lack of skill or in the example at hand, the rider's wanton display of foolhardiness and showmanship.[11]

B. Applicability of the defence in various situations

The use of the defence of *volenti* may be considered in the following four different situations:

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7 [1944] KB 476, at p 479.

8 See also, *Teh Hwa Seong v Chop Lim Chin Moh & Anor* [1981] 2 MLJ 341.

9 See Jones, 4th edn at pp 391-2.

10 [2000] 4 MLJ 42, at 44 *per* KN Segara J.

11 It does seem a high standard is required in order to prove 'knowledge' of the plaintiff. Can this be said to be a sensible policy pertaining particularly to the enhancement of safety while handling vehicles?

1. Workers' cases

In *Smith v Charles Baker & Sons*[12] the plaintiff worked in an environment where heavy stones were lifted over his head. The workers had complained to their employer about the dangerous situation but no action was taken. The employers in fact knew of the risk of the stones falling. One day some stones fell and injured the plaintiff. The employer sought to rely on the defence of *volenti*. The House of Lords held that *volenti* was inapplicable. Knowledge of risk was insufficient – the plaintiff would however be *volen* if the stones were for instance directly placed above his head with him knowing and consenting to the risk of injury.

It is generally rather difficult for employers to raise the defence of *volenti* successfully since the principle laid down in *Bowater v Rowley Regis Corporation*.[13] This is because if the nature of the job is dangerous the employer is required to take reasonable steps to reduce the risk of injury to the employees. In *Bowater* the defendant employer ordered the plaintiff employee, despite his protests, to take out a horse known by the former to be dangerous. The plaintiff was subsequently injured when the horse bolted and the plaintiff was thrown off the cart. The defence of *volenti non fit injuria* was rejected as the work in which the plaintiff was normally engaged in did not involve an element of danger.

As a matter of public policy this defence cannot be raised by an employer who has breached his statutory duty, except in the circumstances as laid down in *Imperial Chemical Industries Ltd v Shatwell*.[14] Here the plaintiff and his brother worked at the defendant's mine and they had agreed amongst themselves to disregard the employer's instructions. They used a particular explosive without taking the necessary precautions, with the result that an explosion occurred and the plaintiff was injured. The court held that there was no pressure or coercion from the defendant on the plaintiff to do what he had done and so the defence of *volenti* was accepted.

In *Kanagasabapathy v Narsingham*[15] the plaintiff, a toddy-tapper was required by the defendant, his employer, to tap twenty-five coconut trees twice daily. The plaintiff had complained to the defendant several times about the slipperiness of the steps due to mossy growth and rain and one day the plaintiff fell and injured himself. The court held the defendant liable for negligence for failure to provide a reasonably safe system of work. The court further stated that even though the plaintiff was aware of the risk he did not consent to it and therefore he was not *volens*.

12 [1891] AC 325.
13 [1944] KB 476.
14 [1965] AC 656.
15 [1979] 2 MLJ 69.

In *Teh Hwa Seong v Chop Lim Chin Moh & Anor*[16] the plaintiff who was a passenger in a lorry, sustained severe injuries when the lorry overturned due to the negligence of the lorry driver. The driver and his employers raised the defence of *volenti non fit injuria*. The court rejected the defence and found the defendants liable as from the evidence adduced, the plaintiff did not freely and voluntarily, with full knowledge of the nature and extent of the risk, impliedly agreed to incur the risk of injury.

It has been held that in a claim between employee-employer, the question is not whether the employee knew of the danger but whether he agreed to run the risk of injury in the sense that he exempted his employer from the duty not to create a dangerous situation and agreed to take the chance of an accident.[17]

Apart from the common law principles which are applicable in determining the applicability of *volenti non fit injuria*, consideration must be given to cases in which some classes of workers are subject to certain statutory provisions. It is outside the ambit of this work to go into in-depth discussion of the right to sue for workers in Malaysia but two important statutes must be borne in mind, namely the Workmen's Compensation Act 1952[18] and the Employees' Social Security Act 1969.[19]

(a) Workmen's Compensation Act 1952 (WCA 1952)

This Act only applies to manual labourers who earn RM500 per month and below[20] but at the same time does not necessarily apply to all types of workers who earn below this amount.[21] Section 24 provides that an employer cannot make any agreement to the effect that the workman relinquishes his right to compensation for personal injury incurred in the course of employment.[22] 'In the course of employment' includes any travelling done with the express or implied permission of the employer,[23] any accident occurring on the employer's premises or other premises connected with his employment if the workman's conduct is for the purpose of rescuing or protecting persons who are thought to be in danger, or for the protection of property[24] and even extends to strictly prohibited conduct if the act is done for the purposes of, and in connection

16 [1981] 2 MLJ 341.
17 See *Taw Too Sang* lwn *Chew Chin Sai & Yg Ln* [2000] 4 AMR 4257 and *Lee Geok Theng v Ngee Tai Hoo & Anor* [2000] 4 MLJ 42.
18 Revised 1982, Act 273.
19 Act 4.
20 Workmen's Compensation Act 1952, Act 273, s 2(1)(a).
21 *Ibid*, s 2(1)(b)-(k).
22 *Ibid*, s 24.
23 *Ibid*, s 4(1)(b).
24 *Ibid*, s 4(1)(c).

In *Condon v Basi*,[38] damages were awarded to the plaintiff who was injured from a tackle during a football match. The tackle was made in a dangerous and reckless manner and even though it may be said that a football player assumes the risk of injury, the assumption of risk does not extend to include instances where the defendant's conduct is dangerous. However, the defendant will not automatically be liable if he contravenes a rule in order to produce fair play, just as a conduct may be so dangerous as to attract liability even though it does not infringe any rules of that game or sport.

The requirement that the plaintiff must consent not only to the risk of harm generally but a particular risk is neatly illustrated in *Gillmore v London County Council*.[39] The plaintiff was a member of a physical training class which was run by the defendants. During one session where the members were lunging at one another, the plaintiff lost his balance and injured himself. It turned out that the floor was slippery due to the defendant's negligence. The court found that if the plaintiff had sustained injuries as a consequence of the physical exercise, his claim would have failed as he had assumed the risk, but this assumption did not include conducting exercise on a slippery floor. The defence of *volenti* was therefore rejected.

3. Rescue cases

In rescue cases it is almost as if the plaintiff deliberately exposes himself to the risk of injury. Initially the English courts felt that rescuers voluntarily assumed the risk of injury whenever they were in the act of rescuing, but this opinion is no longer subscribed to. This is because whenever a person carries out rescue work, he may be argued to be acting under a moral or social duty and thus he cannot be said to be acting completely voluntarily. If however, there is in fact no real emergency, the defence of *volenti non fit injuria* may be raised successfully.[40]

In *Haynes v Harwood*[41] the defendant had left his horse and carriage at the side of a busy street. The horse was alarmed by something and bolted onto the road. The plaintiff, a police constable, was injured when he tried to calm the horse down. In an action against the defendant, it was pleaded that the plaintiff was *volens*. The court rejected the defence and held the defendant liable. Three important principles of law were laid down in considering whether a rescuer is said to be *volenti* in his actions.

Firstly, the test to be applied is – is it reasonably foreseeable that a person will try to save another person who is in danger such as in the situation of the

38 [1985] 1 WLR 866.
39 [1938] 4 All ER 331.
40 *Cutler v United Dairies (London) Ltd* [1933] 2 KB 297.
41 [1935] 1 KB 146.

case? In the instant case since the answer was "yes" the defendant therefore owed a duty of care to the plaintiff. Secondly, a voluntary assumption of risk only arises if assent is given voluntarily, and a rescuer is said to be acting under a social or moral duty and thus his voluntariness is not complete for it to constitute *volenti*. Thirdly, the voluntary assumption of risk or assent must be given before or at the time of the conduct in question but in rescue cases, this assumption of risk if any, is only given after the incident, if at all.

The principle in *Haynes v Harwood* extends to the rescue of property and not merely to the rescue of persons.[42]

What is important is whether as a result of the defendant's conduct it is reasonably foreseeable that someone will try to effect rescue work and on the part of the rescuer himself, the same question will be asked; whether it is reasonable for him to have acted in such a way in the circumstances.[43] Moreover, a defendant cannot rely on *volenti* on the basis that it is the rescuer's duty to be exposed to dangerous situations due to the nature of his job.[44]

4. Passenger cases

In *Nettleship v Weston*[45] *volenti* was not applicable as for its application, the plaintiff must have agreed to incur the risk of being injured through the defendant's negligent driving, which was not so on the facts of the case.

In *Dann v Hamilton*[46] the plaintiff, who took a lift in the defendant's car was aware that the defendant was drunk. The plaintiff was subsequently injured in an accident and the court held that there was a difference between being tipsy and very drunk and in this case since the defendant was only slightly drunk, he still owed a duty of care to the plaintiff. *Volenti* failed as it could not be said that the plaintiff had absolved the defendant from liability for any subsequent negligence on his part. This decision was in fact one based on public policy. Were the defendant held not liable, it would encourage people to drink and drive.

In *Ashton v Turner*[47] the plaintiff and his friends, who were all drunk, committed a robbery at the plaintiff's suggestion. Whilst they were getting

42 *Hyett v GW Ry* [1948] 1 KB 345.
43 See also *Videan v British Transport Commission* [1963] 2 All ER 860.
44 See *Baker v TE Hopkins & Son Ltd* [1959] 3 All ER 225 (doctor) and *Ogwo v Taylor* [1987] 3 All ER 961 (fireman).
45 [1971] 3 All ER 581, above at p 196.
46 [1939] 1 KB 509.
47 [1989] 1 QB 137.

away from the scene of the crime, an accident occurred, and the plaintiff was injured. He claimed from the driver of the car as well as the car owner. It was held on policy grounds that a criminal did not owe a duty of care towards another criminal. The plaintiff was aware of the fact that the defendant-driver was drunk and the situation at the time was one of emergency. *Volenti* was therefore raised successfully.

Consider this Malaysian case: In *Taw Too Sang lwn Chew Chin Sai & Yg Ln*[48] a fight broke out between the plaintiff and the defendants and the plaintiff became blind in one eye. He subsequently sued the defendants for assault and battery. It was found that the plaintiff had prior to the fight, chased the defendants with a knife. The court held *volenti* was inapplicable as knowledge on the part of the plaintiff that he might be involved in a fight with the defendants did not necessarily mean that he had consented in law. *Ex turpi causa non oritur actio* (no cause of action arises out of a base cause) was also rejected – according to the court the fact that the plaintiff was involved in some wrongdoing does not of itself provide the defendant with a good defence.[49]

In *Buckpitt v Oates*[50] the plaintiff took a lift in the defendant's van and before the journey the plaintiff saw a notice of exclusion, "Warning. Passengers in this van bear their own risk. The owner or driver will not be liable for any loss of life, personal injury or other losses howsoever caused. Passengers are not insured". The plaintiff consequently suffered some injuries in an accident due to the defendant's negligence. The plaintiff was held to be bound by the notice.[51]

It is pertinent to discuss some relevant provisions of the Road Transport Act 1987[52] at this juncture. Third party insurance is mandatory in Malaysia.[53] This requirement is however exempted for specified vehicles, one of which is if the vehicle is owned by any government in Malaysia.[54] A policy of insurance need not cover death or personal injury sustained by an employee in the course of his employment.[55] In cases where a vehicle carries passengers, liability for death or personal injury will only arise if the passengers are

48 [2000] 4 AMR 4257.

49 *Ibid* at p 4277. Does this mean the policy issue is different in Malaysia, or can *Ashton v Turner* be distinguished from *Taw Too Sang*?

50 [1968] 1 All ER 1145.

51 This decision has in fact been criticised by Karsten: see Karsten, *"Infant Passengers, Exemption Notices and Volenti Non Fit Injuria"* [1969] 32 Mod LR at 88-92.

52 Act 333.

53 Road Transport Act 1987, Act 333, s 90(1).

54 *Ibid*, s 90(5).

55 *Ibid*, s 91(1)(aa).

carried for hire or reward or in pursuance of a contract of employment.[56] Thus *volenti* might have a limited application for a defendant when the plaintiff passenger is carried in the vehicle for purposes of hire, such as a passenger in a taxi; or when the passenger is carried for a reward. Liability is not extended to damage to property unless the insured party elects for this to be covered in the policy.[57] This means that a passenger in a privately-owned vehicle who sustains injuries due to the negligence of the driver cannot automatically receive compensation via the insurance policy of the insured.[58] He may of course sue the driver in negligence for which the driver is entitled to raise the defence of *volenti*. The question that arises is whether 'reward' means 'currency' *per se*: might it not be extended to include a situation where the defendant's van carries a lecturer to the defendant's premises, where the lecturer is to give some lectures to members of the defendant's organisation? Carrying a passenger in pursuance of a contract of employment also serves to deny the defence of *volenti* if the passenger subsequently becomes injured through the negligence of the driver. The test is whether the passenger has a right to be on the vehicle or is needed in the vehicle, at the time of the accident.[59]

Subject to the statutory provisions above,[60] the position seems to be that mere passengers are a vulnerable class of persons. Not only are they not covered through mandatory insurance, but they may be caught by the defence of *volenti*, in which case should they sustain injuries caused by the negligence of the driver, they might be left uncompensated if they fail in their claim. *Volenti* is of course justified when it can be proved that it is the plaintiff passenger himself who urges the driver to drive dangerously, or where the plaintiff for instance drank himself 'silly' with the defendant and subsequently agreed to fly with the defendant in a light aircraft and consequently died when the plane crashed after take-off.[61]

C. Contributory negligence

Contributory negligence essentially means the plaintiff has breached a duty of care for his own safety, in that he has failed to take reasonable care of himself or his property, which consequently contributed or resulted in his injury.

56 *Ibid*, s 91(1)(bb).
57 See *QBE Insurance Limited v Dr K Thuraisingham* [1982] 2 MLJ 62.
58 See *New Zealand Insurance Co Ltd v Sinnadorai* [1969] 1 MLJ 183.
59 See *Tan Keng Hong & Anor v New India Assurance Co Ltd* [1978] 1 MLJ 97.
60 For a fuller discussion, see P Balan, *Perlindungan Pihak Ketiga Dalam Undang-Undang Insurans Motor*, Makalah Undang-Undang Menghormati Ahmad Ibrahim, 1988, Dewan Bahasa dan Pustaka, Kuala Lumpur at 86-113.
61 *Morris v Murray* [1990] 3 All ER 801, CA.

This defence differs from *volenti non fit injuria* in terms of its effect. Whereas a successful defence of *volenti* absolves the defendant of liability, contributory negligence serves to reduce the amount of compensation payable to the plaintiff in proportion to his own contribution. However it might be the case that the plaintiff is found to have wholly contributed to his damage, and so his claim against the defendant fails.

1. History

In the beginning, contributory negligence was a complete defence. In *Butterfield v Forrester*[62] the defendant partially obstructed a road by placing a pole across it and the plaintiff who was riding violently at dusk was overthrown by the pole and was injured. It was found that the plaintiff would not have met with the accident if he had exercised ordinary care and the plaintiff's claim failed as the accident was said to have been caused by his own negligence.

This rule produced hardship in cases where even though both the defendant and the plaintiff were negligent, the plaintiff's injuries were mainly caused by the defendant's negligence. In order to reduce the injustice caused by this principle the court in the case of *Davies v Mann*[63] created the last opportunity rule where the last person to be negligent and thus the person who had the last opportunity to avoid the accident, would be fully liable. The facts of the case are these: the plaintiff left his donkey, with its legs tied, on the highway. The defendant, who was driving his wagon hit the donkey, killing it. The defendant was found liable as he had the last opportunity to avoid the accident. This rule, although arguably was an improvement to the rule laid down in *Butterfield*, was not without its difficulties. Difficulty was encountered especially in situations where the negligence of the parties involved occurred at the same time, such as in road accident cases, where it would be quite impossible to determine which party had the 'last opportunity' to avoid the collision.

2. The current law

In England the problem mentioned above was solved through the enactment of the Law Reform (Contributory Negligence) Act 1945.[64]

62 (1809) 11 East 60.

63 (1842) 10 M & W 546.

64 Section 1(1) provides that whenever a person suffers injuries due to his own fault as well as others, his claim will not fail, but the amount of compensation he receives will be reduced to an amount that is considered just and reasonable, taking into consideration his contribution to the final damage.

In Malaysia, the current law is contained in s 12(1) of the Civil Law Act 1956.[65]

Section 12(1) reads as follows:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Courts thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Section 12(1)(b) further provides that in the case where there is a contract between the parties or where there is written law which limits liability, then the amount of damages recoverable by the claimant cannot exceed the agreed or stipulated maximum limit.

If the claimant mentioned under s 12(1) dies and an action is brought for the benefit of the dependants, spouse or parents, the provision of s 12(1) still operates to reduce the amount of damages recoverable by those in fact making the claim, to the extent of the deceased's responsibility for the damage.[66]

Section 12(5) further provides that if one of the persons at fault avoids liability to the other party by pleading that the action is barred by limitation, then the party raising this defence is not entitled to recover any damages or contributions from the other party or his representatives. This means that once limitation is used as a defence, it precludes the operation of s 12(1).

Section 12(6) defines 'fault' to mean negligence, breach of statutory duty or any act or omission which is a tort, or any cause of action that allows the application of the defence of contributory negligence.[67]

3. Elements of the defence

It is for the defendant to plead the contributory negligence of the plaintiff. Failure to do so will be fatal to the defendant's case even though the plaintiff has in fact been contributorily negligent. In such a situation if the plaintiff

65 Revised 1972, Act 67.

66 See *Lim Chai Oon v Normah bte Ismail & Anor* [1994] 2 AMR 1679.

67 This would include actions in the torts of nuisance, strict liability, actions founded on breach of statutory duty and breach of an occupier's duty. The defence of contributory negligence is said to be unavailable for intentional torts – see Salmond & Heuston, 20th edn at p 504 but Street, 10th edn at p 290 states that it is available in actions for trespass to the person.

succeeds in proving the negligence of the defendant, he will be entitled to damages based one hundred percent liability despite the fact that he may have contributed to his injury.[68]

The elements of contributory negligence are:

(a) the plaintiff is not required to have a duty of care to the defendant. The duty of care is upon himself to act reasonably so as to avoid damage to himself; and

(b) the plaintiff has 'breached' this duty of care by behaving unreasonably; and

(c) the act or omission must be the cause of his injury, which must be of a type reasonably foreseeable from his act or omission.

The gist of contributory negligence is therefore the unreasonable behaviour of the plaintiff with regards to his own safety which results in foreseeable damage to himself.[69]

Unreasonable behaviour on the part of the plaintiff which contributed to his injury is illustrated in *Jones v Livox Quarries Ltd*[70] where the plaintiff disobeyed his employer's instructions by riding on the back of a traxcavator. Another vehicle hit the back of the traxcavator and the plaintiff was injured. The court held that the plaintiff was contributorily negligent, and affirmed that contributory negligence was applicable to injury that was reasonably foreseeable as a consequence of the plaintiff's behaviour. Just as for the defendant to be held liable for the plaintiff's injury, the injury must be of a type that is foreseeable; so too in contributory negligence, the injury sustained by the plaintiff must belong to the general category of injury that is foreseeable as arising from the plaintiff's negligent conduct, for the defence to be successful.

In *Lai Yew Seong v Chan Kim Sang*[71] the Supreme Court in holding the plaintiff one hundred percent contributorily negligent for hitting a car from behind,[72] stated that contributory negligence means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong.

68 *Hamizan bin Abd Hamid v Wong Kok Keong & Anor* [1994] 3 MLJ 630.
69 See *Foong Nan v Sagadevan* [1971] 1 MLJ 24.
70 [1952] 2 QB 608.
71 [1987] 1 MLJ 403, SC.
72 See also *Waras bin Beno v Khoo Hang Chua & Anor* [1991] 3 CLJ 2605; *Kasirm bin Kasmani v The Official Administrator & Anor* [1991] 3 CLJ 2498.

In *Ang Chai Ha & Ors v Sri Jaya Transport Co (PTM) Bhd*[73] the deceased died in an accident when the car he was driving collided with a bus driven by the servant of the defendants. The defendants admitted their servant's negligence but denied some of the claims made by the dependants of the deceased on the grounds that death was not directly caused by the collision. They further pleaded contributory negligence. It was found that death was caused by extensive burns when the deceased's car caught fire on collision with the bus. At that time there were eleven four-gallon tins of petrol in the boot of the car. The court held that as the defendants had conceded that the collision occurred through the negligent driving of their bus driver, the question of contributory negligence could not arise. The fire would in all probability have happened as a direct consequence of the collision notwithstanding the tins of petrol in the deceased's car and therefore the damage was not too remote.

Consider however, *Wong Fook & Anor v Abdul Shukur bin Abdul Hakim (Wong Piang Loy, Third Party)*[74] where the court held that the reduction of liability on a defendant driver where the plaintiff does not wear a seat belt will only be considered if the plaintiff is the driver of the other vehicle, however, if the plaintiff is a mere passenger then he is entitled to be fully compensated. This principle has been argued to be rather unfair to the defendant.[75]

Where there are two defendants, the court will decide on the contribution by the plaintiff to his injuries and the balance of the blame will be equally apportioned between the defendants. In *Fitzgerald v Lane*[76] the plaintiff was knocked, first by D1 and then by D2. The House of Lords held that the plaintiff was fifty percent contributorily negligent, and the remaining fifty percent was equally divided between the defendants.

Damage must be caused or contributed by plaintiff

The damage that occurs must be caused or contributed by the plaintiff. If from the facts of the case the damage would not have occurred but for the plaintiff's conduct, this would mean the plaintiff is the cause of the damage and would accordingly be one hundred percent contributorily negligent. The focus is on the cause of the damage and not the cause of the accident.

73 [1974] 1 MLJ 87; affirmed [1974] 2 MLJ 92

74 [1991] 1 MLJ 46

75 See Nurchaya Talib, *Wong Fook & Anor v Abdul Shukur bin Abdul Halim (Wong Piang Loy, Third Party) – A Seatbelt Prejudice*, Journal of Malaysian and Comparative Law, 1991, Vol 18 at 185.

76 [1989] AC 328

In *Sundram a/l Ramasamy v Arujunan a/l Arumugam & Anor*[77] the plaintiff who was riding a motorcycle was involved in an accident with another motorcycle. He fell off from his motorcycle and was lying in the middle of the road when a car driven by the defendant ran over his right leg. The court found the defendant liable in negligence because if he had been driving at a slower pace he could have avoided running over the plaintiff's leg. On the defence of contributory negligence, it was found that the plaintiff was not in a position to get up and run to the side of the road to avoid being run over by the car and so the defendant failed to prove that the plaintiff's 'act' of lying in the middle of the road caused or contributed to his injury.

4. The principle of dilemma

If the defendant's negligence places the plaintiff in a dilemma and the plaintiff, in trying to save himself takes the 'wrong' course of action, the plaintiff is not necessarily deemed to be contributorily negligent and the defendant may still be held to be fully liable for the ensuing injury or damage.[78] The plaintiff must prove that he has acted as a reasonable man would have done in the same circumstances. In *Jones v Boyce*[79] the plaintiff reasonably believed that the coach in which he was a passenger was about to overturn due to the negligent driving by the defendant. He jumped off the coach and broke a leg. The coach did not overturn and in a claim against the defendant the court held the plaintiff was not contributorily negligent as his reaction was reasonable in the circumstances.

In *Choh Nyee Ngah & Anor v Syarikat Beruntong Sdn Bhd*[80] a lorry driver died when a wheel of the lorry he was driving came off the steel assembly and an accident occurred on the highway. It was argued by the defendant employer that the deceased had presumably jumped out of the lorry, which presumption relied on the fact that there was quite a good distance that lay between the lorry and the deceased after the accident thereby indicating that the deceased was contributorily negligent. The court rejected the defendant's defence and stated that even if the deceased had indeed jumped out of the lorry, he would not have been contributorily negligent as that act would have been reasonable in the agony of the moment.

The principle has in fact been extended in England in *Brandon v Osborne, Garrett & Co*[81] where due to the negligence of the defendant, broken glass fell from the roof of the defendant's shop. The plaintiff, believing her husband was in danger, clutched her husband and tried to bring him to a place of

77 [1991] 3 CLJ 2109; affirmed in [1994] 3 AMR 2125, SC.
78 *Govinda Raju & Anor v Laws* [1966] 1 MLJ 188.
79 [1860] Stark 493.
80 [1989] 3 MLJ 112.
81 [1924] 1 KB 548.

safety and in the course of doing so she herself was injured. The defendant's plea of contributory negligence failed as she had acted reasonably in the circumstances. It is uncertain whether this extension is only lent to spouses, as in this case or whether it may extend to the protection of strangers as well. A further question is whether it may be extended to the protection of interests other than personal safety.

5. *Contributory negligence of children*

In considering whether a child plaintiff has been contributorily negligent, the main consideration is the age of the child. The question is whether normal children of the plaintiff's age would have acted as the plaintiff has done. In *Yachuk v Oliver Blais Co Ltd*,[82] the plaintiff, a nine-year old bought some gasoline from the defendant's shop, on the false pretext that he was buying it for his mother. He in fact played with the gasoline and was badly burnt when the gasoline was lit. The court found the defendant wholly liable and rejected the plea of contributory negligence on the basis that the plaintiff neither knew nor could be expected to know the danger involved in meddling with gasoline. Might it not be asked that since the plaintiff lied to the defendant as to whom he was purchasing the gasoline for, this meant he was at least aware that he was not supposed to play with gasoline and therefore should have been found to be contributorily negligent?

In *Gough v Thorne*[83] Lord Denning said:[84]

> A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety. He or she is not to be found guilty unless he or she is blameworthy.

The test is objective, and the question remains whether 'an ordinary child' who is of the same age as the plaintiff would do more than what the plaintiff has done.[85]

In *Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad (an infant)*[86] the plaintiff who was four years old was knocked down by a motorcycle ridden by the defendant postman when the boy suddenly ran across the road into the path of the defendant. Evidence showed that the

82 [1949] AC 386.
83 [1966] 3 All ER 398.
84 *Ibid* at p 399.
85 See also *Mullin v Richards* [1998] 1 All ER 920, CA – the test was whether an ordinarily prudent and reasonable 15 year-old schoolgirl would have acted as the defendant did.
86 [1994] 2 MLJ 187.

motorcycle came into contact with the infant plaintiff when he darted across the road, as a result of which the defendant lost control of his motorcycle and as he fell, the motorcycle fell on top of the plaintiff. On the issue of whether the plaintiff was contributorily negligent, Abdul Malik Ishak JC held that:[87]

> ... the degree of care attached to a child should be different from that of an adult. That degree ... must be proportionate to the age of the child. The younger the child is, the lesser the degree of care attributable to the child. This must however be dependent on the facts of each case.

On the facts of this case, the defence failed.

An infant who was two years and eleven months old therefore could not be expected to take care of his own safety.[88] If a young child is injured through the negligence of both the defendant and of a person in charge of the child, the negligence of the latter is irrelevant to a claim made on behalf of the child against the defendant.[89] So where a child was discharged from hospital against medical advice because her parents wanted her to seek bomoh treatment, and that earlier discharge led to more serious injuries, the child could not be penalised as she was not responsible for the discharge.[90]

In *Jag Singh v Toong Fong Omnibus Co Ltd*[91] it was held that a child who travelled to and from school should have the discretion to appreciate that it was dangerous to get in the way of a moving omnibus. Thus in *Santhanaletchumy a/p Subramaniam v Zainal bin Saad & Anor*[92] a twelve year old girl was held to be sufficiently matured and could have prevented or avoided the particular accident when the defendant lorry driver honked his lorry. She was found to have been twenty percent contributorily negligent and the defendant was held to be eighty percent liable. Quoting *Charlesworth on Negligence*[93] Abdul Malik Ishak said:[94]

> When a child is negligent, in the sense that he could by the exercise of reasonable care have prevented or avoided the damage in question, he cannot recover; but in considering what is 'reasonable care' the age of the child must be considered. Infancy as such is not a 'status

87 *Ibid* at p 191.
88 *Wong Li Fatt William (an infant) v Haidawati bte Bolhen* [1994] 2 MLJ 497.
89 *Symes v Ling Ngan Ngieng* [1966] 2 MLJ 149. See also *Oliver v Birmingham and Midland Motor Omnibus Co Ltd* [1932] All ER Rep 820.
90 *Wan Norsiah bte Wan Abdullah v Che Harun bin Che Daud* [1980] 1 MLJ 237.
91 [1962] MLJ 271.
92 [1994] 4 CLJ 192.
93 4th edn at p 1127.
94 [1994] 4 CLJ 192 at 195.

conferring right', so that the test of what is contributory negligence is the same in the case of a child as of an adult, modified only to the extent that the degree of care to be expected must be proportioned to the age of the child.

D. Mechanical defect and inevitable accident

The defence of mechanical defect has been held to be related to the issue of inspection and maintenance of vehicles, and it will only avail a defendant who can prove through his record of service that the vehicle is free from defect.[95] The defence of inevitable accident requires a defendant to prove the cause of the accident and that the result of the cause is inevitable; or to show all the possible causes, one or other of which produces the effect, and with regard to every one of these possible causes, that the result is unavoidable.[96]

However, once the plaintiff succeeds in proving that the defendant has acted unreasonably and therefore is in breach of his duty of care, he cannot then be allowed to claim that his unreasonable conduct is due to an inevitable accident.

In *Che Jah binte Mohamed Ariff v CC Scott*[97] the plaintiff was a passenger in the defendant's car which crashed into a stationary car causing injuries to the plaintiff. The defendant gave evidence that ten days previously, due to brake failure he had sent the car to a competent motor repair firm for repair and general overhaul with particular attention to the brakes. On the day before the accident the plaintiff and the defendant had gone to fetch the car where the foreman of the firm tested the brakes again and found them in order. On the day of the accident but before the accident occurred the defendant had used his brakes several times and they were functioning well. The court held that the defect in the brakes were a latent defect and as the defendant had employed skilled labour no negligence can be attributed to him.

This case illustrates that if by reason of a latent defect in a vehicle which a defendant is not aware of and which cannot be discovered by reasonable examination an accident is caused, the defence of inevitable accident may be raised to exclude liability.[98]

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95 *Ahmad bin Haji Abdul Majid v Lee Yat Cheong & Ors* [1995] 4 CLJ 721.

96 *Ibid* at p 723; see also *Mydin Meerasahib v Sultan Allaudin & Sons* [1948-49] MLJ Supp 60; *Lim Kim Chai & Anor v Foo See Fatt; Gan Chin Baw & Anor v Foo See Fatt* [1970] 2 MLJ 207.

97 [1952] 18 MLJ 69.

98 See also *Wong Eng v Chock Mun Chong & Ors* [1963] 29 MLJ 204; *Tan Chye Choo & Ors v Chong Kew Moi* [1970] 1 MLJ 1, PC.

E. Exclusion clause

An alternative defence that is available in a claim in negligence is that of a valid exclusion clause. This defence is not applicable in England[99] but there is no corresponding statutory provision in Malaysia. An exclusion clause which is construed to be clear and unambiguous may effectively deny what would otherwise be a good claim in negligence.

Save for statutory provisions which impose a duty on the defendant to compensate the plaintiff for personal injury and death, in all other cases an exclusion clause which excludes liability for the same may be effective. The exclusion clause must be construed to exclude liability for personal injury and death resulting from negligence.[100]

Where the exclusion is for liability for damage to property, liability; whether effectively excluded or otherwise, turns on the construction of the exclusion clause. An example is *Chin Hooi Nan v Comprehensive Auto Restoration Service Sdn Bhd*[101] the plaintiff paid some money to the defendants to have his car waxed and polished by the latter. The car was damaged whilst one of the defendants' employees drove the car down to the basement of the building. In a claim for negligence against the defendants, the latter argued that the exemption clause which was printed on the back of the receipt which was given to the plaintiff exonerated them from liability. The clause was worded as follows –

> The company is not liable for any loss or damage whatsoever of or to the vehicle, its accessories or contents. Vehicles and goods are left at owner's risk.

The court held that the exemption clause did not exclude the defendants from the burden of proving that the damage to the car were not due to their negligence and misconduct. They must show that they had exercised due diligence and care in the handling of the car, and since the defendant had failed to do this, they were held liable to compensate the plaintiff for the costs of repair, of hiring another car during the repair period and of engaging an independent adjuster.

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99 By virtue of s 2 of the Unfair Contract Terms Act 1977.

100 See *Malaysian Airline System Bhd v Malini Nathan & Anor* [1986] 1 MLJ 330; *Metro (Pte) Ltd & Anor v Wormald Security (SEA) Pte Ltd* [1981] 2 MLJ 172; *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1956] 3 All ER 957.

101 [1995] 2 MLJ 103.

CHAPTER TEN

NEGLIGENCE: OCCUPIERS' LIABILITY

In England, occupiers' liability is predominantly governed by the Occupiers' Liability Act 1957 with regards to entry by legal entrants or visitors, and the Occupiers' Liability Act 1984 with regards to entry by trespassers or non-visitors.[1] No corresponding statutes have been enacted in Malaysia and the law on occupiers' liability is based on common law principles.[2]

There is no tort of occupiers' liability. Hence a plaintiff does not sue a defendant for occupiers' liability, and similarly a defendant is not liable for the 'tort' of occupiers' liability.

If a plaintiff suffers injury due to a dangerous state of affairs or activity on the premises of the defendant occupier and the plaintiff is able to prove that the occupier had the intention to cause injury to him, the plaintiff may claim under the rule in *Wilkinson v Downton*[3] or for the torts of assault, battery or false imprisonment. If intention cannot be proved, a claim may be made in negligence, and in England before the 1957 Act the plaintiff was said to have had a choice of suing either in negligence or by virtue of a special duty owed by the occupiers. Post the Act, naturally a plaintiff would sue on the Act but since Malaysia does not have a similar Act, cases on occupiers' liability would therefore come under the tort of negligence. The difference between an ordinary negligence claim and a negligence claim for occupiers' liability rests in the standard of care required of the defendant occupier.

Briefly, an occupiers' liability arises in a situation where the premises are not as safe as it should reasonably be and this defective state, which includes activities carried out on the premises; causes injury or damage to the plaintiff.

A. The meaning of occupier

The definition of an 'occupier' was laid down in *Wheat v Lacon & Co Ltd.*[4] Here the defendant owned a public house which was run by their manager.

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1 In England because occupiers' liability is based on statute, it is more popular than actions for negligence *per se*.

2 For a fuller treatment of this topic, see Rutter.

3 [1897] 2 QB 57, see above at pp 26-27.

4 [1966] 1 All ER 582, HL.

A licence was given to the manager and his wife to use the first floor of the building for their own personal use but the defendants had retained the right to conduct repair works. The manager and his wife received paying guests on the first floor with the permission of the defendants. The plaintiff, a patron had fallen down some steps from the first floor of the building, and died as a consequence of his injuries. The House of Lords held that the defendant had sufficient control over the private premises on the first floor together with the manager and thus both parties were occupiers and therefore jointly liable.

The test is occupational control over the premises, which is control associated with and arising from presence in and use of, or activity on the premises. Liability is not based on ownership. Control need not be absolute or exclusive. Lord Denning said:[5]

> ... wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier' and the person coming lawfully there is his 'visitor'; and the 'occupier' is under a duty to his 'visitor' to use reasonable care. In order to be an 'occupier' it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be 'occupiers'. And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other.

An occupier is therefore someone who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons.[6]

An owner who has let the premises to a tenant is generally no longer the occupier but it is essentially a question of fact whether the landlord retains control.

Chua J in *China Insurance Co Ltd v Woh Hup (Pte) Ltd*[7] in applying the control test as laid down in *Wheat v Lacon* held that the contractor of a construction site was an occupier of the premises.[8]

5 *Ibid* at pp 593-4.

6 *Ibid*.

7 [1977] 2 MLJ 57, affirmed [1978] 1 MLJ 59.

8 See *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789 where both a contractor and owner were held to be joint occupiers and therefore jointly liable for damage to the plaintiff's property.

In *Chang Fah Lin v United Engineers (M) Sdn Bhd*[9] too, it was held that if a contractor is shown to have overall charge and control and possession of a construction site, then he may be deemed to have occupation as well as possession of the site, together with overall responsibility.

Actual possession is not required in determining the adequacy of sufficient control. In *Harris v Birkenhead Corporation*[10] a local authority had acquired a house by compulsory purchase and had evicted the tenants. The house was then left vacant and vandals entered the house and broke the door and windows. At a later date a four-year old child entered the house and was injured when he fell from one of the windows. The issue was whether the defendant was an occupier, and the court first held that the defendant had exercised their statutory right to take possession and control of the premises. Following that, they had immediate right of control as soon as they took possession of the house, and were therefore, the occupier.

Similarly in *Lembaga Kemajuan Tanah Persekutuan v Mariam*[11] the court held that the defendant statutory authority, FELDA, remained as the occupier even when possession of a piece of land was given to a contractor, as the facts indicated that the statutory authority still retained control over the premises. Here the kongsi-house which collapsed on the deceased was built for the common benefit of the defendant, the contractor and labourers and the defendant did not cease to be in possession and continued to be the occupier of the site.

The significance of this decision lies in the acceptance in Malaysia that in order to impose a duty of care, the parties need not necessarily be in a pre-existing contractual relationship. In further affirmation of this acceptance, the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee*[11a] held that a landlord of premises stands in close proximity to the lawful visitors of his tenants. The duty may well be narrower than that owed by the occupier (such as the tenant) to the visitor, but it is nonetheless present. This duty is the duty to ensure that the premises let out are indeed safe and suitable for the purposes for which they are let out. The scope of the duty includes dangerous defects which are known, or ought to be known, by the landlord.

Here D1, a school, rented an old dwelling house from D2, a local authority, for a period of three years. D1 used the premises as a hostel to accommodate its students. At the commencement and during the tenancy, D2 did not make available a safety exit for occupants in the event of a fire. This was in fact a

9 [1978] 2 MLJ 259.
10 [1976] 1 WLR 279; [1976] 1 All ER 341, CA.
11 [1984] 1 MLJ 283, FC; applying *AC Billings & Sons v Riden* [1958] AC 240, HL.
11a [2003] 1 AMR 20, CA.

direct non-compliance with the Uniform Building By-Laws 1986. A fire broke out resulting in several deaths and serious injuries to many others. The Sessions Court judge found both D1 and D2 equally liable. The High Court found that as a matter of law D2 could not be liable whether as a landlord or a local authority, and so D1 was found solely liable. D1 appealed. The Court of Appeal set aside the order of the High Court and restored the order of the Sessions Court. D2 was not a bare landlord. It had a duty to comply with the By-Laws which it did not. It was well aware that the premises would be used as a hostel for young children. It had exposed the plaintiffs to the risk of injury knowingly.[11b]

Therefore once it is established that a person has sufficient control over the premises, he is deemed to be the occupier and may be sued for any injuries sustained on the premises.[12]

B. The premises

Premises include all forms of buildings, land spaces, vehicles which are used for carrying persons including tractors[13] and structures such as scaffolding, ladders, walls, pylons and grandstands.

In *Wheeler v Copas*[14] the plaintiff had borrowed a ladder from the defendant. The ladder was broken and the plaintiff was injured whilst he was using it. It was held that even though a ladder constituted premises, the defendant was no longer an occupier as the ladder was lent to the plaintiff and the defendant no longer had control over the ladder. The defendant was however held liable in negligence.

C. Types of entrants and the standard of care required

There are basically four types of entrants, namely contractual entrants, invitees, licensees and trespassers. The standard of care required of the occupier differs according to the different types of entrants.

D. Contractual entrants

A contractual entrant is a person who is on the premises pursuant to a contractual right.

11b See also, *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon* [2003] 2 AMR 6, CA.

12 See also *Ravindran a/l Kunji Kuttan v Tenaga Nasional Berhad* [1996] 2 CLJ 1060.

13 *Lau Tin Sye v Yusuf bin Muhamad* [1973] 2 MLJ 186.

14 [1981] 3 All ER 405.

There are two types of contractual entrants:

1. Main purpose entrant

This is a person who enters the premises for the purpose of occupying it, and who has paid to be on the premises, such as a tenant or a guest in a hotel.

The occupier's duty is to ensure that the premises is safe and adequate for the purposes for which it is contracted out, and the occupier must employ and exercise reasonable steps and expertise in the performance of this duty.

In *MacLenan v Segar*[15] a fire broke out at the defendant's hotel and the plaintiff was injured whilst he was trying to escape from the second floor of the building. The court found the defendant liable for failing to ensure that the premises was safe for habitation, as there was no emergency way out. McCardie J said[16] that when an occupier for a reward, agrees that another person will have the right to enter and use the premises for an agreed purpose, then the agreement contains an implied warranty that the premises would be safe for that purpose as far as can be reasonably expected. This principle is limited as the defendant cannot be held liable for defects to the construction, alteration, repair or maintenance that cannot be reasonably discovered.

2. Ancillary purpose entrant

This refers to a person who has paid to be on the premises for the primary purpose of some activity other than as a personal dwelling, such as a patron at a cinema, a spectator at a sports event, a passenger on a bus, a patient at a private hospital or a pupil at a private school.

The occupier's duty is to ensure that the premises are safe for that particular purpose. In *Hall v Brooklands Auto-Racing Club*[17] some spectators at a car-racing competition were injured when two cars collided. The defendant was held not liable as the court found that they had discharged their duty in ensuring that the stand was free from any danger as far as was reasonable in those circumstances.

Then in *Gillmore v London County Council*[18] the plaintiff fell during an exercise class as the floor was slippery. She successfully claimed against the defendant for the latter's failure to ensure that the floor was suitable for physical exercises.

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15 [1917] 2 KB 325.
16 *Ibid* at pp 332-3.
17 [1933] 1 KB 205.
18 [1938] 4 All ER 331.

The correctness of the distinction between main purpose entry and ancillary or incidental entry has been doubted.[19] This academic issue is not quite resolved yet. Nevertheless the most important principle in this context is that where a person pays to enter premises either for the purpose of occupying it or for the purpose of a particular activity the standard of care required of the occupier is to ensure that the premises are reasonably safe for that intended purpose.

The duty owed to, and the standard of care required, for contractual entrants are the highest amongst all the different types of entrants. The danger on the premises need not be unusual or hidden before the occupier can be found liable.

A special mention must be made in relation to the standard of care owed to spectators in sporting events. The duty of the occupier to ensure the spectators' safety is not absolute. He must use reasonable care but at the same time he is not required to guard spectators against every possible danger; but only against those dangers that may be reasonably assumed to be possible and expected according to the nature of the sport. In *Murray v Haringay Arena*[20] the court denied the plaintiff's claim when he was struck by a hockey puck while watching a hockey game.[21]

E. Invitees

An invitee is a person who enters premises with the permission or on the authority of the occupier. Usually, the purpose of entry is a matter of common interest between the occupier and the invitee.[22] There are basically two types of invitees; although there may be a third category where an invitee is also a licensee.

1. Legally authorised entrants

These are persons who enter premises on the authority of the law such as policemen, firemen, metre-readers or health inspectors.

In *Shamsuddin v Yap Choh Teh & Anor*[23] due to emergency and political problems the government requested that the use of explosives for blasting operations at a particular quarry to be monitored by the police. One of the

19 *Thomson v Cremin* [1953] 2 All ER 1185.
20 [1951] 2 All ER 320.
21 See also *Wilkes v Cheltenham* [1970] 2 All ER 369 where the defendant was not liable when a motorcycle went off the race track and injured the plaintiff.
22 See *Pearson v Lambeth BC* [1950] 2 KB 353 at 366.
23 [1969] 1 MLJ 26.

policemen who was on duty at the quarry was injured when a splinter from an explosion hit his eye. The court held the policeman to be an invitee and a duty of care was owed to him so that he would not be injured by any negligent method of detonating the explosives. The defendant contractor was found liable.

2. *Business visitors*

These are persons who enter premises, be it public or private, for a materialistic reason and who actually bring economic advantages to the occupier, such as a customer at a supermarket, a guest at a hotel, a motorist at a petrol station, a customer at a bank or an employee at his place of work.

In *Indermaur v Dames*[24] the plaintiff gas-fitter fell through a hole in the floor and injured himself whilst he was trying to fix gas pipes at the defendant's sugar factory. The court held that this was an unusual danger which was in fact known to the defendant and even though the plaintiff as an invitee must take reasonable care of his own safety, an occupier must reasonably avoid any damage that could arise from an extraordinary danger that is known to him, or ought to have been known to him. The duty of an occupier to an invitee was explained by Willes J[25] as ensuring, with reasonable care that any danger which is known to him (or ought to be known by him) and which the visitor is ignorant of, is averted, whether by notice, lighting, guarding or otherwise. There is no absolute duty to prevent danger, but a duty to make the place as least dangerous as such a place could reasonably be, having regard to the circumstances applicable in carrying on the particular business.

The principle in *Indermaur v Dames* was followed in the case of *Lau Tin Sye v Yusuf bin Muhammad*.[26] The plaintiff travelled on the defendant's tractor with permission. The tractor was stopped at one point in order that adjustments could be made to its blade cover, but the engine was kept running. The plaintiff, without being instructed to do so stepped off the tractor in order to help and his right foot was cut by the still-rotating blade. At first instance, the defendant was found liable. On appeal the Federal Court held firstly, that the plaintiff was an invitee. However, his injury was not as a result of any dangerous condition on the land. He was injured by the tractor's blade. The court held that even if the tractor is said to be a structure for purposes of identifying the defendant-owner as an 'occupier', *"... it would be a misuse of the English language to say that ... the respondent had entered upon it."*[27] The point remains that there must be a dangerous condition on the premises before liability can be imposed. The defendant's appeal was allowed.

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24 [1866] LR 1 CP 274.
25 *Ibid* at p 288.
26 [1973] 2 MLJ 186, FC.
27 *Ibid* at p 187.

Another relevant case is *Takong Tabari v Government of Sarawak & Ors.*[28] Two actions were jointly tried, one on behalf of the deceased and the other, the plaintiff; in respect of personal injuries to himself. Both the deceased and the plaintiff suffered damage when an explosion and fire occurred while they were on the premises of the defendant Public Bank. The explosion was due to a gas leak from a corroded gas pipe in the premises occupied by the Bank. The deceased and plaintiff sued Public Bank, Perunding who handled the renovation works, owners of the premises and the Government of Sarawak through the Public Works Department (PWD) for negligence for breach of occupiers' liability (and public nuisance as well as escape of gas being a dangerous thing). The court found that the owners of the premises could not be liable as one of the shop lots which made up the premises was not on the list of accredited gas consumers and the other owner of the second shop lot had disconnected the gas supply earlier on. Perunding was also not liable as gas supply was not part of the renovation works which they had conducted for Public Bank.

On the facts the PWD had breached their duty by not taking sufficient precaution to ensure that only accredited gas consumers were connected to the gas supply. Further they did not test for any leakage before gas-meters were installed in the premises concerned, and thereafter, no safety procedures were adopted. PWD and thus the Government had therefore breached their duty, and the consequential damage was reasonably foreseeable.

On the facts it was also found that Public Bank, through its employees including the branch manager did not take any steps after becoming aware of an unfamiliar smell in the premises – and so their omission contributed to the accident and they were negligent.

On the issue of occupier's liability, it was not in dispute that Public Bank was the occupier of the premises. The deceased as a customer of the bank was in the premises for a business purpose of material benefit to the occupier. There was a common interest between them and as such the deceased was an invitee.

The duty owed to an invitee is to prevent damage arising from unusual danger[29] or unusual risk.[30] Here the premises was used for banking business and no customer would expect to find gas, an admittedly dangerous thing, in such a place. Thus the danger was unusual to the deceased and unknown to him at the material time, but which was known or ought to have been known to

28 [1996] 5 MLJ 435.

29 The court cited *Indermaur v Dames*, *Lau Tin Sve v Yusuf bin Muhammad*, *Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors*.

30 See *London Graving Dock Co Ltd v Horton* [1951] AC 737, above.

Public Bank.[31] Liability for the Government and bank was apportioned in the ratio of 90:10.

(a) Duty of invitee to another invitee

A person who, although not an occupier of premises, creates danger to persons who are expected to enter those premises, owes a duty to ensure that the entrants are not injured while on the premises.

In *Dobb & Co Ltd v Hecla*[32] an independent contractor was held liable for injuries suffered by the workman of another independent contractor when that workman was injured while using the scaffolding built by the first contractor. The first contractor had failed to remove or repair their dangerous scaffolding after being repeatedly warned to do so, and on the facts created a situation which they could reasonably foresee would be likely to injure persons like the workman who fell within the proximity rule. Similarly in *Ng Shin Hon v Chow Wai Chuang*[33] the plaintiff engineer who was responsible for the inspection of the defendant contractor's work, suffered injury when he walked into a trench in the ground covered by metal sheets. The court held that the trench was dug without the plaintiff's instruction and so he had no knowledge about it. The contractor was under a duty to take reasonable care to prevent damage to persons whom he may reasonably expect to be affected, whether they be invitees, licensees or other contractors. He had created a concealed danger and a trap for the plaintiff whom he knew would come onto the land.

Thus an occupier, following *Indermaur v Dames*, will be liable to an invitee who suffers any injury or damage to property, if the following factors are established: firstly, if the occupier knows or ought to have known, of the danger, secondly, the danger is unusual to that class of plaintiff in the sense that the danger is not usually found in carrying out the task, having regard to the nature of the place or the premises, thirdly, the danger is not known to the plaintiff, and fourthly, the occupier has failed to reasonably avoid the damage from occurring, be it through a notice, warning lights, guarding or otherwise.

(b) Meaning of 'occupier's knowledge'

An occupier is liable for any danger that is actually known to, or ought to be known by him as a reasonable man. A person who even if a trespasser, in

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31 In respect of the second action, the plaintiff failed as the bank did not collect and keep the gas there. The action in public nuisance also failed as the allegations made were not proven.

32 [1973] 2 MLJ 128.

33 [1968] 1 MLJ 37.

that his presence on the premises is unauthorised by the occupier, but who is there with the valid permission of another party, and who does work for the occupier's benefit is construed as an invitee of the occupier. The occupier has a duty to ensure the safety of the premises for the purpose for which the invitee remains on it.[34]

In *Hawkins v Coulsdon & Purley UDC*[35] Lord Denning stated that if the occupier knows of the physical condition of the premises and a reasonable man would know that it is dangerous, then the occupier is deemed to know of the danger. In these circumstances, he owes a duty to warn an invitee, unless the danger is obvious.

In assessing whether the danger ought to have been known to the occupier, the state of knowledge at the time is taken into account. If a reasonable person would not have expected any danger to arise from the premises, even if there are any warning signs of the danger, the occupier cannot be held liable unless the extent of the unusual danger can be ascertained.[36]

(c) Meaning of 'unusual danger'

What constitutes unusual danger is a question of fact and depends on the degree of danger in each case. Furthermore what is unusual at one time or place may be usual at another time in another place.

In *London Graving Dock Co v Horton*[37] the House of Lords held that an unusual or extraordinary danger is one that is not common for the purposes of a particular invitee. So for instance a gangway that is considered safe and reasonable for stevedores is not an unusual danger for them, but it is an unusual danger for people who work in different circumstances or for members of the society generally. What is unusual is measured through the objective test, subject to the reasons for which the invitee enters the premises.

Therefore, unusual danger depends on the type of plaintiff, the circumstances surrounding the premises and the plaintiff's knowledge.

In *Stowell v The Railway Executive*[38] a puddle of oil at a railway station was held to be an unusual danger to the plaintiff invitee who was waiting for his friend.

34 *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283, FC.
35 [1954] 1 QB 319.
36 *Industrial Commercial Bank v Tan Swa Eng & Ors* and another appeal [1995] 2 SLR 716, CA Singapore.
37 [1951] AC 737, HL.
38 [1949] 2 KB 579.

In *Christmas v General Cleaning Contractors*[39] a broken and dangerous window was held not to be an unusual danger for a window cleaner, although the plaintiff was able to recover from his employers for failing to provide a safety equipment while he performed his job.

In *Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors*[40] the driver of a forklift belonging to the defendants died when it fell on him. The Federal Court first laid down the principle that if the circumstances on the premises were dangerous *'per se'* this did not mean that there was any unusual danger. An unusual danger or risk is one which is not usually found in carrying out the task which the invitee has in hand. On the facts of the case, the court held that the danger that was present in the course of his work (raising the forklift mechanically and using two rubber tree stumps to support the heavy horizontal iron bar) did not constitute an unusual danger as it was a usual risk in the nature of his job, and could reasonably have been foreseen by the plaintiff whilst he was doing his job.[41]

(d) Knowledge of the plaintiff

If the plaintiff knows of the existence of the danger, then the danger ceases to be an unusual danger.[42] This principle is rather harsh on the plaintiff and in subsequent cases the courts felt that the plaintiff's knowledge will absolve the defendant of any liability only if the plaintiff completely and truly knows of the nature and extent of the danger. Therefore if the plaintiff makes a mistake in his assessment of the extent of the danger, the defendant will still be held liable.

The similarities and differences between a contractual entrant and an invitee may be summarised as follows:

The similarities between the two are that both a contractual entrant and an invitee are on the premises with the consent of the occupier. Such consent may be express or implied. The presence of either is known in fact, or known to be likely (as in the case of a metre-reader). For both types of entrant, the occupier receives an economic benefit.

The differences between a contractual entrant and an invitee, and the standard of care owed by the occupier to each may be summarised as follows:

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39 [1951] 2 KB 164.

40 [1983] 2 MLJ 51, FC.

41 Would the outcome have been different for the plaintiff if he had argued that he was exposed to a dangerous system of work?

42 *London Graving Dock v Horton* [1951] AC 737 HL, where a welder, whose claim for injuries sustained due to defective staging by the occupier was denied as he was held to be aware of the danger.

Contractual entrant	Invitee
1. There is a written/oral/express/ implied agreement with regards to the entrance into the premises, and there is consideration on the part of the entrant.	1. An invitee does not have a contractual right to enter the premises. However a legal invitee such as a policeman has a statutory right to enter the premises.
2. The standard of care towards a contractual entrant is higher than towards an invitee. Generally the duty is to take reasonable care to avoid injury arising from foreseeable danger. The scope of the duty to a contractual entrant is the widest compared to other types of entrant.	2. The duty is to take reasonable care to prevent injury arising from unusual danger. The scope of duty is narrower.

A third possible class of invitees is what is commonly referred to as 'public invitees,' which would include persons who go to a public park or a public swimming pool. There is in fact an overlap of the categorisation of such individuals as they may well be licensees. If entrance into the public building requires the entrant to pay a fee, then the entrant will be classified as an invitee, and must be protected against unusual danger. Otherwise the entrant is a licensee in which case the principles discussed below will apply.

F. Licensees

Generally, a licensee is a person who enters the premises with the occupier's gratuitous permission, be it express or implied. Usually the occupier does not have any interest in the presence of the licensee on his premises, unlike a contractual entrant and an invitee.

There are three types of licensees: entrant as of right, social visitors, and an entrant by implied permission.

1. Entrant as of right

Entrants as of right are those who have the right to enter into premises that are open to the public such as a public park, a public lavatory, a public library, a public swimming pool and any other building open to the public.

The general principle is that actual knowledge of the occupier as to the existence of danger is not necessary and the licensee visitor cannot assume

that the premises will be free from visible dangers. The occupier must however, take reasonable steps in the circumstances to avoid any damage from occurring, especially if the danger is obvious.

It is in fact not settled whether an entrant as of right is to be treated as a licensee or an invitee. In Australia, the duty owed to persons who make use of public facilities is deemed to be higher than the duty owed to mere licensees. The principle seems to be, that if the occupier neglects to carry out inspections for the purpose of discovering whether his premises is safe for the public, with the consequence that a member of the public is injured due to the danger arising from the dangerous state of affairs on the premises, then the occupier is said to have failed to exercise reasonable care to avoid the damage and so he will be liable.[43]

It has also been suggested[44] that an entrant as of right cannot be categorised as either an invitee or a licensee. He does not seek the gratuitous use of another's property, and so he is entitled to expect that the premises is reasonably safe, not only for himself but for the public at large.

Considerations that ought to affect the standard of care expected of an occupier of premises to which members of the public can enter as of right were clearly laid down by Dixon J in *Aiken v Kingborough Corporation*[45] which is reproduced below:

> Parks, gardens, playgrounds, shelters, swimming pools, public picture galleries and public libraries are examples of places ... to which members of the public may go as of right. More often than not the care and management of, if not the property in, such places have been vested by or under statute in a corporation or in trustees who are obliged to give free access to the public, but who have full powers of maintenance and repair, as well as of management. The nature of the body as well as of the place must be considered ... but ... unless some other intention can be collected from the statute, a duty of care for the safety of those using the place must ... be cast upon the corporation or trustees by the very situation in which the statute has put them. They are in charge of a structure provided for the use of people who must, in using it, rely upon its freedom from dangers which the exercise of ordinary care on their own part would not avoid. Unless measures are taken to prevent it falling into disrepair or dilapidation or becoming defective, or if it does so, to warn or otherwise safeguard the users from the consequent dangers, it will become a source of injury. The body to which the statute has confided the care and management of the place alone has the means of securing the users against such injury,

43 See *Schiller v Mulgrave Shire Council* [1972] 129 CLR 116; see also Rutter at pp 143-6.
44 In *Aiken v Kingborough Corporation* [1939] 62 CLR 179.
45 *Ibid* at pp 205-6; see also Rutter at pp 145-6.

> the risk of which arises from continuing to maintain premises as a place of public resort and from the reliance which is ordinarily placed upon an absence of unusual or hidden dangers ... The general grounds for ... throwing a duty of care upon the public authority appear in the already well-known statement of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at pp 579-582 and the more particular application of the principles ... formulated to occupiers of premises will be found in a passage in the judgment of Bowen LJ in *Thomas v Quartermaine* (1887) 18 QBD 685 at pp 694-695.

2. Social visitors

A social visitor is one who enters into private premises with the permission of the defendant occupier or by invitation. His purpose for being on the premises is social in nature and does not confer any materialistic or economic advantage to the occupier, an example being a guest.

In *Yeap Cheng Hock v Kajima-Taisei Joint Venture*[46] the plaintiff, who was a geologist, was injured during a visit to a mine, the visit being for his own purposes. His visit was not meant to bring any benefit to the defendant occupier. Syed Agil Barakbah J stated that at common law a licensee is a person who enters premises with the consent of the occupier based on the occupier's gratuitous permission and not for any business purposes. The plaintiff in this case was held to be a licensee and not an invitee, applying the principles above. The defendants were found liable as the cause of the injury, which was a projection of rock in a tunnel, was a concealed danger and was known or ought to have been known by the defendant.

Another instructive case on the liability of occupiers to licensees is *Datuk Bandar Dewan Bandaraya v Ong Kok Peng & Anor.*[47] The plaintiff was badly injured when he fell down the shaft of a lift. The area was poorly lit and there was no warning sign, guard or barricade put up at the lift door to indicate that the lift was out of order. The block of flats including the lifts were owned by the Dewan Bandaraya of which the defendant was its Datuk Bandar. A third party was responsible for the maintenance of the lifts at the material time. The High Court found for the plaintiff. On appeal, the Supreme Court held that the plaintiff was a licensee and that such entrants must take the premises as he finds them. The duty owed to a licensee is not to expose him to hidden perils, and to warn him of existing traps or concealed danger.[48] A trap is something which involves 'the appearance of safety under circumstances cloaking a reality of danger'.[49] On the facts the court found that there existed a trap. The defendant's liability was affirmed.

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46 [1973] 1 MLJ 230.
47 [1993] 2 AMR 1195, SC.
48 Referring to *Fairman v Perpetual Investment Building Society* [1923] AC 74.
49 Citing *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398.

The third party was also found liable as they failed to erect warning signs from the moment they came to know or ought to have known of the trap or hidden danger created by the defective lift, contrary to the provisions in the maintenance agreement.[50]

3. *Entrant by implied permission*

An entrant by implied permission enters into premises in circumstances where the court implies a license. He enters without any express restriction by the occupier. The court applies the doctrine of allurement in this category, such as a child entering a piece of land due to some attraction on the land, or someone who is not prevented to use the occupier's land in order to get to the other side of the land.

(a) The occupier's duty

In *Robert Addie & Sons (Collieries) Ltd v Dumbreck*[51] Lord Hailsham LC said:[52]

> ... in the case of persons who are not there by invitation ... the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known – or ought to be known – to the occupier.

Therefore a duty of care arises when two factors are established: the occupier's knowledge, and there exists a concealed danger.

(b) Meaning of the 'occupier's knowledge'

Initially the occupier would only be held liable if he had actual knowledge as to the existence of danger, but the liability has been extended to situations in which he ought to have known of the existence of the danger. In *Hawkins v Coulsdon & Purley UDC*[53] the occupier was held liable to the plaintiff as he knew one of the steps on his ladder was broken, even though he did not realise the extent of the danger.

The test is objective. If the occupier knows of the condition on the premises, and a reasonable man would have realised of the existence of danger, the occupier will be taken as having knowledge of the danger.

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50 See also *Southern Portland Cement Ltd v Cooper* [1974] 1 MLJ 194 at 199, PC – the occupier's duty to an adult licensee is limited to giving warning.

51 [1929] AC 358.

52 *Ibid* at p 365.

53 [1954] 1 QB 319.

(c) Meaning of concealed or hidden danger

In *Latham v R Johnson & Nephew Ltd*[54] the court stated that concealed danger consists of something hidden or concealed and the element of surprise. The premises might look safe but is in fact a trap.

In order to prove the danger is concealed, it is not necessary to show there exists deception by the licensor. It is sufficient if the danger is something which the licensee is not aware of and could not be expected to be aware of.

In *China Insurance Co Ltd v Woh Hup (Pte) Ltd*[55] the Singapore Court of Appeal held that electric cables lying on the ground across the path used by workmen, who were licensees, constituted a concealed danger as even though the cables were obvious, but the danger, namely electric current, was concealed.

All concealed dangers are regarded as unusual danger but the reverse is not necessarily true. In Canada, the difference between these two types of danger has been abolished and liability is based on the existence of unusual danger.

(d) Knowledge of the plaintiff

If the plaintiff knows of the danger or the circumstances on the premises or that he ought to have reasonably known of the danger, the danger ceases to be a concealed or hidden danger.[56]

So too, if the licensee has been warned of the danger, the danger ceases to be a concealed danger and he is expected to take reasonable care of himself in the circumstances.

Consider however, *Lim Seow Wah & Anor v Housing and Development Board & Anor.*[57] D2 were building contractors who were constructing a building. A licensee ran a coffee stall at the ground floor of the uncompleted building. There was no fence around the building, no warning signs and the public had access to the stall. D2's workers were hacking walls in preparation for plastering. No safety net was used. The plaintiff, who was on his way to the stall was hit by an object which fell on his head. The plaintiff died from his injuries. D2 contended that the plaintiff was a trespasser. The court held that since there was unlimited access to the stall, the plaintiff was not a trespasser,

54 [1913] 1 KB 398.
55 [1977] 2 MLJ 57, affirmed [1978] 1 MLJ 59.
56 *Yeap Cheng Hock v Kajima-Taisei Joint Venture* [1973] 1 MLJ 230.
57 [1991] 1 MLJ 386.

and even if he was, D2 should have foreseen that members of the public would patronize the stall.[58]

4. Children licensees

If the licensee is a child, the duty on the occupier is higher as a child cannot be expected to be aware of dangers that may be obvious to adults.[59]

In *Phipps v Rochester Corporation*[60] two children entered into the defendant's compound to pluck some fruits. They fell and injured themselves. The danger was visible to adults but not to children. The children were held to be licensees, but there was no breach of duty as the defendant had a right to assume that prudent and reasonable parents or guardian would not allow their children to venture into open spaces without exercising any control or without first ensuring that the place was safe.

The element of attraction was balanced with the element of the degree of reasonable care exercised over the children, in an objective manner.

So if the parents or guardian have exercised reasonable care for the safety of their children it falls on the shoulders of the occupier to show that he has taken all reasonable precautions in the circumstances. The occupier did not satisfy this threshold in *Kalaichelvi v Kinrara Group Estates Ltd.*[61] The plaintiff was a three year old girl who while standing near the front door of her house, was hit by an object which flew from the blade of a grass-cutting tractor operating nearby. The grass-cutting machine was about ten feet away from the girl at the time and there were other children in the vicinity. The court held that the licensor occupier must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee. Although the danger of objects flying from the machine was obvious to the estate's workers but due to the girl's age, she could not have known of the danger. Consequently the machine should not have been operated so close to children without any precautions to prevent foreseeable injury.

Summary

A contractual entrant, an invitee and a licensee all come onto the occupier's premises with consent, express or implied, of the occupier. The similarities and differences between a contractual entrant and an invitee have been discussed above. As between invitees and licensees, the similarity is that

58 Was the danger a concealed danger from the facts?
59 *Ramsay v Appel* [1972] 46 ALJR 510.
60 [1955] 1 QB 450.
61 [1971] 4 MC 169.

both enter the premises lawfully, but for different purposes. The main differences between an invitee and a licensee may be laid down as follows:

Invitee	Licensee
1. The occupier usually gains some economic advantage by having the invitee on his premises and the invitee himself may have a similar interest. An invitee is therefore 'invited' onto the premises usually for business purposes.	1. A licensee however, may have an economic interest for being on the premises, but this interest is non-existent on the part of the occupier. A licensee is therefore 'allowed' onto the premises as a matter of grace.
2. The duty is to take reasonable care not to expose him to any unusual danger, which includes a concealed danger.	2. The duty is to take reasonable care not to expose him to a concealed danger, therefore excluding any apparent (and even unusual) danger.

In *Mersey Docks and Harbour Board v Procter*[62] Lord Sumner said:

> The leading distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none.

In general, the duty of an occupier towards a licensee is lower as compared to the duty owed to an invitee.

G. Trespassers

A trespasser is a person who enters premises without any express or implied permission of the occupier. His existence on the premises may not be known to the occupier, such as a wandering child, a thief, a person who has lost his way, and so forth.

A person who is legally authorised to be on the premises may become a trespasser if he goes onto a restricted area,[63] or where he stays on the premises beyond the time allowed to him[64] or where there has been an improper use

62 [1923] AC 253 at 272.
63 *Willcox v Kettel* [1937] 1 All ER 222.
64 *Hourigan v Mariblance Navegacion SA* [1958] 2 Lloyd's Rep 277.

of the premises.[65] Such trespasser may be liable to an occupier in trespass to land.[66]

Initially the duty owed to trespassers was that as laid down in *Robert Addie & Sons Ltd v Dumbreck*[67] where the court stated that in general an occupier does not owe a duty to a trespasser as he had entered without permission and is therefore assumed to have accepted all risks and any danger there might be on the property. This decision was overruled in *British Railways Board v Herrington.*[68] In this case, a six-year old child entered a piece of land which was open to the public and frequented by children. There was an electrified railway track owned by the defendants which ran across the land. The boy was severely injured when he went through a gap in a fence and stepped on the electric railway tracks. The House of Lords found the defendants liable. Even though an occupier did not owe a duty towards a trespasser as that owed towards invitees, nevertheless the occupier must take reasonable steps of common humanity and common sense to avoid danger; or to give warnings to people who might be on his premises. Therefore if the presence of the trespasser is known or reasonably foreseeable,[69] the occupier owes a duty towards the trespasser to warn him of the potential danger even though the duty is lower than the duty owed towards invited visitors. To ascertain whether this duty is fulfilled or otherwise, several factors will be taken into account, namely the expertise, financial standing and the knowledge of the occupier of the trespasser's possible presence on his premises.

Lord Reid[70] stated:

> ... an occupier's duty to trespassers must vary according to his knowledge, ability and resources. ... whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have

65 *David Jones (Canberra) Pty Ltd v Stone* [1970] 44 ALJR 320; *Government of Malaysia & Anor v Kong Ee Kim* [1965] 31 MLJ 81.

66 See above, Chapter 3.

67 [1929] AC 358 HL. A four-year old boy was killed when he was crushed in the terminal wheel of a haulage system belonging to a colliery company. The system was situated in a field which was used as a playground for children and this was known by the defendants. The wheel was dangerous and attractive to children and at the time of the accident it was insufficiently protected. In an action by the father, the court held that the boy was a trespasser and went on the colliery premises at his own risk and therefore no duty of care to protect him from injury existed on the part of the defendant. This decision is no longer good law as it was too harsh on the plaintiff.

68 [1972] 1 All ER 749, HL.

69 See also *Sathu v Hawthornden Rubber Estate Co Ltd* [1961] 27 MLJ 318; *Government of Malaysia & Anor v Kong Ee Kim* [1965] 31 MLJ 81.

70 [1972] 1 All ER 749 at 758, see also Rutter at pp 161-2.

> avoided it. If he knew before the accident that there was a substantial probability that trespassers would come, I think that most people would regard as culpable failure to give any thought to their safety. He might often reasonably think, weighing the seriousness of the danger and the degree of likelihood of trespassers coming against the burden he would have to incur in preventing their entry or making his premises safe, or curtailing his own activities on his land, that he could not fairly be expected to do anything. But if he could at small trouble and expense take some effective action, again I think that most people would think it inhumane and culpable not to do that ... it would follow that an impecunious occupier with little assistance at hand would often be excused from doing something which a large organization with ample staff would be expected to do.

Lord Wilberforce stated[71]:

> What is reasonable depends on the nature and degree of the danger. It also depends on the difficulty and expense of guarding against it. The law ... takes account of the means and resources of the occupier or other person in control – what is reasonable for a railway company may be unreasonable for a farmer ...

In Malaysia, the test applicable in deciding whether an occupier is liable to a trespasser for loss or damage caused while on the premises is a subjective test based on the occupier's knowledge of the danger on his premises according to his own financial limitations.[72]

In *Southern Portland Cement Ltd v Cooper*[73] the Privy Council acknowledged that the fundamental difference between the relationship of occupier and trespasser and other relationships which give rise to a duty of care is that the occupier's relationship with the trespasser has been forced onto him. It is therefore unjust to subject him to the full obligations resulting from the neighbourhood principle. No unreasonable burden must be put on the occupier. He cannot owe a duty to prevent dangers which has arisen without his knowledge. For dangers which he has knowledge but did not create, he cannot be required to incur what would for him be a large expense. However if he creates the danger and he knows that trespassers might come onto his land and not be aware of such danger, he must do more. Generally, the more serious the danger, the greater the obligation to avoid it. The extent of the occupier's duty is based on considerations of humanity – that is, the determination of what would have been the decision of a humane man with the financial and other limitations of the occupier.

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71 *Ibid* at p 777.

72 *Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas* [1995] 2 MLJ 276 at 284.

73 [1974] 1 MLJ 194; [1974] AC 623, PC.

In short, if the occupier knows or ought to know that a trespasser may enter his premises, then the occupier must take reasonable precautions to avoid any damage from occurring. An example of the applicability of the general rule that a trespasser who enters another's premises does so at his own risk is *Chuan Seng & Co Pineapples Factory v Idris & Anor.*[74] Here the two plaintiffs (deceased) were riding on a lorry (the premises) belonging to the defendants, without their consent and knowledge, but with the permission of the defendant's lorry driver. Due to the negligent driving of the driver, the lorry overturned and the two plaintiffs were killed. In an action by their estate against the defendants, the court held that the plaintiffs were trespassers and as such there was no duty of care owed to them. A trespasser on a motor vehicle has no right of action for personal injuries and the occupier is under no duty to put up warning notices, however likely the presence of trespassers.[75]

In Malaysia the courts have long determined the existence of a duty of care of an occupier to trespassers by determining on the facts of each case, whether the presence of the trespasser is likely in the circumstances. Consider the following cases: In *Sathu v Hawthornden Rubber Estate Co Ltd*[76] the plaintiff's cattle strayed onto the defendant's rubber estate whilst grazing. The estate had been sprayed with a poisonous weedkiller a few days earlier and the plaintiff's cattle died. The court found that the defendant could not reasonably have foreseen the trespass by the plaintiff's cattle and so no duty was owed. In *Government of Malaysia & Anor v Kong Ee Kim*[77] the plaintiff who was squatting behind a bush while depasturing her chickens on a village road, was injured when a vehicle used to level and clear land driven by a worker of the defendant came into contact with her. On the facts the Federal Court held that the defendant ought to have foreseen the physical presence of persons behind a bush and so a duty of care was established.

A more recent decision has affirmed that where the occupier is aware of the likelihood of trespassers on his land, he must take measures either to prevent them from entering the land, or to prevent danger to them while they are on the land.[78]

Child trespassers – the 'allurement' factor

The general principle is that an occupier must accept that children are less careful as compared to adults. The safety of children to a large extent lies on their parents and therefore an occupier has the right to question this

74 [1962] 28 MLJ 239.
75 *Ibid* at p 240, referring to *Grand Trunk Railway of Canada v Barnett* [1911] AC 361.
76 [1961] 27 MLJ 318.
77 [1965] 31 MLJ 81, FC.
78 *Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor* [1995] 2 MLJ 276.

responsibility or lack of it, if the warnings given by him are considered sufficient.[79]

Two decisions need to be discussed again – *BRB v Herrington*[80] and *Southern Portland Cement Ltd v Cooper*.[81] In *BRB v Herrington* it was stated that although the general rule is that an occupier is under no duty to prevent danger to trespassers, one exception is where the occupier places upon his land something which is dangerous and is an allurement to children. By putting the allurement there, the occupier is in a sense inviting children to meddle with the dangerous thing and it follows that a duty must be imposed on him.[82] Although with regards to children, the parents' responsibility will also be scrutinised, it is not always easy to conclude with certainty whose responsibility was 'more' at the time of the accident. Thus Lord Reid said[83]:

> Either parents must be required always to control and supervise the movements of their young children, or occupiers of premises where they are likely to trespass must be required to take effective steps to keep them out or else to make their premises safe for them if they come. Neither of these is practicable ... Legal principles cannot solve the problem. How far occupiers are to be required by law to take steps to safeguard such children must be a matter of public policy.

What may be an obvious danger to an adult might well constitute a concealed danger for a child.[84]

In *Southern Portland Cement* the defendant was a quarrying company. They were aware that children were in the habit of playing not far from the working area of the quarry. There was a sandhill on their premises, beneath which lay an electric power cable. A 13 year old boy was severely injured when while playing on the sandhill, his arm came into contact with the electric cable. The Privy Council held that the doctrine of allurement applied and that the duty to avoid danger is proportionate to the degree of danger as well as the attractiveness of the premises to a child. The duty is based on humanitarian considerations which on the facts, was not discharged by the defendants.

The principles in *British Railways Board v Herrington* and *Southern Portland Cement* were applied in the landmark Malaysian case of *Lembaga Letrik Negara v Ramakrishnan*.[85] The plaintiff was a ten-year old child who had

79 *Lembaga Letrik Negara v Ramakrishnan* [1982] 2 MLJ 128, FC.
80 [1972] 1 All ER 749, HL.
81 [1974] 1 MLJ 194, PC.
82 [1972] 1 All ER 749 at 754 *per* Lord Reid.
83 *Ibid* at pp 756-757.
84 Such as the live rail in the facts of the case.
85 [1982] 2 MLJ 128, FC.

climbed an electric pole which was under the control of the local government; in order to free a trapped bird. He was electrocuted and thrown to the ground and suffered extensive injuries. The pole was situated immediately adjoining a public footpath which the defendants knew to be well-used by members of the public. They however did not put up any anti-climbing devices such as warning signs, barbed wires or spikes despite the potential danger and its proximity to the footpath. The court found that the child was a trespasser and that an occupier owes a duty to a trespasser if the occupier knows that the circumstances on his premises may be dangerous to any visitor and that the presence of a trespasser is known or reasonably to be anticipated. This duty is fulfilled if the occupier has taken precautions based on common humanity and in the light of his own circumstances and his financial position. The nature and extent of that duty is lower than that which would be expected of the reasonable man in the ordinary law of negligence. The nature of the duty depends on what the defendant knew, as distinct from what he ought reasonably to have known. Thus once it is shown that the occupier is aware that a trespasser is on his land or might come onto his land, and he knows of the danger on his land which his trespasser is unaware of, the duty arises. The defendant occupier here was found liable as they had erected, maintained and controlled a highly dangerous pole of hidden lethal potentialities which was within easy reach of children. The defendants ought to have known that children might climb the pole and they had breached this duty when they failed to put up warning signs and adequate anti-climbing devices.

In *Sinuri bin Tubar & Anor v Syarikat East Johore Sawmills Sdn Bhd*[86] the defendants operated a sawmill and at the rear of the sawmill was a bathroom provided for their workers. The bathroom was an attraction to the inhabitants of a nearby village which had no piped water. The plaintiff who was eleven years old went into the defendant's compound and bathed. While he was crossing the yard on his way home, his hand was trapped under the logs in the yard. It consequently had to be amputated. The court held that whether an object should be considered an allurement must be a question of fact to be decided on the circumstances of each case, and in the instant case timber logs in a private yard could not be considered an allurement. The court stated[87]:

> ... an object should not be considered an allurement unless the temptation which it presents is such that no normal child could be expressed to restrain himself from inter-meddling, even if he knows that to inter-meddle is wrong. Therefore where a child who was stealing a ride on a low-loader passing through a town at walking pace was killed when attempting to jump off, it was held that the vehicle was

86 [1987] 1 MLJ 315.

87 *Ibid* at p 318, quoting *Charlesworth on Negligence*, 5th edn paragraph 356.

not an allurement. An allurement might either tempt children to come upon premises where they were not permitted to be, so that they were trespassers, or it might tempt children invited or licensed to be on the premises to meddle with the allurement.

Although it might be argued that the bathroom with piped water facilities constitutes an allurement, on the facts however, the sawmill owners had erected a fence separating their sawmill from the adjoining village. There were warning signs posted in Malay and English, prohibiting unauthorised entry. A guard was posted at the entrance to the sawmill. The boy trespasser gained entry through a swamp at the rear of the sawmill, and the method of entry was only known to the village inhabitants, not the defendants.

H. Defences

An occupier who is sued may raise the defence of *volenti non fit injuria* or that he has put up a sufficient notice or warning. The defence of *volenti* has been discussed elsewhere[88] and only the defence of notice will be discussed here.

I. Notice

Notices may be in the form of a warning, or an exclusion clause. It may also take the form of a device which prevents visitors from getting into contact with the danger.

The existence of a notice of warning may be raised by the defendant to show that he has not breached his duty. A clear and valid exclusion clause is a complete defence.

In *Ashdown v William Samuels & Sons Ltd*[89] the court held that an exclusion clause may be raised as a complete defence if the clause is clear and sufficient. In this case, a factory was situated beside a railway track and there were shunting operations on the defendant's land. The plaintiff, an employee at the factory, did not take the road provided but took a short cut across the defendant's land and was subsequently injured. Notices of the danger on the defendant's land were put up and the court held that the notices were adequate. They were clear and sufficient to exempt liability on the defendant.[90]

88 See above, Chapter 9.

89 [1957] 1 QB 409.

90 The decision in this case has been criticised because the plaintiff who did not have any contractual relationship with the defendant was bound by the exclusion clause which in essence was a contractual term.

Chapter Eleven

DEFAMATION[1]

The law of defamation in Malaysia is primarily based on the English common law principles except insofar as it has been modified by the Malaysian Defamation Act 1957[2] (the Act). The Malaysian Defamation Act 1957 is in *pari materia* with the English Defamation Act 1952.[3]

The interest that is protected by this tort is a person's good name and reputation. Mere feelings of hurt however, is insufficient for the award of damages under the tort of defamation. Words spoken in jest and are understood by those who hear them to be so is not defamatory.[4] However words meant as entertainment and claimed to have been said in jest should not affect the plaintiff's reputation. So the circumstances and context in which the words appear are important considerations.

Defamation arises when there is a publication which has a tendency to lower the person's reputation or to cause him to be shunned or avoided by reasonable persons in society, and thereby adversely affecting his reputation.[5]

Defamation is established if *A* tells *B* either orally or in writing that *C* is a dishonest and selfish person who likes to take advantage of those around him. Publication arises when this statement is made to *B*, and as this statement may cause a reasonable person to disassociate himself from *C's* company, it therefore adversely affects *C's* reputation.

What may lead to a tendency to lower a person's reputation depends on the facts and allegations in each case, and their impact on the reasonable man. For instance, to say that a man owes RM15 to a bank is not defamatory as owing money is true of every householder on most days of the month![6] However an allegation that a businessman is bankrupt is *prima facie* defamatory.[7]

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1 For an excellent work on this topic, see Evans.
2 (Revised 1983), Act 286.
3 England also has a 1996 Act which is inapplicable in Malaysia.
4 *Mohamed Azwan Ali v Sistem Televisyen M'sia* [2000] 7 CLJ 498.
5 *Dato Musa bin Hitam v SH Alattas & 2 Ors* [1991] 1 CLJ 314 at 320; *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393.
6 *Tan Eng Seong v Malayan Banking Bhd* [1997] 2 CLJ Supp 552.
7 *Soh Chun Seng v CTOS-emr Sdn Bhd* [1998] 4 AMR 4311.

Other examples of defamatory remarks include suggestions that a professional is acting unprofessionally and unethically,[8] and alleging that a man is *miang*.[9]

A. Who can sue

In *Derbyshire County Council v Times Newspapers Ltd*[10] the plaintiff, a local authority, brought an action against the publishers of a newspaper, its editor and two journalists claiming damages for defamatory articles about the local authority's investments and control of its superannuation fund. It was held that a local authority (and so public authorities and governmental bodies) had no right to sue for defamation in respect of its governing or administrative reputation if no actual financial loss was pleaded or alleged. Lord Keith stated[11] that it is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation would inevitably have an inhibiting effect on freedom of speech.

The principle applicable to a business or commercial organisation is different. In general a trading or non-trading corporation which can show that it has a corporate reputation which is capable of being damaged by a defamatory statement, may sue in libel to protect that reputation in the same way as could a natural person.[12] The Malaysian position appears to be in accord with this general principle. *Borneo Post Sdn Bhd & Anor v Sarawak Press Sdn Bhd*[13] held that a company may claim for libel where the libel concerned injures its reputation in the way of its business. There is no need to prove special damage. A company may also sue for slander of goods as provided for in s 6 of the Defamation Act 1957. A company however, does not have the right to claim in respect of statements reflecting upon it personally.[14] In this case the plaintiff's action failed as the alleged defamatory statements did not contain any specific reference to the plaintiff company and thus could not be said to have reflected upon its way of business. Again in *Doree Industries (M) Sdn Bhd v Sri Ram*[15] the court held that a corporate body may maintain an action for libel and slander in the same way as an individual.

8 *Perunding Alam Bina Sdn Bhd v Errol Oh* [1999] 2 CLJ 875.
9 *Abdul Karim Ayob v Kumpulan Karangkraf Sdn Bhd* [2000] 1 MLJ 243.
10 [1993] 1 All ER 1011, HL.
11 *Ibid.*
12 See also *Metropolitan Saloon Omnibus Co v Hawkins* [1859] 4 H & N 87 (imputation of insolvency).
13 [1999] 1 AMR 1030.
14 The cases of *South Hetton Coal Company v North-Eastern News Association Ltd* [1894] 1 QB 133 and *D & L Caterers Ltd & Anor v D'Ajou* [1945] 1 KB 364 were followed.
15 [2001] 3 AMR 3529.

The imputation must reflect upon the company itself and not upon its members or officials only.

B. Who can be sued

The author of the defamatory words would be the party sued. Where more than one person is involved in the publication of the defamatory words, all of them may be sued. These would include the publisher, editor, journalist (reporter or author) and printer.[16]

C. Types of defamation

Defamation may be divided into two different types, namely libel and slander. In England, libel is a tort as well as a crime whereas slander is only a tort and not a crime. In Malaysia, libel and slander are both torts and crimes.[17]

1. Libel

Libel is defamation in a permanent form and is usually visible to the eye, such as items in writing which includes e-mail,[18] pictures, statues or effigies. Section 3 of the Act provides that the broadcasting of words by means of radio communication shall be treated as publication in a permanent form and therefore constitutes a libel. Libel is actionable *per se*, which means that a plaintiff need not prove any damage. This is because the law presumes that when a person's reputation is assailed, some damage must result.[19] A bank commits the tort of defamation if it wrongfully prints the words 'Account Closed' on a cheque that it is in fact bound to honour.[20]

2. Slander

Slander is defamation in a temporary or transient form. Publication is usually made through spoken words or gestures. A slander is not actionable *per se*. The plaintiff therefore needs to prove actual or special damage in order to succeed in his action. The preferred term is 'actual' rather than 'special' damage, and where reference is made to 'special' damage, it is synonymous with 'actual' damage.

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16 See *Tjanting Handicraft Sdn Bhd & Anor v Utusan Melayu (M) Bhd & Ors* [2001] 2 MLJ 574.

17 See Penal Code (Act 574), ss 499-502.

18 *Bitutech Sdn Bhd v Bosco Philip Anthony & Ors* [2001] 5 MLJ 277.

19 *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 AMR 1776.

20 *Ng Cheng Kiat v Overseas Union Bank* [1984] 2 MLJ 140.

Actual damage refers to actual financial loss or any loss that may be measured in monetary terms. For instance, loss of friendship, or excommunication will not be considered as actual damage as these cannot be quantified in monetary terms. In contrast, the loss of business or employment or even a chance to attend a dinner may be calculated in monetary terms and therefore constitute actual damage. The actual loss must be proved. The damage must also be the natural and reasonably foreseeable result of the defendant's words. The damage must further be a direct result of the defendant's words.[21]

In an action for slander the plaintiff must prove the actual words used. He is not entitled to merely state the impression produced upon his mind or indeed his witnesses' minds by the whole of the statements claimed as being defamatory of him. Further, it is not sufficient for the plaintiff to tender evidence as to what his witnesses have conceived the substance or effect of the words to be.[22] The logical reason for this procedural requirement was stated in *Rainy v Bravo*[23] as follows:

> If the defamatory writing does not exist, and secondary evidence is offered of its contents, the words must be proved and not what the witness conceives to be the substance or the effect of them; for otherwise witnesses and not the court or a jury, would be made the judges of what was a libel.

So in *Workers' Party v Tay Boon Too* the court held that the slander alleged must be set out in the statement of claim in Hokkien precisely as spoken as that was the language in which the slander was uttered, followed by a literal translation in the English language. It is equally insufficient to set out a translation without setting out the original words and vice versa.[24] This point is further discussed below.

In *Lynch v Knight*[25] the court held that to make the words actionable by reason of special damage, that consequence must be such as taking human nature as it is, and having regard to the relationship between the parties concerned, it is fairly and reasonably anticipated to follow from the speaking of the words. This means that even if actual damage is proven, the damage must also have been foreseeable and not too remote. In this regard the ordinary principles on remoteness of damage are applicable.

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21 *Workers' Party v Tay Boon Too; Workers' Party v Attorney-General* [1975] 1 MLJ 47.
22 *Ibid* at p 48.
23 [1872] LR 4 PC 287 at 295 *per* Sir Montague Smith.
24 Followed in *Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors* [1997] 5 MLJ 523 – plaintiff's statement of claim only referred to the quoted words, as opposed to the actual speech, of the defendant. His action failed.
25 [1861] 9 HL Cas 577.

D. Exceptions to the requirement of actual damage in cases of slander

The rule that a plaintiff must prove actual damage in an action for slander is a general proposition, subject to some exceptions. The exceptions in which slander becomes actionable *per se* are as follows:

1. Slander to women

Section 4 of the Act provides that the publication of words which imputes unchastity or adultery to any woman or girl requires no proof of special damage for the action to succeed. In *Luk Kai Lam v Sim Ai Leng*[26] the respondent called the appellant a prostitute and said that the appellant charged RM50 to entertain men at any one time. These allegations were made in the presence of a third party. The court held that since the words impugned the appellant's chastity, special damage need not be proven. Slander was established.

'Words' according to s 2 of the Act include pictures, visual images, gestures and other methods signifying meaning.

2. Slander in relation to a person's professional or business reputation

Section 5 of the Act provides:

> In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary for the plaintiff to prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

The application of this section by the courts has been rather confusing. Perhaps the cases ought to be looked at in order of the dates judgments were given.

One interpretation is that adopted in *John Tan Chor-Yong v Lee Chay Tian.*[27] Here the plaintiff who was an advocate and solicitor claimed that the defendant's words to the plaintiff's friends and clients to the effect that he, the plaintiff, was owing him, the defendant; several months' rent were defamatory as the words were calculated to disparage him in his office. Applying s 5 of the Defamation Act 1957[28] in favour of the plaintiff, and so

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26 [1978] 1 MLJ 214.

27 [1971] 1 MLJ 240.

28 Which at the time of judgment was s 5 of the Malayan Defamation Ordinance 1957, which in turn applied in Singapore.

holding that the plaintiff's case was actionable *per se* without proof of special damage, the court held:[29]

> ... it is significant that, unlike the position previously, it is now unnecessary to allege or prove special damage whether or not the words are spoken of people like the plaintiff in the way of his office or profession. In short, it is unnecessary to allege or prove special damage even if the words are not spoken of the plaintiff so as to affect him in his profession. Thus it will now be actionable *per se* to impute insolvency to a solicitor.

A second interpretation is that adopted in *Workers' Party v Tay Boon Too*[30]; that for the slander to be actionable *per se* under s 5, the defamatory statement must 'reflect upon a person *in the way* (emphasis added) of his office, profession, calling, trade or business'. This means that the defendant's words must clearly refer to the plaintiff in his office, profession, calling, trade or business.

The interpretation of s 5[31] as adopted in *Workers' Party* is in fact a reversion to the common law position prior to the passing of the Defamation Act 1952 of England.

Any confusion that might have arisen was settled in *JB Jeyaretnam v Goh Chok Tong*.[32] In this case the court distinguished between an office of profit and an office of honour. For the slander to be actionable *per se*, the words must be calculated to disparage the plaintiff in his office of profit. An office of profit means that the plaintiff receives monetary remuneration from holding that office. If his position is an office of honour then the plaintiff is required to prove special damage, unless he can prove that the words intimated that he had received bribes, or had acted dishonestly or had acted without integrity, or in any case he has acted in such a way that he may be dismissed from further holding that position. The court also held that by virtue of the wording in s 5, it is no longer necessary for the plaintiff to prove, as was the case at common law, that the words were said *in the* way[33] of that office. It follows that the interpretation adopted in *John Tan Chor-Yong* was reiterated.

It is also a requirement under this section that the plaintiff was following that calling or profession at the time when the words were spoken and published.

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29 [1971] 1 MLJ 240 at 241.
30 [1975] 1 MLJ 47 at 49.
31 Section 5 of the Malaysian Act is in *pari materia* with s 2 of the 1952 English Act.
32 [1985] 1 MLJ 334 at 337-338.
33 (emphasis added).

Further, the words must amount to either a charge of misconduct or of unfitness against him in relation to that calling.[34]

An allegation of dishonesty and corrupt practices (such as receiving money in return for favours) against a Deputy Minister would therefore fall under s 5,[35] either on the basis that the office is an office of profit, or on the basis that the defamatory words intimated that the Deputy Minister had acted without integrity, following *Jeyaretnam*.

3. *Slander in relation to title, slander of goods and malicious falsehood*

Section 6 of the Act provides:

> (1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage –
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.
>
> (2) Section 3 of this Act shall apply for the purposes of this section as it applies for the purposes of the law of libel and slander.

So, if *A* writes a letter to *B* advising *B* not to order *C's* 'char koay teow' for *B's* open-house function, as *A* believes *C* uses less than fresh ingredients, *C* may have a claim against *A* under s 6(1)(a) for slander of goods. If *A* on the other hand, orally informs *B* of the same about *C's* 'char koay teow', *C* has a claim against *A* under s 6(1)(b).

The Act does not indicate any requirement for malice in order to establish liability, but in *Borneo Post Sdn Bhd & Anor v Sarawak Press Sdn Bhd*[36] it was held that in an action for slander of goods under s 6 of the Defamation Act 1957 the plaintiff must prove that the statement was published maliciously.[37]

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34 *Workers' Party v Tay Boon Too* [1975] 1 MLJ 47.

35 *Chua Jui Meng v Hoo Kok Wing* [2000] 6 CLJ 390.

36 [1999] 1 AMR 1030.

37 See also *In-Comix Food Industries Sdn Bhd v A Clouet & Co (KL) Sdn Bhd* [1997] 2 AMR 1554 where it was stated that the absence of malice prevents a claim for slander of goods or slander of title.

The same requirement applies in an action for slander of title – the alleged statement must be disparaging of the goods.[38]

Malicious falsehood

Malice must be proved in a cause of action for malicious falsehood. In *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors*[39] the court held[40] that in a claim for malicious falsehood the plaintiff must prove:

(i) that the defendant has published about the plaintiff, words which are false, and

(ii) that they were published maliciously, and

(iii) special damage has followed as the direct and natural result of the publication.[41]

Special damage must therefore be proven except when s 6 of the Act applies.[42] Here are more examples:

If *A* tells *B* that *C* is no longer operating his coffee-shop, the statement may well deprive *C* of his business and *C* in this instance may sue *A* for malicious falsehood without having to prove special damage provided *C* can prove that *A* was acting maliciously. If *A* on the other hand tells *B* that *C* has left the country, and so *B* does not extend an invitation to *C* for the grand reception *B* is holding for his daughter's wedding, in order to succeed in a claim for malicious falsehood, *C* must prove special or actual damage.

A basic difference between the torts of defamation and malicious falsehood is that defamation protects the claimant's reputation while malicious falsehood protects the claimant's interest in his property or trade.[43] Another difference is that an action for malicious falsehood survives the death of the claimant, unlike an action for defamation.[44]

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38 *Ibid.*

39 [1999] 3 MLJ 529. See also *Doree Industries (M) Sdn Bhd & Ors v Sri Ram & Co & Ors* [2001] 3 AMR 3529.

40 Following *Clerk & Lindsell on Torts*, 17th edn, paragraphs 22-23.

41 See *Datuk Ong Kee Hui v Sinyium anak Mutit* [1983] 1 MLJ 36, FC.

42 *Tan Chong & Son Motor Co Sdn Bhd v Borneo Motors (M) Sdn Bhd* [2001] 3 AMR 3789.

43 See *Joseph v Govt of Sarawak & Anor* [1975] 2 MLJ 38 where plaintiff claimed against his head of department when the latter falsely wrote in a memorandum that the plaintiff was to be transferred to another department with his consent. On the facts the court found that the statement of claim was properly set out in his claim for damages in malicious falsehood.

44 *Doree Industries (M) Sdn Bhd & Ors v Sri Ram & Co & Ors* [2001] 3 AMR 3529.

The ambit of the tort is wider than merely for the protection of commercial interests,[45] thus to a certain extent blurring the differences between an action in malicious falsehood and an action in defamation.

In *Joyce v Sengupta*[46] the Court of Appeal held that damages for anxiety and distress are not recoverable for malicious falsehood. However, damages need not be nominal and the injury in the form of anxiety and distress may be reflected in the amount awarded as aggravated damages as part of general damages.

4. Imputation of a contagious disease

A defamatory statement which carries the imputation of a contagious or infectious disease is actionable *per se*. The words must infer that the plaintiff suffers from such a disease at the time the publication is made, such as venereal disease.

5. Imputation of a crime

Slander is actionable *per se* if the words indicate that the plaintiff is involved in a crime. The crime must be one which attracts corporal punishment, which includes the death penalty, whipping and imprisonment. The idea is that the punishment ought to be of a type where the plaintiff can be made to suffer physically.[47] Imputation of an offence punishable by fine merely, is not sufficient. The rationale or basis of this rule is that reasonable persons are likely to shun and avoid someone who is 'a convicted person' and whose punishment is 'serious'. The presumption is that someone who is merely fined for say, a traffic offence, is not likely to be shunned or avoided by reasonable persons.

In *C Sivanathan v Abdullah bin Dato' Haji Abdul Rahman*[48] the defendant called the plaintiff a cheat, dishonest and a liar. The court held that since the 'crimes' did not attract corporal punishment, the plaintiff's claim was not actionable *per se*. His action failed as he could not prove special or actual damage.

E. Elements of defamation

In order to prove defamation, the plaintiff must establish the elements of this tort, which are:

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45 *Joyce v Sengupta* [1993] 1 All ER 897, CA.
46 [1993] 1 All ER 897, CA.
47 See *Workers' Party v Tay Boon Too* [1975] 1 MLJ 47 at 49.
48 [1984] 1 MLJ 62.

1. the words are defamatory, and

2. the words refer to the plaintiff, and

3. that the words have been published.

1. Words are defamatory

The first requirement that must be established by a plaintiff in a defamation action is that the statement that forms the subject matter of his complaint is defamatory. As a general rule this requirement is satisfied when the words have a tendency to lower the estimation of the plaintiff in the minds of right-thinking members of society,[49] so that the plaintiff is avoided, shunned or ridiculed. Who exactly are 'right-thinking members of society' and by what criteria is one said to be a right-thinking member of society? Unfortunately this question does not have an 'absolutely right' answer. The cases have not all considered the statements complained of by plaintiffs in defamation suits by reference to the perception of this 'right-thinking members of society'. Arguably other perspectives[50] adopted by the courts in determining whether or not any given words are defamatory are to consider the words from the perspectives of the average thinking man,[51] the law-abiding citizen,[52] and the often-referred but elusive ordinary, reasonable man.[53] One is at liberty to conclude that there are indeed several perspectives or 'control groups', against whom the court will consider the words complained of. It is also possible to interpret these different perspectives as being a variation or an explanation of the meaning of the 'reasonable man'.

A recent example of the existence of these different control groups may be found in *DP Vijandran v Karpal Singh*[54] where in an allegation that the plaintiff advocate and solicitor had committed an offence under s 420 of the Penal Code, the court held that it is irrelevant that the public at large may not understand the implication of the allegation. It is sufficient that members of the plaintiff's fraternity including those of the judicial service know the meaning attributed to an offence under s 420.

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49 See *SB Palmer v AS Rajah & Ors* [1949] MLJ 6; *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142; *Syed Husin Ali v Sharikat Perchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390; *Mark Ignatius Uttley v Wong Kam Hor* [2002] 4 AMR 4275.

50 Evans uses the phrase 'control group' at p 10.

51 *Lau Chee Kuan v Chow Soong Seong & Ors* [1955] 21 MLJ 21 at 22 *per* Mathews CJ, CA.

52 *Ibid* at p 22 *per* Murray Ansley CJ.

53 *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; *JB Jeyaretnam v Lee Kuan Yew* [1992] 2 SLR 310, CA.

54 [2000] 6 CLJ 433; [2000] 3 MLJ 22.

The court only looks to the tendency of the response or reaction of the reasonable man, to the words. The court does not concern itself with whether members of society would in actual fact avoid the plaintiff as the crucial factor is whether the words are capable of conveying a defamatory meaning of and concerning the plaintiff. This is a question of law for the court to decide.[55] Should the court find that the words do indeed have a tendency to cause a reasonable man to look down upon the plaintiff, they are deemed to be defamatory. Words which may cause a reasonable man to 'look down upon the plaintiff' would include words which may expose him to hatred, contempt or ridicule,[56] or those which would cause him to be shunned or avoided.[57] It does not matter that no one believed the words to be true.[58] However if it is proven as a fact that as a consequence of the defendant's words people actually do avoid the plaintiff, then the test is whether they are reasonably justified in understanding the words in a defamatory way.[59] So the fact that the words are believed does not automatically make them defamatory.

The plaintiff must know what has been said of him, and cannot merely guess. If the words are merely words of abuse, uttered in anger in the heat of the moment, then the words will not be defamatory.[60] If the words are however uttered in a cold and calculated way then they would probably be defamatory. Therefore the way in which the words are uttered is relevant. In a defamation suit, the intention of the publisher or maker of the statement is irrelevant. The words will be examined objectively, that is, its effect on a reasonable and ordinary reader (or person who hears those words).[61]

The answer to the objective test is not necessarily representative of the majority opinion in a given society. It follows that words may be defamatory

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55 *Tan Sri Dato Vincent Tan v Haji Hasan bin Hamzah & Ors* [1995] 1 AMR 69; *Mark Ignatius Uttley v Wong Kam Hor* [2002] 4 AMR 4275 at 4289, where the court stated that whether a particular meaning is capable of being defamatory is a question of law. Whether the meaning is actually defamatory is a question of fact.

56 *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142; *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56; *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334.

57 *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* [1934] 50 TLR 581, CA.

58 *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56; *Workers' Party v Tay Boon Too* [1975] 1 MLJ 47; *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334.

59 *SB Palmer v AS Rajah & Ors* [1949] MLJ 6; *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142; *Syed Husin Ali v Sharikat Perchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56; *The Straits Times Press (1975) Ltd v The Workers' Party & Anor* [1987] 1 MLJ 186; *Dato Musa bin Hitam v SH Alattas & Ors* [1991] 1 CLJ 314.

60 *C Sivanathan v Abdullah bin Dato' Haji Abdul Rahman* [1984] 1 MLJ 62.

61 *Lee Kuan Yew v JB Jeyaretnam* [1979] 1 MLJ 281.

by reference to the perception of a substantial and respectable minority of the community.[62] Although the 'minority opinion' is not discriminated against in the objective test, this minority opinion is nonetheless subject to it being generally acceptable as part of the norms of that given society. Evans explains it this way:[63]

> ... the opinion of sub-groups of society whose views may be outside the generally accepted norms, or whose views and behaviour are anti-social or otherwise unworthy of protection by the court, may be discounted here.

The application of the reasonable man test and what or whose opinion counts as 'reasonable' may be seen in *Lau Chee Kuan v Chow Soong Seong & Ors.*[64] An article in a Chinese newspaper described how the appellant, a midwife, was taken to a house at night where she delivered a child. She was paid $200. On leaving the house she turned round to look at it and found that the house had disappeared and she was in a cemetery. On arriving at her house she found the $200 in notes had turned into a heap of ashes of burnt Hades currency. The article explained that due to fright, ever since that fateful night she had been ill. The trial judge dismissed the appellant's claim on the ground that in the eyes of the average thinking man the article did not tend to lower the appellant's reputation or disparage her in the way of her profession. The article was therefore not defamatory. On appeal, the Court of Appeal found the words in the article to be defamatory of the appellant. Mathew CJ stated:[65]

> ... the opinion of those who believe in ghosts we can discount and not apply a seventeenth century English standard, but the opinion of all other persons must be that here is a silly woman who believes in ghosts to such an extent that she makes herself ill and is unable to pursue her profession as a midwife ...

The court found that the false statement had been made to the appellant's discredit and she had been ridiculed and brought into contempt.[66] On the meaning and clarification of the phrase 'the reasonable man', Murray-Aynsley CJ explained that it was not enough to prove that the words rendered the plaintiff obnoxious to a limited class, but that it should be proved that the words produced a bad impression on the minds of average, reasonable men.

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62 See Evans, at p 10.
63 *Ibid.*
64 [1955] 21 MLJ 21, CA.
65 *Ibid* at p 22.
66 The appellant was awarded $500 damages.

Words may be defamatory in one of three ways; in its natural and ordinary meaning, or by way of innuendo or by juxtaposition.

(a) Natural and ordinary meaning

The words complained of are defamatory in their natural and ordinary meaning if they impute that the plaintiff is dishonourable or of discreditable conduct or motive or lacks integrity.[67]

The words by themselves, as understood by ordinary men of ordinary intelligence must have the tendency to make them look down, shun or avoid the plaintiff.[68] The natural and ordinary meaning of the words includes but is not restricted to the literal meaning of the words. To prove that the words are defamatory in their natural and ordinary meaning, there is no need for the plaintiff to prove any special knowledge on the part of those to whom the words have been published. The approach is to consider what meaning the words would convey to ordinary reasonable persons using their general knowledge and common sense. Reasonable and ordinary inferences and implications arising from those words are taken into account. Further, the words must be read in the context of the whole publication.[69] Thus to infer that the prime minister of a country uses the Internal Security Act to detain priests as a route of attack against the Catholic Church has been held to be defamatory of the prime minister as the words imputed abuse of power, dishonourable and discreditable conduct on his part.[70] Labelling a Muslim man as 'Abu Jahal' is defamatory as it imputes that person as a big liar, untrustworthy and irresponsible.[71]

In *Institute of Commercial Management United Kingdom v News Straits Times Press (Malaysia) Bhd*[72] the plaintiff claimed against the defendant damages for libel in respect of words contained in an article published by the defendant entitled 'British 'diploma mills' step up sales racket'. The plaintiff alleged that the words in the article, in their natural and ordinary meaning or by innuendo were understood to mean, *inter alia*, that the plaintiff was one of the 'diploma mills' advertising actively in Malaysia, that the plaintiff was a bogus educational institution and that therefore the plaintiff was carrying out unlawful activities in Malaysia and other places. The plaintiff alleged

67 *Chok Foo Choo v The China Press Bhd* [1999] 1 AMR 846, CA.
68 *Rajagopal v Rajan* [1972] 1 MLJ 45; *Tan Sri Dato Vincent Tan v Haji Hasan bin Hamzah & Ors* [1995] 1 AMR 69.
69 *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390.
70 *Ibid.*
71 *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75.
72 [1993] 1 MLJ 408.

that the words were calculated to injure and disparage the plaintiff in its trade as an educational establishment and examining body; that the plaintiff had in fact been injured in its credit and reputation as such.

The court held that any ordinary reasonable person who read the article would certainly link ICM with one of those organisations which operated the 'diploma mills'. The words had a strong tendency to lower the plaintiff in the estimation of right-thinking members of society generally or the parents of potential students or the potential students themselves. Citing *Hough v London Express*[73] the court stated that it was immaterial whether the words were believed by those for whom the article was published.

In *Lewis v Daily Telegraph Ltd*[74] a newspaper printed the news that a Fraud Squad was investigating into the plaintiff's company. The plaintiff's action failed as the court held that the statement was not capable of giving rise to the meaning that the plaintiff carried out his business fraudulently. A reasonable man would not infer guilt from the fact of a police enquiry.[75]

In *Ayob bin Saud v TS Sambanthamurthi*[76] the plaintiff, a land surveyor who had valued the defendant's land, received a copy of a letter sent by the defendant to a third party which stated *inter alia* – "I am surprised that a Chinese surveyor has charged RM1,450 whereas a Bumiputra asks for RM4,480 which is daylight robbery." In an action for libel, the court held that the phrase "daylight robbery" and the innuendo, which was the comparison made between the charges of a Bumiputra and Chinese surveyor, only indicated that the fees asked for by the plaintiff was too high. They were used as words of general abuse and in the literal sense these words were not defamatory in nature in that they did not have the tendency to cause reasonable men to avoid the plaintiff. There is therefore a need to distinguish between words which might have a tendency to discredit the plaintiff's reputation, (which are defamatory and therefore actionable) and words which were meant and indeed understood to be words spoken in anger and 'in the heat of the moment'. In determining whether the words are capable of bearing a defamatory meaning or are merely vulgar abuse, the circumstances and context in which the words appeared must be taken into account. Ultimately, the words are subject to the objective test: Would the reasonable, right-thinking man to whom the words are published, taking into account all the circumstances of the case; have the tendency to look down upon the plaintiff?

73 [1940] 2 KB 507.
74 [1964] AC 234.
75 See also *The Strait Times Press (1975) Ltd v The Workers' Party* [1987] 1 MLJ 186.
76 [1989] 1 MLJ 315.

(b) Innuendo

Sometimes a defamatory imputation does not arise from the literal meaning of the words. So the words by themselves are not defamatory but become so by virtue of either inferences or special facts or circumstances known by the recipient or reader of the words. In these circumstances the words are said to be defamatory by innuendo. Innuendo may be divided into two types, false innuendo and true or legal innuendo.

(i) False innuendo

Where the words are defamatory of the plaintiff due to inferences or implications arising from them, this is when the words are described as giving rise to a false innuendo.

A false innuendo may arise from a combination of statements and pictures. For instance, a newspaper prints the plaintiff's picture and below this picture is a caption which reads: 'A lawyer's activities are being investigated'.[77] In an action where the plaintiff alleges that the words are defamatory based on a false innuendo, the plaintiff is not allowed to explain the meaning or inferences that can be drawn from the words or pictures. The words must speak for themselves.[78]

Ordinary inferences and implications arising from the words complained of are also classified as being within the natural and ordinary meaning of those words. It is difficult to distinguish between a false innuendo and the natural and ordinary meaning of words where the latter encompasses natural inferences arising from the words. Perhaps this explains why in many of the cases, the words complained of are claimed to be defamatory either in their natural and ordinary meaning or by way of a false innuendo.

In *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd*[79] the defendant newspaper published among others, the following statements regarding the plaintiff: 'The Menteri Besar considers Syed Husin Ali as wanting to arouse the hatred of the Malaysian people against the Government and the British; the University lecturer was spreading subversive ideas in order to poison the thoughts of the Malays.' The issue before the court was whether the words were defamatory of the plaintiff. It was held that by inference or implication the words conveyed the meaning that the plaintiff was dishonest, disloyal to the Government, a subversive element and ungrateful. The plaintiff's claim was accordingly allowed.

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77 See *CS Wu v Wang Look Fung & Ors* [1981] 1 MLJ 178.
78 *Bank of China v Asiaweek Ltd* [1991] 2 MLJ 505.
79 [1973] 2 MLJ 56.

In *Lee Kuan Yew v JB Jeyaretnam*[80] during the election rally for a general election, the defendant spoke of the performance of the plaintiff thus –

> I'm not very good in the management of my own personal fortunes but Mr Lee Kuan Yew has managed his personal fortunes very well. He is the Prime Minister of Singapore. His wife is the senior partner of Lee & Lee and his brother the director of several companies ... so Mr Lee Kuan Yew is very adept in managing his own personal fortunes but I am not ... if I become Prime Minister there will be no firm of JB Jeyaretnam & Co in Singapore because I wouldn't know how to manage my own personal fortunes.

The court held that in that context, the words in their natural and ordinary meaning implied that the Prime Minister had gained and secured personal financial advantage for himself and his family members from his position. Defamation was established.

Another example is *Chua Jui Meng v Hoo Kok Wing & Anor.*[81] The defendants alleged at a press conference: that the plaintiff had received at least RM200,000 from a director of a company in order that the plaintiff, as Deputy Minister of International Trade and Industry could grant various licenses to the director; that the plaintiff owned a RM1.5 million three-storey bungalow in Damansara Heights, and tens of thousands of electrical goods. The court found that the words, in their natural and ordinary meaning were understood to mean that the plaintiff was dishonest and corrupt. The statements had discredited and disparaged the plaintiff in his office as the Deputy Minister of International Trade and Industry.

(ii) True or legal innuendo

Words are also capable of bearing a defamatory meaning by way of a true or legal innuendo.

A true or legal innuendo arises due to special facts which are known to the recipient of the publication. This special knowledge will cause the words to be defamatory of the plaintiff. Otherwise the words are not defamatory in nature. Special knowledge refers to special and particular, additional factors that are known or available to those to whom the words were published. For instance, if *A* were to tell *C* that *B* enjoys a glass or two of wine on the weekends, the statement is not defamatory in its natural and ordinary meaning, but if *C* knows that *B* is a Muslim, the statement may give rise to a true or legal innuendo. A special meaning or inference arising from a slang may

80 [1979] 1 MLJ 281 at 282-3; affirmed in [1979] 2 MLJ 282.
81 [2000] 6 CLJ 390.

equally give rise to a true or legal innuendo. The basis of the claim in this situation is that the words are defamatory to those who possess the special knowledge. A plaintiff relying on a true innuendo must prove the following:

(i) that there exists external facts other than the words by the defendant, and these facts, which must be proven, combined with the defendant's words are defamatory in nature, and

(ii) these facts are known by one or more persons to whom the defendant's words have been published, and

(iii) the knowledge of these facts may cause the words to be defamatory of the plaintiff, in the eyes of reasonable men who are privy to the special facts.[82]

In *Tolley v Fry & Sons Ltd*[83] the plaintiff was an amateur golfer, and the defendant a chocolate manufacturer. An advertisement in a newspaper showed a caricature of the plaintiff playing golf with a bar of the defendant's chocolate sticking out of his trouser pocket. In the picture a caddy was seen pointing to the plaintiff indicating that the plaintiff's performance was as good as the quality of the defendant's chocolate. This advertisement was in fact an advertisement for the defendant's chocolate. The plaintiff claimed for libel. The words and the picture were not defamatory on the face of it but the innuendo was that the plaintiff had received payment for the advertisement and therefore had prostituted his status as an amateur golfer. The House of Lords held the defendant liable as those who knew of the plaintiff's status may reasonably assume that the plaintiff had consented to, and had been paid for the advertisement.

In *R Murugason v The Straits Times Press (1975) Ltd*[84] the plaintiff alleged that a report in the Straits Times imputed that he had acted improperly and unethically in the conduct of his practice as an advocate and solicitor, in that although he was acting on behalf of a client who was contesting an election petition, it was openly questioned whether the client had acted of her own accord, as 'after all, she (the client) was only a washerwoman and they (plaintiff included) are lawyers.' The plaintiff's case rested on the argument that those who have knowledge of legal proceedings would know that for the case to be brought to the courts, the plaintiff would have had to be instructed to do so by the client. The words in the article suggested that the client had not done so and so the plaintiff's involvement was questionable.

82 *Tan Sri Dato Vincent Tan v Haji Hasan bin Hamzah & Ors* [1995] 1 AMR 69.
83 [1931] All ER 131; [1931] AC 333.
84 [1984] 2 MLJ 10.

The court held that by claiming the words are defamatory on a legal innuendo, the plaintiff was admitting that in their natural and ordinary meaning the words are not defamatory. Unfortunately in this case the plaintiff did not prove that one or more persons to whom the words were published were privy of the special knowledge with regard to institution of court proceedings. As such evidence was an essential element in a case of legal innuendo, the plaintiff's claim was dismissed.

(c) Juxtaposition

Juxtaposition usually involves a situation that employs visual effects, such as an effigy[85] or placing the plaintiff's photograph in a pile of pictures of wanted criminals. Thus defamatory imputations can arise from material other than written or spoken words.

In *Monsoon v Tussauds*[86] the plaintiff was accused of committing a crime in Scotland. The crime was not proven and the plaintiff was released. The defendant then erected a statue of the plaintiff and placed the statue together with statues of other criminals. The court found the defendant liable for defamation.

Another example is *Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu & Ors.*[87] The plaintiff applied for interlocutory injunctions to restrain the defendants from further printing, publishing and circulating libels concerning him in their Chinese newspaper (OCDN). At the time the plaintiff held various political and public offices in Sabah particularly. He was director and chief executive of the Sabah Foundation. He was also a co-trustee of a Trust known as Amanah Tun Datu Haji Mustapha, established by the Foundation, which Trust was responsible for the distribution of cash benefits to its beneficiaries (comprising all adult citizens of the State of Sabah). Among the publications objected by the plaintiff are: the first complaint related to a cartoon depicting the plaintiff as a horse being ridden by someone appearing to be Tun Datu Haji Mustapha, with dollar-notes jutting out of the horse's hip-pocket. The second complaint related to a caricature entitled 'The Magic Door', which showed two doors. One was labelled as 'Sabah 1967' depicting the plaintiff entering this door while holding some papers and an empty briefcase. '¢' was printed on the sole of his shoe. Another door was labelled 'Sabah 1975' depicting the plaintiff leaving the door while carrying a similar briefcase which contained money. He was also carrying timber logs in his arm. '$' was written on the sole of his shoe.

85 *On Tin Khoon lwn Hu Sepang & 2 lagi* [1995] 2 CLJ 55.
86 [1894] 1 QB 171.
87 [1977] 1 MLJ 56.

The plaintiff contended that in the first caricature, although it contained no words, it clearly referred to him as director of the Foundation and the rider referred to Tun Datu Haji Mustapha, chairman of the Foundation. The caricature imputed that he had become a stooge or errand-boy of the chairman, and the dollar-notes implied that he had unlawfully amassed fortune from holding his office. The plaintiff contended that in respect of the second caricature, the magic door referred to the Sabah Foundation. The person depicted to enter the 1967 door was him as it was in that year that he was made director and chief executive of the Foundation. The word '¢' imputed he was a poor man at the time. Further the person depicted leaving the door in 1975 also referred to him as it was in that year that he publicly announced his intention of leaving the Foundation. The word '$' on his shoe and dollar-notes in the briefcase imputed that while he was holding office he had amassed fortune.

The court held that the publications disclosed a clear case of libel and because there arose a serious question to be tried, the court's intervention was justified. The plaintiff's application was granted.

Intent of publisher is irrelevant, so is plaintiff's perception of the words

It is not a requirement in a cause of action for defamation, to prove that the defendant intended the words to have a defamatory meaning. Assessment of the nature of the words is made objectively with the guidance of the reasonable man test, and not subjectively, whether by reference to the mental state of the defendant or the perception of the plaintiff. Intention is therefore irrelevant to establish this first element of defamation.[88] However, the presence of intention to defame may give rise to malice, which if proven, may adversely affect the defendant in certain defences and the award of damages made against him.

2. Words must refer to the plaintiff

The second element that must be proven by a plaintiff in a cause of action for defamation is that the words must refer to him. The test to establish this was laid down in the case of *David Syme v Canavan*,[89] the test being – are the words such that it would be reasonable in the circumstances to lead persons acquainted with the plaintiff to believe that he was the person referred to? Even if a plaintiff is not specifically named in the words, he may be described so as to be recognised – and it does not matter whether the description takes the form of a word-picture of an individual or a description of his physical peculiarities or the form of a reference to a class or persons of

88 See *Rajagopal v Rajan* [1972] 1 MLJ 45, FC.
89 [1918] 25 CLR 234.

which he is believed to be a member. So if in the circumstances the description is such that a person hearing or reading the alleged words would reasonably believe that the plaintiff is referred to; that would be sufficient reference to him. It is not necessary that the public at large should understand the words to be defamatory of the plaintiff. It is sufficient that those who know the plaintiff believe that he is the person referred to.'[90] Only the person defamed may bring an action in defamation. Other persons cannot initiate a cause of action on his behalf. A person's reputation is said to die with him on his death, therefore a next-of-kin cannot institute proceedings on behalf of the deceased.[91]

Reference to the plaintiff is obviously established if the plaintiff's name is clearly stated, irrespective of whether the defendant has the intention to defame the plaintiff or otherwise. Where the defamation is intentional, this may result in the plaintiff obtaining a higher award of damages.[92] Note however, that the Defamation Act 1957 provides for the defence of unintentional defamation.[93] Nevertheless, insofar as the plaintiff is required to prove that the defendant's words referred to, or were understood to refer to him, the intention of the defendant is irrelevant.

In *Atip bin Ali v Josephine Doris Nunis & Anor*[94] the defendant claimed for breach of promise to marry against Datuk Rahim Thamby Chik. The defendant subsequently did not pursue her claim after the writ had been filed. However the newspapers found out about the writ and published the matter. The plaintiff and all UMNO members of Alai, Melaka claimed that as a result of the publication, the members of both PAS and Wanita UMNO avoided them on the basis that they (the plaintiffs) supported an adulterer. The court held that the word 'UMNO' did not appear on the writ. If any party was defamed, it was Datuk Rahim Thamby Chik himself and only he could have taken action but not the UMNO members.

In *Hulton & Co v Jones*[95] a fiction was written concerning an Artemis Jones in Peckham. There was in fact a real Artemis Jones, the plaintiff, a lawyer in that town. His friends thought the story concerned the plaintiff. The court held that defamation was established as those who knew him understood the words as referring to him, although that was not intended to be so by the author and publisher.

90 *Abdul Khalid v Parti Islam Se Malaysia & Ors* [2002] 1 MLJ 160.
91 Civil Law Act 1956 (Revised 1972), Act 67; s 8(1) provides that a cause of action for defamation does not survive against or for the benefit of the estate of a deceased person.
92 *Bridgmont v Associated Newspapers* [1951] 2 All ER 285.
93 See Chapter 12.
94 [1987] 1 MLJ 82.
95 [1910] AC 20.

In *Newstead v London Express Newspaper Ltd*[96] a statement in the defendant's newspaper stated that 'Harold Newstead, 30 years old, Camberwell man, was punished for bigamy'. There were in fact two people by the same name and the statement was true of one but not the other, the plaintiff. The court held the defendant liable to the plaintiff.

Therefore where the words refer to the plaintiff directly, whether by name or description, this second requirement will be satisfied. Reference by description would include reference through a caricature of him.[97] In a case where there are only two retailers of a particular product in the whole country, a statement made by retailer *A* claiming that only their products are genuine is defamatory of retailer *B* as that statement would entitle a reasonable man who knows retailer *B* to interpret the words to mean that retailer *B* is dishonest and deals with fake or imitation products. Readers of that statement and all those who have dealt with either *A* or *B* would understand the words as referring to *B*.[98] Words may also refer to the plaintiff through external or extrinsic facts. This means that persons who possess these external facts of the plaintiff, combined with the words, may reasonably be led to believe that the statement refers to him.[99] An example of reference to the plaintiff by external or extrinsic facts can be found in *Sandison v Malayan Times Ltd & Ors.*[100] In an article which published that a senior expatriate executive of the Rubber Industry Replanting Board had been dismissed for corruption, the court held that although the executive was not named, the date of dismissal was mentioned and indeed that was the date the plaintiff ceased holding that position. The article also reported on who succeeded the dismissed executive and as the identity of the successor was well known, the defamatory words clearly indicated the plaintiff as the corrupt executive.

A plaintiff who wishes to establish that the words referred to him by external or extrinsic facts, needs to prove three factors:[101]

(i) that there are external or extrinsic facts, which must be proven, which link the defamatory words to him; and

96 [1939] 4 All ER 319.

97 *Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu & Ors* [1977] 1 MLJ 56.

98 *Le Mercier's Fine Furnishings Pte Ltd & Anor v Italcomm (M'sia) Sdn Bhd* [1996] 3 CLJ 590.

99 *Sandison v Malayan Times Ltd & Ors* [1964] MLJ 332; AJA *Peter v OG Nio & Ors* [1980] 1 MLJ 226. See *Chew Sew Khian v Saniboey Mohd Ismail* [2003] 1 AMR 408 where all the words used, except one, could be connected to the plaintiff and the court held that a reasonable reader would not understand the words as referring to the plaintiff.

100 [1964] MLJ 332.

101 See *AJA Peter v OG Nio & Ors* [1980] 1 MLJ 226.

(ii) the words were published to persons who had actual knowledge of those external or extrinsic facts; and

(iii) that imputing knowledge of these facts to a reasonable man, he could come to the conclusion that the words indeed referred to the plaintiff.

These three factors are identical to the three factors necessary to establish a legal or true innuendo. However, in the case of a true innuendo, proving these three factors was for the purpose of establishing that the words are defamatory of the plaintiff. In the present discussion, the same three factors are employed to establish that the defamatory words refer to the plaintiff.

A report stating that a private company had fully funded a visit of a group of UMNO leaders and members from a division in Trengganu to Europe was held to have satisfied the second element in proving defamation.[102] It was found that although the particular group was not specifically named, the division referred to was identifiable through a process of elimination, as no other group from any other division was touring Europe at that time. The court further held that the plaintiff was easily identifiable as one of the participants in that group, as he was a member of the State Legislative Council and the State Exco and the UMNO Youth Leader for the Kemaman Division.

Class or group defamation

The general principle is that the defendant will not be liable unless there is a specific reference to the plaintiff or certain individuals in a particular group.

Where a number of persons are referred to, defamation may arise if the plaintiff can prove that the words refer to each or particular individuals in the class or group of persons in which he is himself personally implicated.[103] Liability will depend on the size of the class – the larger the class, the smaller the chance of success; as well as the words employed – the more general the words the less chance of success.

In *Knupffer v London Express Newspaper Ltd*[104] the defendants' newspaper reported unethical activities of the Young Russian Party in France and USA. The plaintiff, who was the leader of the British branch, failed in his action as the total membership of the party was several thousand and no particular member could claim that the report was referable to him.[105]

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102 *Ahmad bin Said v Zulkiflee bin Bakar & Yang Lain* [1997] 5 MLJ 542.

103 *Bruce v Odhams Press Ltd* [1936] 1 All ER 287.

104 [1944] 1 All ER 495.

105 Compare the case of *Le Fanu v Malcolmson* [1848] 1 HL Cas 637, where the article was aimed at one particular factory.

Reference to a ruler (Raja) does not mean reference to the Malay race generally and a plaintiff who is of the Malay race therefore cannot sue as the words do not specifically refer to him.[106]

In *Eastwood v Holmes*[107] it was held that if a man wrote that all lawyers were thieves, no particular lawyer could sue unless there was something to point to the particular individual lawyer.

3. The words must be published

That the words must be published is the third element of defamation. Publication means the dissemination of the defamatory words or material to a third party, other than the plaintiff.

The rationale is that if the defamatory words are not made known to any other person (other than the plaintiff himself), then the defendant's words cannot injure the plaintiff's reputation for in whose estimation would his reputation be lowered?

Therefore if the words or printed material are not heard or seen by third parties, and only the plaintiff hears or sees them, publication does not arise.[108]

In *Dr Jenni Ibrahim v S Pakianathan*[109] the plaintiff was a psychologist who was working on a voluntary basis at a Help Centre. The defendant who was the former managing director of the Centre wrote two letters indicating that the plaintiff had committed breach of trust amounting to about RM70,000. Copies of one of these letters were sent to all the directors of the Centre, to the Director of the Welfare Services of Perak and to the Registrar of Societies of Malaysia. The court held that sending copies of the said letter to the other parties constituted publication.

In *Wan Abdul Rashid v S Sivasubramanian*[110] the defendant lawyer spoke of the plaintiff, who was a Registrar of the Sessions Court in Kuantan: "Ohh ... that corrupted fellow, he needs to be taught a lesson ... I am going to get the BSN and then he would know ... I am going to get the whole lot of you fellows because you fellows are nothing but corrupted buggers right from the Registrar". The court held there was publication as the words were spoken in public.[111]

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106 *Tengku Jaffar bin Tengku Ahmad v Karpal Singh* [1993] 2 AMR 2062.

107 [1858] 1 F & F 347.

108 See *Matchplan (M) Sdn Bhd v William D Sinrich & Anor* [2000] 6 MLJ 423; *Riddick v Thames Board Mills* [1977] QB 881.

109 [1986] 2 MLJ 154; *S Pakianathan v Dr Jenni Ibrahim* [1988] 2 MLJ 173, SC.

110 [1984] 1 MLJ 385.

111 Might it not be argued that those words were spoken in anger and therefore should not be defamatory in nature?

In *Tan Chee Kong v Lee Ee Liat*[112] the defendant sent a letter to the plaintiff and on the envelope, after the plaintiff's name were the words 'Ex-Informer, Kempeitai'. The court held the words to have been published to the postal employees. The fact that they were sworn to secrecy concerning their job functions was irrelevant.

Preparing a report in pursuance of a duty, such report containing adverse remarks about the plaintiff, and sending the report to a third party, does not give rise to defamation.

In *Joel Salaysay v Medical Laboratory (Pte) Ltd & Anor*[113] the plaintiff a student, applied for a visa from the Canadian embassy, whereby he was required to undergo a medical examination and to have his blood tested. The plaintiff approached D2 a doctor, who sent the plaintiff to D1 for a blood test and on two separate occasions D1 reported their findings on the plaintiff's blood sample which when interpreted, meant that the plaintiff had tested positive for syphilis. This matter was duly reported to the Embassy by D2. The plaintiff's blood was subsequently found to be free from syphilis. In an action for negligence and defamation against D1, D2 having settled the claim out of court, the court found D1 not liable as it was not D1's duty to make any diagnosis but that of D2. D1 was merely asked to do the blood test and report on it as he found it and therefore the written report was made in the performance of his duty. The court further held that the publication to the Canadian High Commission was not publication of what D1 had said but was the diagnosis of D2 and the use of the word 'syphilis' by him.

The general rule is that if a document which contains defamatory words is expected to be published to a third party and a third party does in fact read the document, publication is established.

In *Theaker v Richardson*[114] the defendant wrote a defamatory letter to the plaintiff, a married woman and a fellow member of the local urban district council. Her husband read the letter as he thought that it was election address as the letter was sealed in a manila envelope, similar to the kind used for distributing election addresses. The Court of Appeal held that publication was reasonably expected in the circumstances. The question to be asked is – was it a natural and probable consequence of the defendant's writing and delivery of the letter that the plaintiff's husband would open and read the letter?[115] If the answer is yes, then publication existed and vice versa.

112 [1949] MLJ 277.
113 [1985] 2 MLJ 185.
114 [1962] 1 All ER 229.
115 *Ibid* at p 237 *per* Pearson LJ.

By contrast in *Huth v Huth*[116] where a butler read a defamatory letter written by the defendant husband to his plaintiff wife in an unsealed envelope, the court held that there was no publication as it could not reasonably be anticipated in the circumstances, that that letter addressed to the wife would be likely to be opened and read by the butler. The publication was unforeseeable.

(a) Exceptions

There are exceptions to the rule that publication to a third party constitutes publication for the purposes of the law of defamation. No publication is deemed to exist if the communication is made between spouses, as husband and wife are regarded as one entity.[117] Evans[118] suggests that a sounder basis for retaining this exception is to acknowledge that publication does exist, but that the communication is protected by absolute privilege arising from the confidential nature of the relationship between spouses.[119]

There is however, publication; where the defamatory words are conveyed to one spouse, concerning the other spouse.[120] Mere distributors such as newspaper delivery men are also excluded from being the 'third party' for the purposes of establishing publication. Where the words are printed in a newspaper, the element of publication would only be satisfied when they are read by readers. Similarly, a typist or printer who hands back to the author the defamatory material to be proofread or corrected does not publish the libel to the author. The typist or printer is merely an agent of the author.

(b) Other relevant factors

Other factors which are relevant in establishing publication are as follows:

(i) Language to be understood

The language used must be understood by the third party, for there cannot be a publication when the third party does not understand what is being said or written.[121]

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116 [1914] All ER 242; [1915] 3 KB 32, CA.
117 *Gatley on Libel and Slander*, 8th edn, 1981, paragraph 248.
118 At p 32.
119 See *Wennhak v Morgan* [1988] 20 QBD 635.
120 See *Theaker v Richardson* [1962] 1 WLR 151, CA, above at 262 and *Wenman v Ash* [1853] 13 CB 836.
121 See *Luk Kai Lam v Sim Ai Leng* [1978] 1 MLJ 214, FC.

(ii) Must the actual words be proven?

In order to establish publication the plaintiff must be able to specify what exactly has been said or written by the defendant. Where the cause of action is for libel, this requirement does not pose any problems as a record of the defamatory words may be referred to. In a cause of action for slander, this requirement may pose some difficulty. The rule is that the actual words used must be set out in the statement of claim. This requirement however, does not mean that every word that was said or written by the defendant must be proved. In *Hassan & Anor v Wan Ishak & Ors*[122] it was held that it would be sufficient if the substance of the words alleged was proven, or at least the material and defamatory portion of the words. (This is in contrast to the decision in *Lim Kit Siang v Datuk Dr Ling Liong Sik*[123] where it was held that it is insufficient to merely describe the substance, purpose or effect of the words. The words should be reproduced verbatim).

'Proving the substance of the words' has been interpreted to mean proof of the actual words used – at least the words alleged to be defamatory. The plaintiff cannot rely on the impression or perception of listeners or readers to whom the words were said or disclosed.

So if I had told *X* that you are lazy, irresponsible and a heavy gambler, in a cause of action for slander against me, for the purposes of establishing publication, you must set out in your statement of claim all that I have alleged against you as above, or at least that I had used the words 'lazy' or 'irresponsible' or 'gambler'. It might be insufficient for you to merely state that *X* has told you that I have described you as having low morals and useless, for instance.

The extent of this requirement of proof of actual words must now be seen in the light of the Court of Appeal decision in *Karpal Singh a/l Ram Singh v DP Vijandran.*[124] Both the appellant/defendant and respondent/plaintiff are advocates and solicitors. In a separate action between the parties, the Supreme Court ruled in favour of the defendant and the plaintiff was ordered to pay costs. The plaintiff mistakenly sent a cheque from an account which was already closed. When he realised his mistake he sent a replacement cheque immediately. The defendant however, issued a press statement alleging that the plaintiff had sent in a cheque which was later dishonoured, and so his conduct amounted to the offence of cheating under s 420 of the Penal Code. He further alleged that the plaintiff was unfit to be on the rolls of advocates and solicitors in the country. This press statement was published in two leading

122 [1961] MLJ 45, CA.
123 [1997] 5 MLJ 523.
124 [2001] 3 AMR 3625, CA.

local English newspapers. In an action by the plaintiff, the High Court held[125] for the plaintiff as not only were the words defamatory of him, but that there was actual malice on the part of the defendant when he knew that the plaintiff had made a genuine error.

The defendant, relying on *Lim Kit Siang v Datuk Dr Ling Liong Sik*[126] further argued that the actual words as stated in his press statement were not reproduced in the newspapers and this omission ought to have been fatal for the plaintiff's case. The court rejected this argument on the basis that *Lim Kit Siang* proposes that the words in the statement of claim (as opposed to words in the newspapers, as in this case) should be the words exactly used by the defendant. The court however held that the principle in *Hassan v Wan Ishak*[127] applied, that it is not fatal to the plaintiff's case even where he fails to plead the actual words, provided the substance of the words is pleaded. Further, even if the plaintiff pleads the actual words, he is not required to prove the actual words in court. Proving that the words are substantially the same as those uttered is sufficient.

The defendant appealed. The issue was that the plaintiff in his statement of claim did not quote the actual words from the press statement, and that the translation into Bahasa Malaysia was not certified. What the plaintiff did was to plead that the defendant 'caused to be published' in the two newspapers the words pleaded. However, the substance of what was pleaded was the same as the relevant parts appearing in the press statement and the newspapers. The defendant contended that since the actual words were not pleaded, the pleading was defective.

The Court of Appeal dismissed the appeal on liability. It held that although the words in the statement of claim were not the actual words as in the press statement, the meaning of what was reported in the newspapers and the pleading was the same. The failure to quote the words verbatim was therefore not fatal to the plaintiff's case. On the issue of translation into Malay although the translation was not certified, it was found to be correct.

In arriving at this decision, the Court of Appeal has laid down and reaffirmed several important principles of law:

1. 'There is neither statutory provision nor rules of court that the actual words must be pleaded *in toto* failing which the action fails, no matter what'.[128]

125 See *DP Vijandran v Karpal Singh & Ors* [2000] 6 CLJ 433; [2000] 3 MLJ 22.
126 [1997] 5 MLJ 523.
127 [1961] MLJ 45, CA.
128 *Karpal Singh v DP Vijandran* [2001] 3 AMR 3625 at 3652, *per* Abdul Hamid Mohamad, JCA.

2. Where the words are spoken in a foreign language, the words should be reproduced in that same language in the statement of claim.[129]

   Further, if that language is not the language of the court, a translation of the words into the language of the court should be pleaded.[130]

3. However, it is not crucial that the words in the original language are pleaded as long as the translated version corresponds in meaning with the words in the original language.[131]

4. There is a distinction between what has to be pleaded and what has to be proved. On the issue of proof, the plaintiff does not have to prove every word that is pleaded but proof of words that are substantially the same as those pleaded is sufficient.[132]

On the issue of what has to be pleaded – where the words have been published, the actual words must be pleaded. However this is not imperative for as long as what is in fact pleaded is substantially the same as the words.

Where the words have not been published and the plaintiff is seeking for an injunction to prevent publication, then the actual words need not be pleaded. What is required is that the words must be set out 'with reasonable certainty'.[133]

(iii) Identity of persons to whom the statement is published

The plaintiff must prove the identity or identities of the person or persons to whom the defamatory material has been published.[134] Naturally this requirement is not needed where the defamatory words appear in newspapers or magazines as these articles are widely read and the fact of publication is obvious.

129 *Hassan v Wan Ishak* [1961] MLJ 45, CA – words spoken in Malay, but in the statement of claim the words were set out in English. The sense of the Malay words was the same as the sense of the English words that were pleaded. The court held that the omission was not fatal to the plaintiff's claim. But see *Lim Kit Siang v Datuk Dr Ling Liong Sik* [1997] 5 MLJ 523 – exact words must be pleaded. The court relied on *Workers' Party v Tay Boon Too* [1975] 2 MLJ 124 and *Collins v Jones* [1955] 2 All ER 145.

130 *Hassan v Wan Ishak*, above.

131 *Hassan v Wan Ishak*. Note that in *Lim Kit Siang* the court stated that the words in its original language must be reproduced. So too in *Workers' Party v Tay Boon Too*.

132 *Karpal Singh v DP Vijandran* [2001] 3 AMR 3625 at 3648.

133 The court referred to *British Data Management plc v Boxer Commercial Removals plc* [1996] 3 All ER 707, CA.

134 *S Pakianathan v Dr Jenni Ibrahim* [1988] 2 MLJ 173.

(iv) Republication

If the words are repeated or copied, a new cause of action arises.[135] For the second publication and others following it, all the defendants may be sued. The general rule is that the person who first produces the defamatory material is primarily liable for the subsequent publication.[136] This applies where the originator authorised or intended the republication. He will be liable if republication is reasonably anticipated, taking into account the whole circumstances in which he wrote or said the defamatory words and the party to whom (or which) he made his first publication.[137] *Chua Jui Meng v Hoo Kok Wing*[138] is a good example. Here the defendants first wrote to the Anti Corruption Agency (ACA) alleging corruption on the part of the plaintiff.

The same letter was then published to the press during a press conference. Two newspapers then republished the defamatory words. The defendants were found liable for the republication of the letter and the statements therein in the newspapers on the principle that the original maker of the statement is liable for the foreseeable subsequent republication of his allegations by another. It was clear that the defendants intended their allegations to be republished as it was them who lodged a report with the ACA and who called for the press conference. Malice was patent throughout.

A person who gives a press statement in the expectation that it would be published is responsible for the republished version even if it is an edited version. It is irrelevant that his statements have not been precisely reported provided it can be shown that he intended the sense and substance of his statement to be republished by the newspaper.

(v) Place of publication

In relation to a court's jurisdiction to hear a claim in libel, the principle is that the cause of action (and thus the tort of defamation) arises in the place where the publication takes place, whether it is read, seen or heard. A letter containing defamatory words, written in Singapore and sent from Malaysia to Japan, is not actionable in Malaysia as publication takes place in Japan.[139] So where a defamatory article is written outside Malaysia but is published in Malaysia, the Malaysian High Court has jurisdiction to hear the case.[140]

135 *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390.
136 *M'Pherson v Daniels* [1829] 10 B & C 263.
137 See *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142.
138 [2000] 6 CLJ 390, see facts at p 254 above.
139 *Yin Cheng Ang v Taro Imanaka* [1997] 4 MLJ 65 – the court held that the *forum non conveniens* would be either Japan or Singapore.
140 *Tan Sri Rahim Datuk Thamby Chik v John Marcom & Ors (No 2)* [2000] 5 MLJ 191.

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CHAPTER TWELVE

DEFENCES TO DEFAMATION

Many of the defences which are applicable to other torts are also applicable in an action for defamation, such as consent and *volenti non fit injuria*. The defence of consent and defences specific and peculiar to the tort of defamation will be discussed in this chapter.

A. Consent or assent and *volenti non fit injuria*

The plaintiff who gives his consent for publication to be made, be it express or implied, cannot hold the defendant liable. For instance, if the plaintiff consents to being interviewed, knowing that the contents of the interview will be printed in a magazine. The defendant must prove such authorisation or consent in order for this defence to succeed.[1]

In *Cookson v Harewood*[2] the defendant published a true statement of the plaintiff not being allowed to ride the horses at his club. The plaintiff claimed that the innuendo was that he was corrupt and indulged in fraudulent practices. The court held that the plaintiff could not claim from the defendant as the statement was true and that permission was obtained to publish that statement. If the statement was defamatory, then the plaintiff had to bear the consequences that followed.

B. Justification

The defence of justification or truth, is an absolute defence. Once the defamatory statement is proven to be true the law will not protect the plaintiff.[3] The state of mind of the defendant at the time of the publication is irrelevant. Malice therefore, does not defeat the defence of justification. The burden of proof lies on the defendant to prove his allegation.[4] The defendant must justify his allegation by proving its precise truth.[5] The defendant is required

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1 See *Normala Samsudin v Keluarga Communication Sdn Bhd* [1999] 2 MLJ 654 (consent not proven).

2 [1932] 2 KB 478n; [1931] All ER 533.

3 *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408.

4 *Meeran Lebbaik Maullim & Anor v J Mohamed Ismail Marican and The Straits Printing Works* [1926] 2 MC 85.

5 *Workers' Party v Tay Boon Too; Workers' Party v Attorney General* [1975] 1 MLJ 47.

to prove the truth of all his allegations which are defamatory and materially injurious.[6]

In *S Pakianathan v Dr Jenni Ibrahim*[7] where the defendant alleged that the plaintiff had committed a criminal breach of trust amounting to RM70,000 the Supreme Court held that the burden rested on the defendant to prove justification. The defendant was required to prove the truth of his allegation and it was not sufficient for him to state that he believed the allegation to be true.

It is also not sufficient for an allegation that the plaintiff is a corrupt, connoting thereby that the plaintiff is guilty of conduct punishable as a criminal offence, merely to prove that the plaintiff had acted in such a way that could cause him to be dismissed from his employment.[8] So if *A* says to *B* that *C* is a thief, it is insufficient for *A* to merely state that he believes *C* to be a thief. The plea of justification will only succeed if *A* can prove as a fact that *C* has stolen something. Passing on a rumour cannot be justified on the basis that the rumour in fact exists, the defendant must prove the truth of the subject matter of the rumour.[9] A plaintiff's conviction under the Penal Code has been held to be admissible evidence to support the plea of justification (and fair comment). The defendant is not required to prove the plaintiff's conviction all over again.[10]

Thus a defendant may escape liability for his defamatory allegation if he can prove the truth of the facts within the allegation. If several allegations are made, the defendant is not required to prove the truth of all the allegations. Section 8 of the Defamation Act 1957 (the Act)[11] provides:

> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

An application of this section can be seen in *Abdul Rahman Talib v Seenivasagam & Anor*[12] where the defendant alleged that the plaintiff, a

6 *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 42; affirmed [1966] 2 MLJ 66.

7 [1988] 2 MLJ 173.

8 *Sandison v Malayan Times & Ors* [1964] MLJ 332.

9 *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142; see also Evans, at p 51.

10 *Ramanathan a/l Chelliah v Penyunting The Malay Mail & Anor* [1998] 2 AMR 1219; *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 1 CLJ 519; [2001] 1 AMR 589, CA.

11 (Revised 1983), Act 286.

12 [1965] 1 MLJ 42; affirmed [1966] 2 MLJ 66.

government minister, had received money and favours to his personal advantage through his influence as minister. The defendant could prove the truth of the receipt of favours but could not do so with regard to the receipt of money. The court held that the unproved allegation did not materially injure the plaintiff's reputation having regard to the truth of the allegation concerning receipt of favours and so the defence of justification was successfully raised against the plaintiff.[13]

C. Fair comment

A comment which is honestly and fairly made may also absolve the defendant from liability. Section 9 of the Act provides:

> In an action for libel or, slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

In order to establish this defence, the defendant must show that[14]:

1. the words must be in the form of comment and not a statement of fact; and

2. the comment must be based on true facts; and

3. the comment is fair and not malicious; and

4. the comment concerns an issue of public interest.

Each requirement will be examined in turn.

1. Words must be in the form of comment

This defence does not apply if the words are statements of fact. In *Meeran Lebbaik Maullim & Anor v J Mohamed Ismail Marican & The Straits Printing Works*[15] the defendant failed in this defence as the words that the plaintiff

13 See also, *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 1 CLJ 519; [2001] 1 AMR 589, CA.

14 *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; [1987] 1 MLJ 176, CA; [1989] 3 MLJ 1, PC; *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408.

15 [1926] 2 MC 85.

had robbed the public and was a 'Kafir' were allegations of fact and not of opinion. If the defendant had explained that the plaintiff was selling an inaccurate translation of the Koran and had made an enormous amount of profit and thus committed a 'robbery', then the statements would have been a comment.

In both *SB Palmer v Rajah & Ors*[16] and *JB Jeyaretnam v Goh Chok Tong*[17] the plaintiff was alleged to have incited all those who were attending a meeting to leave the meeting. In the first case it was construed as an allegation of fact and therefore the defence failed. In the second case the facts were stated before the alleged defamatory statement was made and the defence succeeded as the statement constituted a comment and not an allegation of fact.

The test in deciding whether the words are fact or comment is whether the ordinary and reasonable man, upon being told of the words, would regard them as a statement of fact or as comment.[18] If the facts and comments are so mixed up that one cannot be distinguished from the other then this defence will not be available to the defendant.[19]

So if I were to allege that *X*, a member of Parliament is an immoral and dishonest person, this would be an allegation of fact and the defence of fair comment will not be available to me. If I were to allege that *X* has been seen gambling for six nights a week for the past two months and has failed to turn up for scheduled visits to his constituency and that therefore he is an immoral and dishonest person, this will constitute a comment. Whether it is 'fair' comment or otherwise will depend on the reasonable man's construction of my said comment. On the other hand if I were to allege that *X* is a liar and a cheat and therefore a dishonest person, 'dishonest' may well be the comment based on the allegation that he is a liar and a cheat, but all three words, 'liar, cheat and dishonest' may well amount to allegations of fact and the defence of fair comment presumably cannot be raised. I shall have to resort to the defence of justification.

2. The comment must be based on true facts

The defendant must prove the truth of the facts on which the comment is based. It is not essential that all the facts be proven; it is sufficient that the facts which form the basis of the comment are proven.[20] In *SB Palmer v AS*

16 [1949] MLJ 6.
17 [1985] 1 MLJ 334; affirmed [1987] 1 MLJ 176, CA; affirmed [1989] 3 MLJ 1, PC.
18 *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390.
19 See *Noor Asiah Mahmood v Randhir Singh & Ors* [2000] 2 AMR 1475.
20 *Mohd Jali bin Haji Ngah v The New Straits Times Press (M) Bhd & Anor* [1998] 5 MLJ 773.

Rajah & Ors[21] the defendant failed to prove his allegation that the plaintiff had walked out of a meeting in a dramatic fashion. The plaintiff had in fact walked out in an ordinary manner. Since the truth of this alleged fact was not proven, the defence of fair comment failed.

In *Telnikoff v Matusevitch*[22] the plaintiff a Russian emigrant was employed by the BBC Russian Service. He wrote an article concerning the Russian Service which was published by the Daily Telegraph. The defendant was a Russian Jew employed by Radio Liberty, London (a United States radio station), and he wrote a letter in reaction to the plaintiff's letter to the same newspaper, imputing racialist opinions onto the plaintiff. The plaintiff's solicitors wrote to the defendant demanding an apology, which was not made. The plaintiff then sued the defendant for libel, stating that the words were defamatory in their natural and ordinary meaning. The defendant pleaded fair comment on a matter of public interest, to which the plaintiff replied that the defendant was actuated by express malice. The House of Lords[23] held that if the contents of the letter were fair comment then the plaintiff cannot complain notwithstanding that they were defamatory. If the contents were defamatory statements of fact, the plaintiff will succeed unless the statements were true.

Therefore in order for the defence of fair comment to succeed it must be proven that there is a true statement of fact, which then becomes the subject of the comment.[24]

3. The comment must be fair and is not malicious

A comment that is made maliciously is not a fair comment.[25] Malice is ill will or spite or some previous quarrel or bad relationship or any indirect or improper motive in the mind of the defendant at the time of publication.[26] In order to be fair the comment must be an honest expression of the writer made in good faith. The 'fairness' test is an objective test. If a comment is honest, fair and independent, even a strong criticism would pass the test. Even though the writer is prejudiced, it would still constitute a fair comment if a reasonable man would also come to the same conclusion as the maker of the comment.[27] However if it can be proved that the defendant did not

21 [1949] MLJ 6.
22 [1992] 2 AC 343.
23 *Ibid* at p 355, *per* Lord Templeman.
24 See also, *Mohd Jali bin Haji Ngah v The New Straits Times Press (M) Bhd & Anor* [1998] 5 MLJ 773; *Perunding Alam Bina Sdn Bhd v Errol Oh & Ors* [1999] 1 AMR 64; *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 AMR 846, CA.
25 *Rajagopal v Rajan* [1972] 1 MLJ 45.
26 *Chong Siew Chiang v Chua Ching Geh & Anor* [1992] 4 CLJ 1839.
27 *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; affirmed [1987] 1 MLJ 176, CA; affirmed [1989] 3 MLJ 1, PC.

believe that what he published was true, or that he knew the statement to be false; that is generally conclusive evidence of express malice.[28]

4. The comment concerns an issue of public interest

The comment must be on an issue of public interest, otherwise the defence is not available.[29] Matters that are regarded as issues of public interest are the administration of justice, and as such the defence of fair comment in relation to court proceedings is applicable.[30] Comments concerning the acts and activities of people who are influential in a particular society, such as the conduct and acts of ministers are also regarded as matters of public interest.[31]

In *London Artists Ltd v Littler*[32] Lord Denning said that there was no definition as to what constitutes public interest. Whenever a matter is such as to affect people at large so that they may be legitimately interested in, or concerned at what is going on, or what may happen to them or others, then it is a matter of public interest on which everyone is entitled to make fair comment. Therefore government and public administration issues, contents of the mass media, all forms of art and entertainment, utilisation of public funds and religious issues would be regarded as matters of public interest.

Other examples of issues accepted as being in the public interest are: comments in a newspaper with regard to the quality and contents of secondary school textbooks,[33] comments in newspapers that consultant architects in a project to build additional car-park floors of a hospital did not comply with building plans,[34] and comments about an invitation to the public to invest in ostrich farming.[35]

D. Privilege

There are two types of privilege; qualified and absolute. The defence of qualified privilege is provided for both through statute and common law.

28 *Gatley on Libel and Slander*, 8th edn, paragraph 773(2) at 337; *Chong Siew Chiang v Chua Ching Geh & Anor* [1992] 4 CLJ 1839; *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173, followed in *Pang Fee Yoon v Piong Kien Siong & Ors* [1999] 3 AMR 3464.

29 *Henry Wong Jan Fook v John Lee & Anor* [1976] 1 MLJ 231. See also, *Horrocks v Lowe* [1975] AC 135, HL at 149-150 *per* Lord Diplock.

30 *Cargill v Carmichael & Anor* [1883] 1 Ky 603 (Civ).

31 *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142.

32 [1969] 2 QB 375.

33 *Pustaka Delta Pelajaran Sdn Bhd v Berita Harian Sdn Bhd* [1998] 6 MLJ 529.

34 *Perunding Alam Bina Sdn Bhd v Errol Oh & Ors* [1999] 1 AMR 64.

35 *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529.

1. Statutory qualified privilege

Statutory qualified privilege is provided for in s 12 of the Act. Section 12(1) reads as follows:

> Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.

'Newspaper' has been defined in s 2 of the Act as any paper containing public news or observations consisting wholly or mainly of advertisements, and which is printed for sale and is published in Malaysia either periodically or in parts at intervals not exceeding thirty-six days.

Section 13(1) further provides that the provisions of the Act apply in relation to reports or matters broadcast by means of radiocommunication as part of any programme or service provided by the station within Malaysia.[36]

Therefore the only parties which are entitled to rely on the defence of statutory qualified privilege under s 12 are newspapers and broadcasting stations.

Section 12(1) only protects reports of matters that are listed in Part I of the Schedule to the Act. These are as follows:

1. A fair and accurate report of proceedings –

   (a) of the legislature of any part of the Commonwealth other than in Malaysia;

   (b) of an international organisation of which Malaysia or the Government thereof is a member;

   (c) of an international conference to which the Government sends a representative;

   (d) before any court exercising jurisdiction throughout any part of the Commonwealth (as defined in the Constitution) outside Malaysia or a court martial held outside Malaysia under any written law in force in Malaysia or under any Act of the United Kingdom Parliament; and

36 Section 13(3) of the Act defines broadcasting station as any radiocommunication station which is licensed under the Telecommunications Act 1950 which authorises the station to provide broadcasting services for general reception.

(e) of a body or person appointed to hold a public enquiry by the Government of Malaysia or any state thereof; or by the legislature of any part of the Commonwealth outside Malaysia.

2. A fair and accurate copy of or extract from any register kept in pursuance of any written law in force in Malaysia which is open to inspection by the public or which members of the public are entitled to have searched or of any other document which is required by any such law to be open to inspection by the public or to which members of the public are entitled on payment of a fee to a copy.

3. A notice, advertisement or report issued or published by or on the authority of any court within Malaysia or any Judge or officer of such court or by any public officer or receiver or trustee acting in accordance with the requirements of any written law.

Section 12(2) provides that a publication of any report or matter covered under Part II of the Schedule to the Act is also privileged.

Statements which are covered under Part II of the Schedule are as follows:

1. A fair and accurate report of the findings or decision of any association formed in Malaysia for the purpose of –

   (i) promoting or encouraging the exercise of or any interest in any art, science, religion or learning; or

   (ii) promoting or safeguarding the interests of any trade, business, industry or profession or of persons carrying on the same or engaged therein; or the interests of any game, sport or pastime, to the playing or exercise of which members of the public are invited or admitted:

   Provided that such finding or decision relates to a person who is a member of such association or is subject by virtue of any contract to the control of such association and that such association is empowered by its constitution to exercise control over or to adjudicate upon the matters to which the finding or decision relates.

2. A fair and accurate report of the proceedings of any public meeting held in Malaysia.[37]

37 'Public meeting' is defined in s 2 of the Act as a meeting *bona fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern whether the admission to the meeting is general or restricted.

3. A fair and accurate report of the proceedings at any meeting or sitting in any part of Malaysia of –

   (a) any local authority or committee thereof; or

   (b) any Commission, tribunal, committee or person appointed for the purpose of any inquiry:

      (i) by or under any written law; or

      (ii) by the Yang di-Pertuan Agong, or the Ruler or Yang di-Pertua Negeri of any state; or

      (iii) by any public officer of any Government in Malaysia; or

   (c) any other tribunal, board, Commission, committee or body whether incorporated or not, constituted and exercising functions by or under any written law in force in any part of Malaysia or the Republic of Singapore or under any other lawful warrant or authority for public purposes.

   Provided that such meeting or sitting is one to which admission is not denied to representatives of newspapers or other members of the public.

4. A fair and accurate report of the proceedings at a general meeting, wherever held, of –

   (a) any joint-stock company or corporation wherever registered whose business is in any way directly concerned with Malaysia; or any part thereof, or

   (b) any company constituted, registered or incorporated under the provisions of any written law in force in Malaysia provided it is not a private company within the meaning of the Companies Act 1965.

5. A copy or a fair and accurate report or summary of any notice or other matter issued for the information of the public:

   (a) by or on behalf of any Government in Malaysia; or

   (b) by any public officer; or

   (c) by any local authority.

If however, the plaintiff concerned has requested the defendant to publish in the newspaper in which the original publication was made, a letter or any statement by way of explanation or contradiction and the defendant refuses

or neglects to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances, the defendant will not succeed in his defence under this section.[38] The privilege is therefore subject to an explanation or contradiction as requested.

The publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern or not for the public benefit will not be protected under this section.[39]

The privilege conferred to reports listed under both Parts I and II of the Schedule is qualified. For reports of matters listed under Part I of the Schedule, the privilege is lost if the author and/or publisher is found to be malicious with regard to the publication. For reports of matters listed under Part II of the Schedule, the privilege is lost if the author and/or publisher:

(i) has been requested by the plaintiff to publish either an explanation of or contradiction to the original publication, and the defendant has not done so either through refusal or neglect; or

(ii) has been requested by the plaintiff to publish either an explanation of or contradiction to, the original publication, and the defendant has done so but the explanation or contradiction is inadequate or unreasonable in the circumstances; or

(iii) is found to have acted maliciously.

2. Common law qualified privilege

If the defendant is neither a newspaper nor a broadcasting station, it is not entitled to raise the defence of qualified privilege under s 12. Further, qualified privilege under s 12 does not extend beyond the scope as listed in the Schedule to the Defamation Act.

Nevertheless, publication made other than by a newspaper or broadcasting station, and for purposes other than those listed in the Schedule to the Defamation Act may still be privileged under common law principles of qualified privilege. There are circumstances under which a person is allowed by law, to make defamatory remarks without his being liable for the tort of defamation. This is due to public policy and convenience in life. The privilege is qualified because if the plaintiff can prove that at the time of the

38 *Ibid.* s 12(2).
39 Defamation Act 1957, s 12(3).

publication the defendant was malicious or he had exceeded the boundaries of the privilege, the defence will not be available.[40] It is important that the statement is made honestly and without any improper motive. In order to rebut this privilege, it is the plaintiff who must prove express or actual malice. It is not for the defendant to prove the absence of malice or his *bona fide* as that is presumed when the occasion is privileged.[41]

The defence of qualified privilege must be distinguished from the defence of fair comment. Fair comment is a right exercisable by every member of the public as each and every one of us is entitled to make a comment which is fair on matters of public interest. Qualified privilege is only available to a person who falls within one or more of the four circumstances laid down below, though these circumstances are in no way conclusive, except that past decisions may be better understood in this way.

The defendant must prove that the statement was made on a privileged occasion,[42] a privileged occasion being one where the defendant is entitled to say something which no one who is not within the privilege is entitled to say on that occasion.[43]

Four recognised circumstances of privileged occasions are:

(a) Statements made between parties who have a mutual interest over the subject matter of the communication

The maker of the statement must generally have a duty to communicate or inform the recipient of the subject matter of the communication, and he must honestly believe in the facts published.[44]

This common interest must be reciprocal for the defence to succeed. In *Aloysius Tan Ting Kai v Ng Hong Kheng & Ors*[45] a statement defamatory of the plaintiff in his profession was sent to the President of the Employees' Union. The Union was in fact not involved with the activities of its senior executives such as the plaintiff, as the plaintiff was not a member of the Union. The court held that the President did not have an interest to receive a copy of the said letter. Qualified privilege as pleaded by the defendant failed. However, where the recipient of the defamatory statement is a trade union which has a contractual agreement with the employers on behalf of

40 *Rajagopal v Rajan* [1972] 1 MLJ 45.
41 *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 1 AMR 245.
42 *Rajagopal v Rajan* [1972] 1 MLJ 45.
43 *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142.
44 *Chop Kim Lee Seng Kee v Yeo Kiat Jin* [1956] MLJ 67.
45 [1982] 1 CLJ 122.

their employees, the communication between the union and the employers would be privileged on grounds of mutual interest.[46]

The mutual interest must exist in both parties at the time of publication, such as between a former employer and a prospective employer. A publication that is made after the interest has ceased to exist is therefore not accepted as being published under privileged circumstances.[47] Generally, curiosity about certain matters is an interest that is not recognised under the law. Some examples where parties have been held to have a mutual interest are: an employer explaining to his employees why one of the employees was retrenched, as they ought to know that if they were to act in a similar fashion they would probably face a similar consequence[48]; an investor in a company will be protected if he makes a defamatory statement of the company at a meeting for all investors; a legitimate complaint to a company of any wrongdoing by its employee in matters where the complainant has an interest[49]; committee members are protected when discussing matters that are related to their roles in that committee; communication within a family concerning the welfare of that family and complaints against government hospitals, which are public institutions, to persons who have power over the administration of the hospitals[50]; and a petition by several cabin crew against their officer, made and copied to high-ranking officials of MAS who correspondingly had a duty and an interest in the matter.[50a]

It appears from the cases that the recognised 'interest' is one which is financial in nature. The principle however remains, that any legitimate interest worthy of protection by the law, will be afforded this defence.

If a third party, in public, repeats a libel or slander originated by someone else at the plaintiff's request, the defence of qualified privilege based on mutual interest is still applicable. The third party here is deemed as merely informing the plaintiff as to what has been said concerning him, since the plaintiff has the right to know what has actually been said by the defendant.

The privilege ceases to exist when the original party (the defendant) repeats the slander or libel in public, even though it is done at the plaintiff's request. Similarly, no privilege is given to the defendant who repeats his allegations in answer to questions put to him by other parties who are investigating the matter on behalf of the plaintiff.[51] Privilege exists if in the initial instance

46 *John Lee & Anor v Henry Wong Ian Fook* [1981] 1 MLJ 108, FC.
47 *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75.
48 *Gould v Dobb & Co Ltd* [1938] MLJ 207.
49 *K Magathevan v Shafie Hj Kassim* [2001] 3 MLJ 86.
50 *Veitch v De Mornay* [1878] 1 Ky 418 (Civ).
50a *K Surjit Kaur a/p Gean Kartar Singh v Belinda Choi Shuk Yee* [2003] 2 MLJ 91.
51 *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142.

there is no publication, and publication is subsequently made at the request of the plaintiff or his agents for the purpose that the plaintiff has a way of proving the elements for the tort of defamation.

Statements made by candidates to the electorate at a general election is not protected by privilege. This is provided for in s 14 of the Act as follows:

> A defamatory statement published by or on behalf of a candidate in any election to a local authority or to the Dewan Rakyat or any Legislative Assembly or other elected or partially elected body shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the person by whom it is published is qualified to vote at the election.

(b) Statements made to fulfil a legal, moral or social duty

Communication made by a person who has a legal, social or moral duty to another person who has an interest to receive the communication is also protected by privilege.[52]

The interest (or duty to communicate) in the subject matter of the communication between the maker of the statement and the recipient must be proven. This is essential. The defendant's honest and *bona fide* belief that this interest exists, or his belief that he has a duty to make the communication, is insufficient.[53] Whether a duty in fact exists or otherwise is for the judge to decide.

In *John Lee & Anor v Henry Wong Jan Fook*[54] the plaintiff who was a former employee of the defendant, wrote a letter alleging that the defendant had abused his power in retrenching the plaintiff. A copy of this letter was sent to the plaintiff's Union. The defendant replied to this letter in which he explained the plaintiff's bad reputation in handling his job. A copy of this letter was also sent to the same Union. The court held that this letter by the defendant was privileged. Since the plaintiff had appealed to his Union there was a probability that the matter would be brought to the Industrial Court and therefore the Union had an interest to receive a copy of the letter written by the defendant. The defendant also had the right and duty under the law to give his evidence to the Union before the matter proceeded further.

It is rather difficult to prove the existence of a moral or social duty. In order to determine the existence of this type of duty, the test usually employed by

52 *John Lee & Anor v Henry Wong Jan Fook* [1981] 1 MLJ 108.
53 *Abdul Rahman Talib v Seenivasagam* [1965] 1 MLJ 142.
54 [1981] 1 MLJ 108.

the court is – would a reasonable person, endowed with the standard level of intellect and who upholds moral principles agree that the communication be made?[55]

The judge has to ask himself whether ordinary and reasonable persons who are in the defendant's situation would feel that they have a duty to make the communication. In short, a moral or social duty would arise if it is reasonable for the defendant to publish the statement in question.

Some examples of communication based on a social or moral duty are: communication to the Superintendent of Police with regards to the probability of the occurrence of a crime.[56] That statements made in a police report are statements made on privileged occasions was affirmed more recently.[57] However, the privilege is lost if the facts show that the defendant does not have a positive or honest belief in the truth of the statement they made in the police report. So for instance if the dominant motive of making the report is so that the police will assist the defendant in locating the plaintiff for their own investigations, the privilege will be lost, as there would have been an abuse of the process of law.[58] The communication will not be privileged if it is made to a person or authority who does not have the power or jurisdiction to investigate, prevent or act on the alleged conduct. A letter that contains allegations of a lecturer acting irresponsibly in conducting his lectures or classes, written by the Dean to the lecturer's employer[59]; accusation by a pregnant student that her teacher had sexual relations with her, made to the relevant authorities in order that an investigation could be made[60]; a report by the director of a company as to the plaintiff's immoral activities, made to the chairman of that company was covered by privilege; but communication of the same matter to the plaintiff's wife was not privileged as the defendant had no duty to pass on that information to her[61]; a report in a newspaper concerning the contents of a particular textbook to be used in KBSM.[62] The court in *Pustaka Delta Pelajaran Sdn Bhd v Berita Harian Sdn Bhd*[63] found that the publication of the alleged defamatory article was protected as issues pertaining to KBSM and school textbooks are a matter of public interest and the defendant had a duty to inform the public at large. Although 'public interest' was not defined, the 'public interest' element in

55 *Stuart v Bell* [1891] 2 QB 341 at 350 *per* Lindley J.
56 *Mushroodin Merican Noordin v Shaik Eusoff* [1876] 1 Ky 390 (Civ).
57 *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 1 AMR 245.
58 *Abdul Aziz Jelani v Peter Chua Swee Lai* [2000] 2 MLJ 462.
59 *Clarence Wilfred v Tengku Adnan bin Tengku Mahmud & Anor* [1983] 1 CLJ 136.
60 *Karthak v Damai* [1962] MLJ 423.
61 *Watt v Longsdon* [1930] 1 KB 130.
62 The new curriculum for secondary schools.
63 [1998] 6 MLJ 529.

this case was fulfilled on the grounds that the issues raised in the article involved not only the pupils concerned, but also parents, teachers, officers in the Ministry of Education, academicians and the country as a whole. Reports of suspicious activities and status of a company was held to be privileged as the maker of the statement had a legal and moral duty to inform the public about the activities of the company under such circumstances.[64] *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad*[65] held that removal of the Deputy President of UMNO and Deputy Prime Minister of the nation were matters of public interest and there was a corresponding duty to explain such removals to the nation. While what the Prime Minister respondent explained as reasons for such removals were offending words – that the appellant was involved in homosexual practices – they were published on a privileged occasion.[66] Reporting the alleged misconduct of an advocate and solicitor to the police and Bar Council entitles the complainant to raise qualified privilege on the basis that the report was made pursuant to a social, moral and legal duty.[67]

(c) Statements made to relevant authorities in order to settle public nuisance or disputes

There is an overlap between statements made in pursuance of a social or moral duty (on the basis of public interest) and statements made under this heading.[68]

The case of *Blackshaw v Lord*[69] laid down the principle that any statement which is made for the public benefit must fulfil two requirements:

(i) there is a duty on the maker of the statement to make that statement for the public benefit; and

(ii) the person or persons to whom the statement is made must have a reciprocal interest to receive or have knowledge of the statement.

Where a newspaper publishes that the products of a particular company are dangerous because the products are poisonous, the publication would be protected by qualified privilege.

64 *Mohd Jali bin Haji Ngah v The New Straits Times Press (M) Bhd & Anor* [1998] 5 MLJ 773.

65 [2001] 1 CLJ 519; [2001] 1 AMR 589, CA.

66 An application for leave to appeal to the Federal Court was dismissed, in consideration of the low prospect of success of the applicant's case – *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 1 CLJ 663, FC.

67 *Albert Chew v Hong Leong Finance Bhd* [2001] 4 CLJ 419.

68 Some might argue they both fall under the same category.

69 [1983] 2 All ER 311.

In *Gould v Dobb & Co Ltd*[70] the plaintiff claimed remuneration for his wrongful dismissal, and the defendant, in response to the claim, made a defamatory statement of the plaintiff to the plaintiff's lawyer. The court held the statement to be privileged.

Recklessness or malice on the part of the defendant will defeat the defence of qualified privilege.[71]

(d) Statement made in order to protect one's own interest or property

A statement made by a defendant in order to protect his interest or his reputation may be covered by privilege, so long as the statement is made *bona fide* and is relevant to the allegations made by the other party.[72] If for instance, a person's reputation is questioned he has a right to respond to the allegations. If *A* accuses *B* of being a thief, *B* has a right to call *A* a liar. Even though calling a person a liar is *prima facie* defamatory but in this situation *B*'s response is privileged as he is refuting *A*'s allegation. If *B*'s response contains accusations which far exceed the initial accusation against him made by *A*, *B* cannot rely on the defence of qualified privilege. For instance if *A* alleges that *B* is not capable of carrying out his responsibilities in his job due to the number of mistakes that *B* has made, *B* is not justified in calling *A* a liar and a thief, as calling *A* a thief has no bearing on the initial accusation made against *B*.

In *Osborn v Boulter*[73] a publican complained to the brewers who supplied him with beer that it was of poor quality. The brewers replied that they had heard rumours that the poorness of the beer was due to the watering of it by the publican. They subsequently published this statement to a third party and in an action by the publican, the court held this statement to be privileged.

(e) Accurate and fair report of proceedings

A fair and accurate report of parliamentary proceedings is protected by qualified privilege as it is in the public interest to know the issues discussed in Parliament. It is vital for the report to be accurate and fair in order to attract the privilege. If the report is unclear or forms only a part of the

70 [1938] MLJ 207.

71 *Joel Salaysay v Medical Laboratory (Pte) Ltd & Anor* [1985] 2 MLJ 195. See also *Dr Jenni Ibrahim v S Pakianathan* [1986] 2 MLJ 154, where it was held that since the defendant's statements were false and made maliciously to disparage the plaintiff's reputation, the defence of qualified privilege failed.

72 *Lee Kuan Yew v JB Jeyaretnam* [1979] 1 MLJ 281; affirmed [1979] 2 MLJ 282, CA; affirmed [1982] 1 MLJ 239 PC.

73 [1930] 2 KB 226.

parliamentary proceedings, which may cause harm to particular individuals, then the privilege will be withdrawn.[74]

(f) Ancillary qualified privilege

Publication to other persons in the ordinary course of business would be protected by 'ancillary' qualified privilege. Examples would be dictating a defamatory letter to a secretary or typist, or publication of defamatory words to the addressee's secretary. A defamatory letter or fax sent by one legal firm to another and read by a clerk at the receiving firm would be protected under this cloak of privilege.[75]

3. Absolute privilege

There are instances where words which are harmful to a person's reputation are not actionable, as the publication of these words is protected by absolute privilege. The circumstances are usually connected to the administrative system within a particular government, whether the statement is made by legislative bodies, the executive or the judiciary. An advocate is protected by absolute privilege if he makes a defamatory statement while in the course of legal proceedings. This rule is however, restricted insofar as the defamatory words are relevant to the matter at hand, and spoken in good faith.[76] Statements uttered outside the court room are not afforded the privilege.[77]

Absolute privilege is also extended to statements made during parliamentary debates and proceedings, which are not questionable in any courts of law.[78] Absolute privilege is also extended to any reports, papers, votes or other matters that Parliament orders or authorises to be published.[79]

In *Times Publishing Bhd & Ors v S Sivadas*[80] the court held that absolute privilege for proceedings in Parliament covers written opinions by the public, made as a response to the issues that are raised to the public by the Parliamentary Committee. This privilege stands even if the statement is made maliciously.

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74 *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142.

75 *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] 2 AMR 2111, CA.

76 *Ibid.*

77 *Ibid.*

78 Article 63 of the Federal Constitution; Houses of Parliament (Privileges and Powers) Act 1952 (Rev 1988); ss 3 and 7. However, article 63(4) of the Federal Constitution provides that this privilege is lost if that person is charged under a law made under article 10 of the Federal Constitution or under the Sedition Act 1948.

79 Houses of Parliament (Privileges and Powers) Act 1952 (Rev 1988), s 26.

80 [1986] 1 MLJ 372.

Therefore any defamatory remark made by a member of Parliament during parliamentary debates is not actionable, even if the remarks are made maliciously. This privilege does not extend to the repetition of the same remarks outside Parliament.[81]

It was stated above that under s 12(1), Part I of the Schedule to the Act, item (i)(d); a fair and accurate report of court proceedings held in the Commonwealth but outside Malaysia is given qualified privilege. A fair and accurate report of judicial proceedings held in Malaysia enjoys absolute privilege by virtue of s 11(1) of the Act which provides:

> A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and *bona fide* comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

'Report of judicial proceedings' has been interpreted to include a notice of court action. In *Wong Cham Mew v Hong Leong Finance Bhd*[82] the court held that a notice of substituted service of an originating summons is a notice made in court proceedings as the order for such notice was granted by the senior assistant registrar in the course of carrying out his judicial task.

Section 11(2) of the Act further provides that the absolute privilege is lost if the publication is blasphemous, seditious, indecent or prohibited by law.

E. Unintentional defamation

Where a defendant unintentionally and innocently publishes defamatory material of another person, he may raise the defence of unintentional defamation provided for under s 7 of the Act. This defence is appropriate in a situation where a reporter writes what is alleged to be a defamatory article in a magazine, and the plaintiff sues both the reporter and the publisher of the magazine. It is the publisher who might wish to avail himself of this defence. The defence may only be raised in the following circumstances.

Firstly, if the words are defamatory of the plaintiff in their natural and ordinary meaning which includes a false innuendo, innocent publication is proved when the publisher can show that –

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81 *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142.
82 [1998] 2 MLJ 195.

(a) he did not intend to publish them of and concerning the plaintiff; and

(b) he did not know of circumstances in which the words might be understood to be referring to the plaintiff; and

(c) he had exercised all reasonable care in relation to the publication.[83]

This situation would cover cases in which the publication specifically referred to say, one particular Ah Chong; but readers of the words believed the article referred to another Ah Chong. It also applies in cases where no specific names are mentioned, but the description in the article also describes the plaintiff.[84]

Secondly, if the words are defamatory of the plaintiff due to certain external factors by way of true innuendo, innocent publication is proved when the publisher can show that –

(a) he did not know of circumstances in which the words might be understood to be defamatory of the plaintiff; and

(b) he had exercised all reasonable care in relation to the publication.[85]

In both cases, any reference to the publisher includes his servant or agent who is involved with the contents of the publication.

If the defamatory article plainly refers to a given individual, the publication will not be an 'innocent publication' even though he is not specifically named.[86] Likewise if the identity of the person referred to in the article may be easily discovered, the publisher cannot be said to have exercised all reasonable care in relation to the publication.

In *Sandison v Malayan Times Ltd & Ors*[87] the defendant's newspaper published an article indicating that a senior expatriate executive of the Rubber Replanting Board had been dismissed on November 13, 1962, for corruption. The executive was not named but the court found that the article clearly referred to the plaintiff as he was the only senior expatriate executive on the Board.

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83 Defamation Act 1957, s 7(5)(a).

84 See *Hulton & Co v Jones* [1910] AC 20 and *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377, CA above at pp 258-259.

85 Defamation Act 1957, s 7(5)(b).

86 *Bank of China v Asiaweek Ltd* [1991] 2 MLJ 505.

87 [1964] MLJ 332.

Once innocent publication is established, the defendant may make an offer of amends. Under this section, an offer of amends means to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the party aggrieved in respect of the words.[88] If copies or record of the defamatory material have been distributed by or with the knowledge of the person making the offer he must take reasonable steps having regard to the circumstances, to notify persons to whom the copies have been distributed that the words are alleged to be defamatory of the party aggrieved.[89]

If the offer of amends is accepted by the plaintiff and is duly performed no action may be taken or continued against the defendant, although this acceptance by the plaintiff does not affect his rights to claim against any other person jointly responsible for the publication.[90] Where the offer is accepted but a dispute subsequently arises in relation to the steps to be taken in fulfilment of the offer and the parties cannot come to an agreement, an application to resolve the matter may be made to the High Court, whose decision shall be final.[91] The court has the power to make an order for costs against the person making the offer. This includes the power to order the payment of costs on an indemnity basis and expenses reasonably incurred or to be incurred by the plaintiff in consequence of the publication in question.[92]

If the offer of amends is rejected, the fact that the offer has been made will be a defence to any action in libel and slander against the defendant provided that –

(a) the words complained of were published by the defendant, or the publication has been made innocently as defined in s 7(5) of the Defamation Act 1957; and

(b) the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff; and

(c) the offer has not been withdrawn.[93]

88 Defamation Act 1957, s 7(3)(a).

89 *Ibid*, s 7(3)(b). For the apology to be sufficient, it must not be conditional. The defendant who tenders an apology must understand that he is acting on the basis that he has accepted the fact that his publication has indeed defamed the plaintiff – *Normala Samsudin v Keluarga Communication Sdn Bhd* [1999] 2 MLJ 654.

90 *Ibid*, s 7(1)(a).

91 *Ibid*, s 7(4)(a).

92 *Ibid*, s 7(4)(b).

93 *Ibid*, s 7(1)(b).

If the person making the offer of amends is not the author of the statement, the defence under s 7(1)(b) does not apply unless he proves that the words were written by the author without malice.[94]

In *Sandison v Malayan Times Ltd & Ors*[95] offers of amends were made on January 3 and 24, 1963 about two months after the publication of the defamatory words. The court held that the offers of amends were not made as soon as practicable as there was a time lapse of more than a month between the dates of the publication and that of the first offer of amends.

An offer of amends under s 7 must be expressed to be made for the purposes of this section. It must be accompanied by an affidavit specifying the facts relied on by the defendant to show that the words in question were published by him innocently in relation to the plaintiff. If the offer is rejected no other evidence than those specified in the affidavit is admissible in his attempt to establish the defence that the publication has indeed been made innocently.[96]

F. Innocent dissemination[97]

A person who participates in the publication of a defamatory article is subject to suit. If he is a mere distributor or delivery boy, this rule would impose undue hardship on these persons and the law in these special circumstances provides the defence of innocent dissemination.

In *Vizetelly v Mudie's Select Library Ltd*[98] it was held that the defence of innocent dissemination is available to a defendant who is not the author, printer or first or main publisher of the defamatory article. Additionally he must also prove all of the following requirements:

1. that he was innocent of any knowledge that the publication in question contained a libel; and

2. there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose it contained a libel; and

3. when the article was disseminated by him it was not by any negligence on his part and that he did not know that it contained a libel.

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94 *Ibid*, s 7(6).
95 [1964] MLJ 332.
96 Defamation Act 1957, s 7(2).
97 See Evans, at p 92.
98 [1900] 2 QB 170.

G. Immunity

In *Dato' Param Cumaraswamy v MBf Capital Bhd*[99] it was held that a person who while he was the United Nations Special Rapporteur on the independence of judges and lawyers was immune from suit or prosecution as long as his acts were done, or his words were spoken or written, in the exercise of his function (as in the course of performing his mission).[100]

H. Mitigation of damages

The amount of damages awarded by the court may take into consideration what is known as mitigating factors, which if accepted by the court will result in a lower award of damages to the plaintiff. Mitigating factors include the existing reputation of the plaintiff, the plaintiff's behaviour towards the defendant and the extent of the publication.

Evidence by the defendant that he has either made, or offered to make an apology to the plaintiff is also a factor in mitigating the amount of damages. Apology in mitigation of damages is provided for in s 10 of the Act. The defendant may raise in court that he has made or offered an apology to the plaintiff before the commencement of the action or if the action was commenced before there was an opportunity of making or offering such apology; as soon afterwards as he had the opportunity of doing so.[101] The court must be satisfied that from the apology, it must be understood that the defendant has accepted the fact that its publication has indeed defamed the plaintiff. A conditional apology which does not indicate contrition would be insufficient.[102]

In an action for libel contained in any newspaper[103] or any broadcast,[104] the defendant may also state in mitigation of damages that the libel was inserted in such newspaper or broadcast without actual malice *and* without gross negligence; and that before the commencement of the action or at the earliest opportunity thereafter he inserted or offered to insert in such newspaper or broadcast a full apology for the said libel.[105]

99 [1997] 4 AMR 1229, CA.

100 The question in this case was whether the terms of the appellant's mandate authorised/included granting interviews to members of the press.

101 Defamation Act 1957, s 10(1).

102 *Normala Samsudin v Keluarga Communication Sdn Bhd* [1992] 2 MLJ 654.

103 Defamation Act 1957, s 10(2).

104 *Ibid*, s 13(2).

105 For s 10(2) to apply, the defendant must also have paid money into court under the provisions of any written law relating to civil procedure.

I. Factors taken into account in assessing damages[106]

Damages for the tort of defamation must fulfil three purposes; firstly to compensate for feelings of distress and disappointment; secondly to make up for the injury to the plaintiff's business and personal reputation, and thirdly to redeem the plaintiff's reputation as a whole.

The amount of damages should be one that is sufficient to show the public that the plaintiff's reputation has indeed been redeemed. Factors that are taken into account in awarding damages are as follows:[107]

1. the plaintiff's position and standing in society,
2. the seriousness of the libel,
3. the mode and extent of the publication,
4. any mental disturbance, disappointment and feelings of hurt that the plaintiff has suffered,
5. the uncertainty felt by the plaintiff during trial,
6. the defendant's actions from the time of the libel to the time judgment is given,
7. the absence or refusal of any apology or retraction or correction of the libel.
8. any malice on the part of the defendant.[108]

Due to the consideration of all the above factors, it was held in *MBf Capital Bhd v Tommy Thomas (No 2)*[109] that an award of damages for defamation cannot be based or compared with awards of damages for personal injuries. The court stated that awards in personal injury cases and defamation actions serve different purposes, have different elements and different histories. As such, awards for pain and suffering in personal injury actions do not provide

106 See below, Chapter 17.

107 *Tan Sri Dato' Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors* [1995] 1 AMR 69; affirmed in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493, CA; *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] 2 AMR 2111, CA.

108 *MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 2)* [1997] 3 MLJ 403.

109 [1997] 3 MLJ 403.

guidance, as to what amounts to a reasonable award of damages in a defamation action.[110]

The court quoted Lord Hailsham's judgment in *Cassell & Co Ltd v Broome*[111] in explaining the reason for the difference in awards of damages between personal injury and defamation actions thus:[112]

> In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of *restitutio in integrum* has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Nor merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. As Windeyer J ... said in *Uren v John Fairfax & Sons Pty Ltd* (1967) 117 CLR 118 at p 150:
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> > 'It seems to me that ... a man defamed does not get compensation for his damaged reputation. He gets damages *because* he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.'

The Federal Court in *Ling Wah Press (M) Sdn Bhd v Tan Sri Dato' Vincent Tan Chee Yioun & Ors*[113] in affirming an enormous award of damages stated that while an award in personal injury cases is to compensate the plaintiff for his pain and suffering, past, present and future; the element of punishment or deterrence does not enter into the award, as in awards in defamation cases.

A plaintiff in a defamation action may stipulate the sum he is claiming for as a measure of his worth in the form of loss of reputation. Thereafter it is for him to establish that claim (and its corresponding monetary value) by way of proof in court.

In an illuminating judgment on the issue of quantum of damages, the Court of Appeal in *Karpal Singh a/l Ram Singh v DP Vijandran*[114] traced the

110 *Ibid* at p 411, adopting the dissenting judgment of McHugh J in *Carson v John Fairfax & Sons Ltd* [1993] 113 ALR 577, at 629.

111 [1972] 1 All ER 801, at 824.

112 *MBf Capital Bhd & Anor v Tommy Thomas (No 2)* [1997] 3 MLJ 403.

113 [2000] 3 AMR 2991, FC.

114 [2001] 3 AMR 3625, CA.

development of the trend of awards in defamation cases in Malaysia. The most extravagant amount of damages awarded by a Malaysian court was in *Tan Sri Vincent Tan Chee Yioun v Haji Hassan b Hamzah & Ors*[115] where the plaintiff was awarded a total of RM10m against seven defendants. Both the Court of Appeal[116] and Federal Court[117] confirmed the award.[118]

Prior to the case of *Vincent Tan*, the awards of damages for defamation ranged between RM500 to RM100,000. Following *Vincent Tan* the awards ranged between RM100,000 to RM3m. Then in *Cheah Cheng Hock & Ors v Liew Yew Tiam & Ors*,[119] a case where the plaintiffs advocates and solicitors faced the allegations of breaching their professional duty of care and were alleged to be unfit to be advocates and solicitors, the court, based on *MGG Pillai* awarded the plaintiffs a total of RM1m. On appeal to the Court of Appeal in *Liew Yew Tiam & Ors v Cheah Cheng Hock & Ors*[120] the awards were reduced to RM100,000. Gopal Sri Ram JCA (who ironically affirmed the RM10m award in *MGG Pillai*) stated that the trend of awarding millions of ringgit in defamation was set in *MGG Pillai* but that the decision was much misunderstood. Although the Federal Court's subsequent affirmation of the decision and award created a binding precedent, it did not follow as a matter of policy that the plaintiff in every case should be entitled to receive an award in millions of ringgit.

In *Karpal Singh v DP Vijandran*, the facts of which are discussed elsewhere,[121] the court awarded RM500,000 in damages. Having referred to the trend of awards, the court held that although the Federal Court decision in *Ling Wah Press* is binding, it is the principle in assessing damages and not the amount, which is binding. The amount to be awarded depends on the facts and circumstances of each case. The standing of the plaintiff is an important factor to be considered. However, holding a high position is not synonymous with a person having a high personal integrity, reputation and honour. Having considered all the circumstances of the case, the initial award of RM500,000 was reduced to RM100,000.

115 [1995] 1 AMR 69.
116 *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & other appeals* [1995] 2 AMR 1776, CA.
117 *Ling Wah Press (M) Sdn Bhd v Tan Sri Dato' Vincent Tan Chee Yioun & Ors* [2000] 3 AMR 2991, FC.
118 In *Ling Wah* only 3 of the 7 defendants appealed. Out of the total RM10m, the total amount of damages against them was RM7m.
119 [2000] 2 AMR 2444.
120 [2001] 2 AMR 2320, CA.
121 See pp 264-265 above.

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CHAPTER THIRTEEN

NUISANCE

The law of nuisance is one branch of the law of tort which purpose is to provide comfort to persons who have proprietary interests in land and to members of society generally, through control of environmental conditions. Although a person who has an interest in land is able to do whatever he wishes on his land, his activities however, must not cause inconvenience or damage to another person who similarly has an interest over *his* land. Thus the law of nuisance is concerned with the balancing of competing interests.

A. Nuisance distinguished

Although there appear to be similarities between nuisance and trespass to land, there are distinct differences between these two causes of action. Nuisance has more in common with negligence and strict liability, yet there are also specific differences among these torts. The similarities and differences are noted below.

1. Nuisance and trespass to land

Nuisance and trespass to land do not overlap. Only a direct act may give rise to an action for trespass to land whereas a cause of action in nuisance may be maintained in cases of consequential harm. This was clearly stated in *Government of Malaysia & Anor v Akasah b Ahad.*[1] Here the plaintiff operated a petrol station. The defendant then built a federal highway which was on higher ground than the petrol station, and the road to the station had to be closed. The defendant offered to build a road to the petrol station through another route but the plaintiff refused. In an action for nuisance against the defendant, the Supreme Court found that the plaintiff had failed to prove nuisance. With regards to the differences between nuisance and trespass the court stated that nuisance is of a bigger class than trespass. Whether an act is a nuisance or a trespass depends on whether there is a direct physical interference. Trespass means a direct entry onto the land belonging to another and is actionable *per se* without any proof of special damage, whereas nuisance is an interference to the plaintiff's interest over

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1 [1986] 1 MLJ 396, SC.

his property, and does not necessarily require entry by the defendant. To succeed, the plaintiff is generally required to prove special damage.

Another difference is that trespass is interference with possession of land, whereas nuisance is interference with the use of land.[2]

2. Nuisance and negligence

There may be an overlap between nuisance and negligence as a negligent act may also give rise to nuisance.[3] For instance landowners owe their neighbours a duty not to disturb or withdraw natural right to support (soil to soil support), a breach of which gives rise to a cause of action in negligence and/or nuisance.[4] This however, does not mean that negligence is a prerequisite in an action for nuisance.

In *Wisma Punca Emas Sdn Bhd v Dr Donal*[5] the defendant was doing some construction job beside the plaintiff's clinic. The job included piling and excavation works. As a consequence of these activities, the plaintiff's wall cracked and tilted. The defendant contended that he had taken all reasonable precautions. The court allowed the plaintiff's claim and granted him damages. The defendant appealed and contended that the main issue in the case was one of negligence and since nuisance was not specifically pleaded, the appeal should be allowed. The Supreme Court held that negligence is not a requirement in nuisance actions[6] and therefore a plaintiff need not prove any negligence in a nuisance case. All that is necessary is proof of special damage which would be damage to his property due to the activities of the defendant on the adjoining land. Since the cause of action in this case was founded on the natural right of support,[7] in the context of this case the court held that it was the same as saying that the claim was based on nuisance. The appeal was accordingly dismissed.

3. Nuisance and the rule in Rylands v Fletcher[8]

The rule in *Rylands v Fletcher* imposes liability when something that is likely to cause mischief escapes from the defendant's land onto the plaintiff's land, causing damage to the plaintiff. This in itself may give rise to an action for nuisance but not necessarily so.[9]

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2 *Yip Shou Shan v Sin Heap Lee – Marubeni Sdn Bhd* [2002] 5 MLJ 113.

3 See *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286, FC – inadequate precautions during earthworks led to collection of water which eventually escaped onto, and damaged plaintiff's property.

4 *Wong See Lee & Ors v Ting Suk Lay* [1997] 2 CLJ 205, FC.

5 [1987] 1 MLJ 393, SC.

6 See also *Hiap Lee Brickmakers Ltd v Weng Lok Mining Co Ltd* [1974] 2 MLJ 1, PC.

7 See also *Goh Chat Ngee & 3 Ors v Toh Yan & Anor* [1991] 2 CLJ 1163.

8 [1868] LR 3 HL 330.

9 See Chapter 14.

In an action for nuisance generally the interference must be something that is continuous, whereas in an action under the rule in *Rylands v Fletcher* one single act of interference is sufficient.

The rule in *Rylands v Fletcher* applies only to cases where there has been some special use of land bringing with it increased danger to others. It does not extend to damage caused to adjoining owners as the result of the ordinary use of land.[10]

B. Damage and remedies

The harm or damage that usually occurs in nuisance cases are of two types, namely damage to property, which is easily identifiable, and/or interference to personal comfort, which is specific to the tort of nuisance. Damage to property is self-explanatory. However, it also includes nuisance by encroachment on a neighbour's land. In both instances the measure of damages is the diminution in the value of the land which will usually be (though not necessarily) the cost of reinstatement.[10a] Pure economic loss in the form of the fall in the value of the land has been held to be recoverable.[10b]

The remedy usually sought in a claim for nuisance is an injunction, which function is to prevent the nuisance from continuing; or monetary compensation, which is usually granted for damage to property. In *Pacific Engineering Ltd v Haji Ahmad Rice Mill Ltd*[11] it was stated that a person injured by a nuisance may bring an action and claim damages for the injury alone or together with a claim for an injunction.

Alternatively, a person or group of persons affected by the activities conducted by another on the latter's land may choose to lodge a report to particular authorities, such as to the Health Officer of a local authority. This last remedy is widely used as there are many organisations and government bodies whose activities are statutorily governed.[12]

Damage must be proved in an action for nuisance for otherwise the action will fail.[13] The damage must be of a kind that is reasonably foreseeable to arise from the defendant's wrongful conduct.[14] Actual damage however, need

10 *Leakey v National Trust* [1980] 1 All ER 17.
10a *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426, HL.
10b *Arab-Malaysian Finanace Bhd v Steven Phoa Cheng Loon* [2003] 2 AMR 6, CA.
11 [1966] 2 MLJ 142, at 146.
12 See for example, Local Government Act 1976, Act 171, Part IX.
13 *Wong See Kui v Hong Hin Tin Mining Co* [1969] 2 MLJ 234.
14 *Leong Bee & Co v Ling Nam Rubber Works* [1970] 2 MLJ 45; *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352.

not be established if the nuisance is caused by smell and it has been held that injury to health is not a necessary ingredient in the cause of action for nuisance by smell as the interference here is something that substantially affects the senses or the nerves.[15]

In England, it appears that the right to claim in nuisance for damages for personal injury *per se* is probably no longer available as a result of the House of Lords' decision in *Hunter v Canary Wharf Ltd.*[16] The reason given is that a claim in negligence would be the more appropriate cause of action.

C. The concept of reasonableness

The reasonableness or otherwise of the defendant's activity or act is central in nuisance cases because only when the interference is deemed unreasonable will nuisance be established. Reasonableness in nuisance does not mean whether the defendant has taken adequate precautions to avoid the risk of accident – this is reasonableness in the tort of negligence. In the tort of nuisance, reasonableness is measured by balancing the rights and interests of both parties, which is a process of compromise. The court needs to take into account, the fact that in the first place the defendant has a right to the use and enjoyment of his land. Although the defendant may be shown to have taken all precautions to prevent any harm to the plaintiff – this does not mean that the defendant has acted reasonably for the purposes of nuisance. The plaintiff who nonetheless suffers damage as a result of the defendant's activity needs to be compensated, as he too, is entitled to the (safe) use and enjoyment of his land. So the damage suffered by the plaintiff is a relevant factor in determining the reasonableness of the interference.

The meaning and scope of reasonableness is wider in nuisance than in negligence. Reasonableness is not limited to the defendant's conduct but extends beyond that to include the effects and consequences of his conduct.[17]

In *Syarikat Perniagaan Selangor Sdn Bhd v Fahro Rozi Mohdi & Ors*[18] Chang Min Tat FJ stated that almost every one of us has to tolerate a certain amount of interference from our neighbours and we in turn have a right to make a certain amount of noise in the enjoyment of our property. A person may use his property in a reasonable way but no one has the right to create intense noise just as no one should be asked to put up with such a volume which by

15 *Dato' Dr Harnam Singh v Renal Link (KL) Sdn Bhd* [1996] 1 AMR 1157.
16 [1997] 2 All ER 426; [1997] AC 655, HL.
17 See Street, 10th edn at p 358 for a slightly different emphasis on the meaning of reasonableness in nuisance.
18 [1981] 2 MLJ 16, at 17.

any reasonable standard becomes a nuisance. So the ordinary use of a residential property is not capable of amounting to nuisance.[19]

Determining the existence of nuisance thus requires the striking of balance between on the one hand, the right of one party to use his property for his own lawful use and enjoyment; and on the other, the right of the other party to the undisturbed enjoyment of his property. There is no universal or precise formula available, but a useful test for measuring the reasonableness of the defendant's activity is what is accepted as reasonable according to the ordinary usage (of land) of others living in that particular society.[20]

It follows that reasonableness cannot be determined with accuracy. Whether an activity amounts to actionable nuisance or not depends on other factors, such as the purpose of the defendant's conduct, location, time, extent of damage, the way in which the interference occurs, motive and malice, the effect of the interference, and whether it is continuous or in stages or intermittent. The factors considered in determining the concept of reasonableness is explained below in section G.

D. Categories of nuisance

Nuisance is divided into two main categories: public nuisance, which is a crime as well as a tort, and private nuisance, which is a tort.

It is quite possible for the same conduct to amount to both public and private nuisance if the plaintiff is able to satisfy the necessary requirements.

E. Public nuisance

Public nuisance arises when there is an interference with public rights such as the obstruction of public highways[21] or the selling of contaminated food.[22] A set of facts giving rise to a claim in public nuisance may also give rise to an action for negligence and a defendant may well be sued for both torts in the alternative; an example being cases of obstruction on public highways.

19 *Southwark London BC v Mills & Ors, Baxter v Camden London BC* [1999] 4 All ER 449, HL (plaintiff affected by noise made by other tenants, not due to their unreasonable behaviour but due to poor soundproofing). However, contrast with *Sampson v Hodson-Pressinger* [1981] 3 All ER 710, CA (due to flawed construction of roof terrace, its ordinary use caused excessive noise and was an actionable nuisance.

20 *MBf Property Services Sdn Bhd v Madihill Development Sdn Bhd (No 2)* [1998] 4 CLJ 136.

21 Local Government Act 1976, Act 171, s 67(1)(c).

22 *Ibid*, s 73(1)(c).

The mere fact that an obstruction has occurred or that there is an inconvenience does not of itself turn it into a nuisance. Nuisance would only be created if, knowing or having the means of knowing of its existence, a person allows it to continue for an unreasonable time or in unreasonable circumstances. So if a tree adjoining a highway falls onto the highway without any negligence on the part of its owner, and the tree causes an obstruction to the highway it would be wrong to suppose that a nuisance is immediately created.[23] It is on the other hand obviously unreasonable and dangerous to leave long steel pipes with sharp edges by the side of a highway for one or two years, as this would undoubtedly create a danger to users of the highway.[24] The defendant's conduct need not be independently unlawful, but it is the effect of his conduct on the plaintiff that is considered.[25] Other public interests protected by the tort of public nuisance include public comfort, safety and health although the last type of interest is now statutorily governed.[26]

1. Definition

In *Attorney-General v PYA Quarries Ltd*[27] it was stated that public nuisance arises when an act materially affects the reasonable comfort and convenience of life of a class of the society.

This definition was adopted in the case of *Majlis Perbandaran Pulau Pinang v Boey Siew Than & Ors*[28] where it was stated:

> ... it is clear that a nuisance is a public nuisance, if, within its sphere, which is the neighbourhood, it materially affects the reasonable comfort and convenience of a class of the subjects of the State.

The number of persons required to constitute 'a class of the subjects of the State' is a question of fact in each case. It is not necessary that every single member of the society is affected. For instance, hundreds of obscene telephone calls to at least 13 women over a period of five years were held to have constituted a public nuisance.[29]

23 *Len Omnibus Co Bhd v North South Transport Sdn Bhd & Anor and Another Appeal* [1978] 2 MLJ 246; *Batang Kali Estates Sdn Bhd v Romani bte Abdul Aziz* [1995] 3 AMR 2774.

24 *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109.

25 See *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1992] 3 WLR 449, at 458.

26 See for example, Penal Code (Revised 1997), Act 574, Chapter XIV.

27 [1957] 2 QB 169, at 184 *per* Romer LJ.

28 [1978] 2 MLJ 156, at 158, *per* Gunn Chit Tuan J.

29 *R v Johnson* [1997] 1 WLR 367, CA.

2. *Public nuisance is also a crime*

A public nuisance is a crime as well as a tort. A person who is found guilty of public nuisance may be subject to a criminal sanction.[30] For instance, the pollution of streams with any filth and trade refuse within a local authority area constitutes a nuisance as well as being a criminal act.[31]

3. *Persons who may claim*

(a) Criminal proceeding

If it is a criminal proceeding, prosecution lies at the instance of the Public Prosecutor on behalf of the government.

(b) Civil proceeding – person who suffers special or particular damage

Public nuisance is not necessarily an interference with the plaintiff's use and enjoyment of his land. As such, the plaintiff who wishes to sue for public nuisance need not have an interest in land in order to be entitled to claim. However, only a person who has suffered special damage can claim for damages for public nuisance. The plaintiff therefore has to prove that he has suffered damage and injury over and above the ordinary inconvenience suffered by the public at large. This is to prevent multiplicity of actions, which would be harsh on the defendant.

The following factors may be used as a guidance to determine the existence of special or particular damage:

(i) The type or extent of damage is more serious. In essence the plaintiff must suffer more than what is suffered by other persons who are exposed to the same interference. Personal injury or damage to property would fall under 'special or particular damage'.

(ii) The damage must be a direct consequence and is substantial (therefore the damage cannot be consequential as in negligence claims). An example of direct damage is when a plaintiff suffers breathing problems due to the defendant's smoke pollution.

In *Pacific Engineering v Haji Ahmad Rice Mill*[32] the plaintiff was in the business of selling heavy earth-moving equipment and construction equipment, namely heavy tractors and industrial forklift trucks. Padi husk from the defendant's

30 Penal Code (Revised 1997), Act 574, s 268.
31 Local Government Act 1976, Act 171, ss 69, 70.
32 [1966] 2 MLJ 142.

factory would fly over to the plaintiff's premises when the defendant burned the padi husk. The plaintiff's workers had to cover their mouths and noses to prevent themselves from inhaling the dust. They had to shut the door when the wind blew in their direction and machines which were displayed became dusty very quickly. The plaintiff's lubricant oil also became dirty due to the dust from the padi husk. In an action for an injunction against the defendants the court held that there was no law in this country as in England, whereby a proceeding may only be instituted upon the consent of the Attorney-General for public nuisance cases. (As a statement of law, this is wrong as in the absence of special damage s 8(1) of the Government Proceedings Act 1956 applies). The court further held that in an action for public nuisance, a plaintiff may institute proceedings without obtaining prior consent from the Attorney-General if he has suffered special damage. In this case, the plaintiffs had proved that they suffered personal discomfort and injury to property and thereby satisfying the requirement of 'special damage'. An injunction preventing the defendant from burning rice husks in the compound of their premises was granted.

(c) Civil proceeding – no special damage suffered by any particular individual

Section 8(1) of the Government Proceedings Act 1956[33] (GPA) provides that the Attorney-General, or two or more persons who have obtained written permission from the Attorney-General, may institute a suit in public nuisance for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case. This relator action is available to these two (or more) persons even if they have not suffered special damage, special damage being extra damage that is over and above that suffered by other persons in the community.

In *Koperasi Pasaraya Malaysia Bhd v Uda Holdings Sdn Bhd & 41 Ors*[34] it was held that in a relator action for public nuisance, consent must first be obtained from the Attorney-General. In this case the action failed as the plaintiff did not obtain such consent. The court additionally held[35] that in a relator action brought under s 8(1) of the GPA, the plaintiff must prove special damage arising from the public nuisance. (It is respectfully submitted that this is *per incuriam* as s 8(1) of the GPA clearly provides that the plaintiff need not suffer special damage).[36]

The requirement of the Attorney-General's consent as laid down in s 8(1) of the GPA need not however, be met if the claim is brought by a local authority

33 Revised 1988, Act 359.
34 [2002] 4 AMR 4701.
35 *Ibid* at p 4708.
36 See also, *South Johore Omnibus Sdn Bhd v Damai Express* [1983] 1 MLJ 101.

in the public interest. In *MPPP v Boey Siew Than*[37] the plaintiff local authority brought an action for an injunction to restrain the defendants from using their premises as a restaurant without having obtained a licence from the plaintiff, and for damages for public nuisance. At the High Court it was held that the plaintiff could not sue the defendants without the written consent of the Attorney-General. On appeal from the plaintiffs, the Federal Court held that since the plaintiff had commenced its action based on s 80 of the Local Government Act 1976 which allowed a local authority to take action in its own name, it therefore released the local authority from the obligation stipulated under s 8(1) of the GPA. This release was said to be in the interests of justice and of the proper functioning of the plaintiff as a local authority.

F. Private nuisance

Definition

Private nuisance may be defined as an unlawful interference with a person's use, comfort, enjoyment and any interest that a person may have over his land.[38]

As with the definition of public nuisance, in private nuisance too, 'unlawful interference' does not mean that the activity or conduct of the defendant is inherently unlawful. An interference becomes unlawful and constitutes a nuisance when it unreasonably interferes with the plaintiff's enjoyment of his land.

The difference between public and private nuisance was laid down in the case of *MPPP v Boey Siew Than*,[39] where it was stated:

> ... a nuisance is a public nuisance, if, within its sphere, which is the neighbourhood, it materially affects the reasonable comfort and convenience of a class of the subjects of the State. A private nuisance ... is one which disturbs the interest of some private individual in the use and enjoyment of his property by interference with the usual enjoyment of property by causing or permitting the escape of deleterious substances or things such as smoke, odours or noise. The difference between a public and a private nuisance is that, in regard to the former, rights which are common to all subjects are infringed. Such rights are unconnected with the possession of or title to immovable property.

37 [1979] 2 MLJ 127, FC.

38 *Read v Lyons & Co Ltd* [1945] KB 216, at 236. This definition was accepted and applied in the case of *Hiap Lee Brickmakers Ltd v Weng Lok Mining* [1974] 2 MLJ 1, PC.

39 [1978] 2 MLJ 156, at 158.

In an action for private nuisance the plaintiff must prove interference with the enjoyment of his land. Therefore a plaintiff must have an interest in land to be able to sue in private nuisance,[40] unlike a claim based on public nuisance which does not require the plaintiff to have any interest over land.

Persons who have an interest over land are a landowner, a tenant and a licensee who has been granted a licence to use the land for a particular purpose.[41]

G. Establishing private nuisance

A plaintiff in a private nuisance action need not prove special or particular damage. The elements required to establish private nuisance are:

1. Substantial interference

Nuisance is not a tort which is actionable *per se*. Although it does not require the plaintiff to prove special or particular damage, the plaintiff must prove that he has suffered damage in order to succeed in his claim. As stated earlier,[42] and derived from the definition of nuisance itself, the tort protects a person from two types of damage or interference – interference with the use, comfort or enjoyment of his land; and physical damage to the land. Whichever type of damage has materialised, the plaintiff must prove that there has been substantial interference.

What constitutes substantial interference (and thus actionable in nuisance) differs according to which of the two recognised types of damage or interference the plaintiff has suffered.

(a) Interference with the use, comfort or enjoyment of land

These interferences are collectively known as amenity nuisance. They result in the feeling of discomfort whereby one is unable to live peacefully and comfortably on one's own land arising from the defendant's activity.

What constitutes substantial interference depends on the facts and circumstances in each case. A trivial interference does not give rise to nuisance. The courts have held that loss of one night's sleep due to excessive noise,[43] using adjoining premises for prostitution[44] or as a sex shop[45] and

40 This requirement was not met in *Khorasandjian v Bush* [1993] QB 727.
41 See further discussion below at H. Who Can Sue, pp 317-319.
42 See above at B. Damage and Remedies, pp 297-298.
43 *Andrea v Selfridge & Co Ltd* [1937] 3 All ER 255, CA.
44 *Thompson-Schwab v Costaki* [1956] 1 All ER 652.
45 *Laws v Florinplace Ltd* [1981] 1 All ER 659.

persistent telephone calls[46] all constitute substantial interference. There is no formula upon which a situation may conclusively be said to amount to substantial interference or otherwise. Decisions have to be made on a case-by-case basis, and the courts do have to take into account, whether the plaintiff's complaint is reasonably justified in the context of the surrounding circumstances.

In *Woon Tan Kan (Deceased) & 7 Ors v Asian Rare Earth Sdn Bhd*[47] the plaintiffs residents of Bukit Merah village sued the defendants, principally for an injunction to restrain the defendant company (ARE) from operating and continuing to operate its factory. The plaintiffs alleged that the activities from the factory produced dangerous radioactive gases harmful to the residents of Bukit Merah. The High Court granted a *quia timet* injunction,[48] and held that the tort of private nuisance was established.[49] Peh Swee Chin SCJ stated:[50]

> In the case of nuisance of the kind involved here, the situation complained of ought to be something over and above the inconvenience normally existing in the locality where a plaintiff and defendant both reside. There must be substantial interference with enjoyment of land ... In a nuisance of the kind involved in the present case, proof of actual damage, physical or financial or personal injury is not required, the law presumes damage here ... injury to health need not be proved ... once annoyance or discomfort is established.

It was held that since the plaintiffs' health was being affected harmfully, insidiously, significantly and to a substantial degree, this constituted substantial interference for which damage is presumed. In *Dato' Dr Harnam Singh v Renal Link (KL) Sdn Bhd*[51] the plaintiff had for eighteen years operated a clinic and hospital for the treatment of ear, nose and throat ailments. The defendant operated a renal clinic at which patients receive haemodialysis on the floor above the plaintiff's clinic. The defendant was found liable for emitting from their clinic obnoxious fumes which escaped downwards into the plaintiff's clinic.

The plaintiff, his staff and patients were found to have suffered substantial damage ranging from skin diseases, red and swollen eyes, headaches, lethargy and breathing difficulties.[52]

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46 *Khorasandjian v Bush* [1993] QB 727.

47 [1992] 4 CLJ 2299, HC; [1992] 3 CLJ (Rep) 786, HC.

48 On appeal to the Supreme Court [1992] 4 CLJ 2207, SC; [1992] 1 CLJ (Rep) 8, SC, the injunction was set aside.

49 The Supreme Court did not decide on any of the tort issues raised at the High Court.

50 [1992] 4 CLJ 2299, at 2323.

51 [1996] 1 AMR 1157.

52 Upheld on appeal in *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 3 AMR 2430, CA.

Where the interference affects the plaintiff's leisure or a purely recreational facility, the courts are generally more reluctant to pronounce the defendant's activity as an actionable nuisance, particularly if the defendant's activity brings benefit to the public[53] or the defendant's act of building on his own land, without any further activity, causes the interference.[54] Policy undoubtedly comes into play in determining reasonableness, as the courts would need to balance between on the one hand, the plaintiff's right to be involved in recreational activities on his own land and on the other, the defendant's equal right to build on his land, particularly if his activity is deemed to be of greater significance to say, the government and society generally.[55]

(b) Material or physical damage to land or property

Where actual physical damage to land occurs, the general principle is that it amounts to substantial interference and is therefore recoverable. However, it is not automatic that actual physical damage is recoverable. It must nonetheless be established that the physical damage is substantial in nature. As with amenity nuisance, it appears that what amounts to substantial interference is also a question of fact and determinable on a case by case basis. For instance, in *Darley Main Colliery Co v Mitchell*[56] minor subsidence on the plaintiff's land was not actionable. A clear example of substantial interference is found in *Goh Chat Ngee & 3 Ors v Toh Yan & Anor*.[57] The defendant who held a mining licence carried on mining work on his land. The plaintiff whose land was adjacent to the defendant's land alleged that through their mining activities the defendants had committed negligence and nuisance. The mining activities constituted an unnatural use of land, as water had escaped and flooded the plaintiff's land causing it to collapse and sink, subsequently causing flooding, erosion and settlement. The court found that a landowner had a common-law obligation not to interfere with the support structure of his neighbour's land, which is provided for under s 44(1)(b) of the National Land Code 1965. The defendant had breached this statutory duty and was also liable in nuisance for the unreasonable, unlawful and substantial interference with the use and enjoyment of his neighbour's land.

Hotel Continental Sdn Bhd v Cheong Fatt Tze Mansion Sdn Bhd[58] is another useful example. The appellants who owned a hotel were building a 20-storey

53 *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436.
54 *Hunter v Canary Wharf Ltd* [1997] AC 655.
55 In *Hunter*, the Secretary of State had designated the relevant area as an enterprise zone with the effect that planning permission was deemed to have been granted for any form of development.
56 [1886] 11 App Cas 127.
57 [1991] 2 CLJ 1163.
58 [2002] 3 AMR 3405, CA.

extension to their hotel. The respondents who owned the adjacent land claimed that the piling works of the appellants caused severe cracks to appear in their heritage building. Their application for an injunction was allowed as it was found that unless an alternative system of piling was adopted, the safety and structural stability of their building would be endangered. The Court of Appeal, on the authority of *Rapier v London Tramways Co*[59] held that once the defendant's activity constitutes an actionable nuisance in law, it is no defence that the defendant has taken all reasonable precautions to prevent it. In this case, although the piling works were temporary, it did not exclude the respondents' right to an injunction as the physical damage to their property constituted an (substantial) interference which was actionable.

2. *Unreasonableness*

The first requirement in establishing nuisance is to prove that the interference is substantial in nature. In determining what constitutes 'substantial' interference, the plaintiff must further prove the interference to be unreasonable. The unreasonableness of the defendant's activity is the second requirement in establishing nuisance. The following factors have been used as guidelines by the courts in order to determine whether an interference is unreasonable (and therefore substantial), and actionable.

Two important points must be borne in mind throughout the discussion of these factors. One is that, unless otherwise stated; none of the factors are conclusive of whether the interference is unreasonable or otherwise. They are merely relevant considerations to be taken into account. Secondly, because a substantial interference may amount to unreasonable interference and *vice versa*, quite often the courts have held defendants' activities as being actionable nuisances on the basis that they constituted *both* substantial and unreasonable interferences. It is important to realise that the two elements of nuisance are interconnected and interdependent.

That there is no clear-cut definition as to what constitutes unreasonable interference may be seen in the House of Lords' decision in *Hunter v Canary Wharf Ltd.*[60] The plaintiffs claimed damages in respect of interference with their television reception, for a period of two years, caused by the defendants' nearby building which was 250 metres high. The court held that in the absence of an easement the mere presence of a neighbouring building did not give rise to an actionable nuisance. The court however, acknowledged that interference with television reception may amount to an amenity nuisance in appropriate circumstances.[61] Generally, for an action in private nuisance

59 [1893] 2 Ch 588.
60 [1997] AC 655, HL.
61 It did not elaborate what would qualify as 'appropriate circumstances'.

to lie in respect of interference with the plaintiff's enjoyment of his land, it has to arise from something emanating from the defendant's land, examples being – noise, dirt, fumes, a noxious smell, vibrations and suchlike.[62]

(a) Damage and location of the plaintiff's and defendant's premises

The location of the plaintiff's and defendant's premises are relevant considerations in assessing whether the defendant's activity is unreasonable and amounts to substantial interference.

In *St Helen's Smelting Co v Tipping*[63] the plaintiff owned a rubber estate which was situated in an industrial area. The smoke from the defendant's copper-smelting factory had caused considerable damage to the plaintiff's trees. Lord Westbury LC distinguished between 'sensible injury to the value of property' or 'material injury' (physical damage), and injury in terms of personal discomfort (non-physical damage). For the latter type of damage, his lordship stated that the level of interference must be balanced with surrounding circumstances, and the nature of the locality must be taken into account. For instance a person cannot expect the air in an industrial area to be as fresh and clean as the air in the mountains. If however, the interference causes physical damage to property, then the locality or surrounding circumstances is irrelevant. An occupier of land must be protected from physical damage no matter where he is. Location is therefore an important factor when the interference is merely to the use, comfort and enjoyment of land as opposed to physical damage to property.[64]

For non-physical damage, Lord Wright in the case of *Sedleigh-Denfield v O'Callaghan*[65] laid down the test of liability as being what is reasonable in accordance with common and usual needs of mankind in a society, or in a particular area. His Lordship stated[66]:

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in ... a particular society ...

62 *Hunter v Canary Wharf Ltd* [1997] AC 655, at 685 *per* Lord Goff.
63 [1865] 11 HL Cas 642.
64 See also *Chan Jet Chiat v Allied Granite Marble Industries* [1994] 3 MLJ 495.
65 [1940] AC 880; [1940] 3 All ER 349.
66 [1940] AC 880, at 903.

This 'balancing exercise' in cases of non-physical damage (or amenity nuisance) was in the plaintiffs' favour in *Bliss v Hall*[67] and *Sturges v Bridgman*.[68] In *Bliss v Hall*, the defendant managed a factory for three years and during this time smoke, smell and other remittances came from the factory. The plaintiff moved into a house near the factory. In an action against the defendant, the latter raised the defence that it (the factory) had been there before the plaintiff. The court held that a defence that an activity has been going on before an action is brought to halt the activity is inapplicable as the plaintiff too, had his rights; one of which was the right to clean air. In *Sturges v Bridgman*, the plaintiff physician claimed against his neighbour over the noise arising from the neighbour's confectionery business. The court took into consideration the fact that the area consisted of many medical specialists' consulting rooms and the plaintiff's claim was allowed.

So what constitutes unreasonable and substantial interference has to be looked at in context. Certainly in amenity nuisance cases, the location of the premises (particularly the plaintiff's) would give an indication whether the defendant's activity actually constitutes an unreasonable and substantial interference to the plaintiff. What is regarded as excessive within that locality would generally be actionable.[69] For instance, in *Syarikat Perniagaan Selangor Sdn Bhd v Fahro Rozi, Mohdi & Ors*[70] the appellant who had a lease over a piece of land had agreed and promised to use the land as a skating rink, restaurant and a cinema. The appellant subsequently built an open stage and staged some shows. He also opened a discotheque. The court held that people who lived in the urban area must be prepared to accept a lot of noise from their neighbours and he himself may make noise; but no one however, has the right to create excessive noise. Similarly a person is not required to tolerate an excessive level of noise which is unreasonable and is a nuisance.

However it should be noted that the character of a locality may change over time, so that the same activity may give rise to an actionable nuisance at one time but not at a later time. *Gillingham BC v Medway (Chatham) Dock Co Ltd*[71] is a good example. Here planning permission had been granted to the defendant to build a commercial port and the reason behind this was so that it would be of benefit in terms of creating employment for the community in that area. It was agreed that the defendant would have unrestricted access to the area for construction purposes. Construction was done twenty-four hours a day and the heavy vehicles had to pass through a residential area to

67 [1838] 4 Bing NC 183.
68 [1879] 11 Ch D 852.
69 *Gaunt v Fynney* [1872] 8 Ch App 8.
70 [1981] 2 MLJ 16, FC.
71 [1992] 3 All ER 923.

get to the site. In 1988, five years after the planning permission was granted to the defendant, the plaintiff alleged that the defendant was interfering with the comfort of the residents in that area and was therefore committing public nuisance. The court held that whenever planning permission is granted, it is for the purposes of either renewing or changing the use of the area, and whether an act gives rise to a public nuisance or not must be measured with the circumstances in that same area in line with the renewal or changed use of that area, at that time and not the time before it. Therefore, since in 1983 permission was granted for the purpose of converting the place into a commercial area, which included the agreement that construction would be carried out for twenty-four hours per day, the plaintiff's claim failed.

The principle arising from *Gillingham* ought not be taken literally – that planning permission will automatically change the characteristics of a neighbourhood. Indeed the suggestion of the Court of Appeal[72] should be taken into account – that in deciding whether planning permission has changed the character of a particular neighbourhood, the answer should only be in the affirmative if and only if, the planning permission has been granted. Before its grant, the court should not consider its application as automatically being in favour of the defendant, as this could lead to a premature and unfair extinction of the plaintiff's rights to the use, comfort and enjoyment of his land.

The general principle remains that what is regarded as excessive in a particular locality would generally be accepted as unreasonable and amounts to a substantial interference. However, the balancing of conflicting interests can sometimes give rise to unpredictable and unexpected outcome. *Murdoch v Glacier Metal Co Ltd*[73] is one such case, where it was held that despite being exposed to continuous loud noise from a factory during the night, the plaintiff's claim in nuisance could not succeed. The court found that there was no automatic common law nuisance when sleep was disturbed. In this case the proximity of the plaintiff's property to a busy bypass played a role in negativing the actionability of the plaintiff's claim.

(b) Public benefit of the defendant's activities

If the object of the defendant's conduct benefits the society generally, it is more likely that the conduct will not be deemed unreasonable. Nevertheless, the defendant's activity which benefits the public will still constitute actionable nuisance if the activity causes damage to property or substantial interference to the plaintiff's enjoyment of his land. So a claim in nuisance for the building of schools, factories, government hospitals and power stations,

72 In *Wheeler v JJ Saunders Ltd* [1995] 2 All ER 697, at 711.
73 *The Times*, January 21, 1998, CA.

although giving rise to interference in the form of noise and dust to nearby residents, would probably be denied on the basis of the utility derived from the construction of the facilities.

Perbadanan Pengurusan Taman Bukit Jambul v Kerajaan Malaysia[74] is illustrative. The defendant renovated some units in a flat managed by the plaintiff in order to set up a government clinic. The plaintiff argued that the renovation was not only conducted without their approval, but that it caused pipe and drain blockages. Further, the renovated units intruded into the common five-foot pathway, thereby causing nuisance.

The court denied the plaintiff's claim. It held that whether something amounted to nuisance or not must be considered with reference to local circumstances and surroundings. An inconvenience does not necessarily give rise to an actionable nuisance. The purpose of the renovation provided substantial public benefit. On the facts the defendant had provided a new five-foot way and so no nuisance was created in this aspect. On the issue of approval it was found that consent was given to the defendant by the plaintiff's predecessor and on the principle of equitable estoppel the plaintiff was estopped from going back on the consent given by their predecessor.

Even if the defendant's activity gives rise to public benefit, this does not automatically mean that his activity is not actionable. An example is *Adams v Ursell*.[75] The defendant was in the trade of selling fried fish. The shop was located in the residential part of a street. Faced with a claim for an injunction, he argued that his business benefited the public, especially the poor and therefore the smell produced by his trade was justified. The court rejected the defence as the plaintiff's comfort and convenience also had to be considered.

Kennaway v Thompson[76] further held that even if the defendant's activity gives benefit to the society generally, it does not justify substantial interference to the plaintiff. If the plaintiff suffers any physical damage, then the plaintiff's right to comfort and enjoyment overrides any public benefit that may be derived from that activity.

(c) Extraordinary sensitivity on the part of the plaintiff

The law of nuisance is not sympathetic to a plaintiff who is extra sensitive, whether the sensitivity is related to the plaintiff himself or to his property. If the only reason why a plaintiff complains of dust is because he has an

74 [2000] 1 AMR 228.
75 [1913] 1 Ch 269.
76 [1981] QB 88.

unusually sensitive skin, his claim will probably fail. Sensitivity however, is irrelevant once unreasonable and substantial interference is proved, for once nuisance is established, the fact that the damage is more than what is reasonably expected, due to the sensitivity of either the plaintiff or his property, becomes irrelevant. In short, sensitivity cannot be used as a basis for claiming that the defendant's conduct constitutes an unreasonable and substantial interference, but once unreasonable and substantial interference is established, sensitivity will not deprive the plaintiff from obtaining a remedy. In *McKinnon Industries Ltd v Walker*[77] the defendant's factory emitted noxious fumes which damaged the plaintiff's commercially grown and delicate orchids. The court found the defendant liable as the fumes would have damaged flowers of ordinary sensitivity.

By contrast, in *Robinson v Kilvert*[78] the defendant was in the business of making paper boxes. The process involved using hot air. The plaintiff who lived in the floor above the same premises was in the business of selling special paper which was sold according to weight. Naturally, the hot air from the defendant's place caused the moisture in the plaintiff's papers to dry up. The raised temperature in the plaintiff's premises did not inconvenience the plaintiff's workers and it would not have affected normal paper. The court denied the plaintiff's claim for compensation on the ground that ordinary paper would not have been affected by hot air, and therefore the plaintiff's property was extra sensitive.

In *Bridlington Relay v Yorkshire Electricity Board*[79] the plaintiffs owned a television and radio station. The defendants which were the Board responsible for the supply of electricity in the area, erected an electrical powerhouse in the same area. The plaintiffs, believing that the power line would cause interference to the reception of television and so would damage their business, applied for a *quia timet* injunction. The court held that a person cannot hold his neighbour liable just because he uses his property in a special way, whether it be for a commercial or personal purpose. The use of the plaintiff's aerial for this particular kind of business was use of a special kind, which was particularly vulnerable to interference and his claim was denied. In this case television viewing was held to be purely recreational and the interference was not substantial interference. However, television viewing is much more common nowadays than it was at the time *Bridlington* was decided and so perhaps the decision would not stand today should the same facts arise before the courts.[80]

77 [1951] 3 DLR 577, PC.
78 [1889] 41 Ch D 88.
79 [1965] 1 All ER 264.
80 Indeed this was stated in Canada in *Nor-Video Services Ltd v Ontario Hydro* [1978] 84 DLR (3d) 221.

(d) Interference must be continuous

The interference must be something that is continuous or occurs very often, as generally a continuous activity will constitute substantial interference. This requirement is not conclusive but it is certainly a factor in deciding whether the interference is substantial or otherwise. For instance, where the roots of a tree belonging to the defendant had spread to the neighbouring property and caused structural cracking to that property, such interference amounted to continuing nuisance until the completion of remedial works.[81] Yet a temporary interference has been held to constitute a nuisance.[82] An isolated incident has also been held to constitute a nuisance, if the incident is due to a dangerous state of affairs on the defendant's premises.[83] In any case the recurrence of the interference is a relevant consideration.

(e) Temporary interference and isolated incident

It has been stated above that one of the relevant considerations in establishing nuisance is that the interference must be continuous. As stated, this factor is not conclusive and that a temporary interference or an isolated incident may constitute nuisance. The general principle is that the more serious the interference, the more likely the court will regard it as unreasonable. For instance in *MBf Property Services Sdn Bhd v Madihill Development Sdn Bhd (No 2)*[84] the construction of a road over the defendant's land for the purposes of connecting two pieces of the plaintiff's lands was an actionable nuisance as the road was tarred, pre-mixed and thus permanent in nature. A mandatory injunction was accordingly granted to the defendant.

In cases of temporary interference, the courts are likely to be reluctant to grant an injunction except in extreme cases, for instance where damages will not be an adequate remedy.[85] If the plaintiff is claiming for damages as opposed to an injunction, the nature of injury suffered by him will be a relevant factor in determining whether the temporary interference is an actionable nuisance. If his injury is temporary the court may hold that the interference is too trivial to be considered as a nuisance. An example is where a person suffers inconvenience while his neighbour is renovating his house.

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81 *Delaware Mansions Ltd v Westminster City Council* [2001] 4 All ER 737, HL.

82 *Matania v National Provincial Bank Ltd and Elevenist Syndicate Ltd* [1936] 2 All ER 633 (temporary noise and dust).

83 *Spicer v Smee* [1946] 1 All ER 489.

84 [1998] 4 CLJ 136.

85 See *Hotel Continental Sdn Bhd v Cheong Fatt Tze Mansion Sdn Bhd* [2002] 3 AMR 3405, CA.

Cases of isolated incidents require a slightly different consideration and the principles of law may be better understood in the light of the following cases.

In *Sedleigh-Denfield v O'Callaghan*[86] the defendants were held liable in nuisance when as a result of allowing a culvert on their land to remain blocked, the plaintiff's adjoining property was flooded. The court held that flooding on the plaintiff's land was foreseeable as a result of the state of affairs on the defendants' land.[87]

In *Spicer v Smee*[88] the plaintiff's house was burnt down due to a defective wiring system in the defendant's adjoining house. The court found the defendant liable as there was a dangerous state of affairs on his premises. Atkinson J stated[89]:

> ... private nuisance arises out of a state of things on one man's property whereby his neighbour's property is exposed to danger.

In *British Celanese Ltd v AH Hunt (Capacitors) Ltd*[90] the defendant, a manufacturer of electrical components kept strips of metal foil in his factory. These strips of metal foil were blown away by the wind to an electrical powerhouse and caused a disruption to the electrical supply in the area, which consequently damaged the plaintiff's machines and materials resulting in the loss of production.

The court held that one incident may give rise to a nuisance[91] and the defendant was found liable as the damage was not too remote.

Recoverability under this principle was further explained in the case of *SCM (UK) Ltd v WJ Whittall & Son Ltd*[92] where the court held that a single escape may give rise to a nuisance, but it must be proved that the nuisance is as a result of a dangerous state of affairs on the defendant's premises or land or arising from the activities carried out on the land. The gravity of the harm and the frequency of the escape are factors taken into account in determining whether a dangerous state of affairs existed on the defendant's land. It appears

86 [1940] 3 All ER 349.
87 See also, *Leakey v National Trust* [1980] 1 All ER 17, below at p 323.
88 [1946] 1 All ER 489.
89 *Ibid* at p 493.
90 [1969] 2 All ER 1252.
91 Relying on *Midwood & Co Limited v Mayor, Aldermen, and Citizens of Manchester* [1905] 2 KB 597 where the plaintiff recovered for explosion of inflammable gas on the defendant's premises which set fire to the plaintiff's premises and caused damage to his goods.
92 [1970] 1 WLR 1017.

that there must be foreseeability of damage to the plaintiff arising out of the condition on the defendant's land, premises or property before the defendant will be found liable.

In *Thean Chew v The Seaport (Selangor) Rubber Estate Ltd*[93] the plaintiff's husband suffered injuries from which he later died when a diseased rubber tree belonging to the defendant fell onto the highway, and onto the lorry in which the deceased was travelling. The defendant was found liable in nuisance as he had failed to remedy the dangerous state of his property within a reasonable time after he did or ought to have become aware of it.

Therefore if a person has not caused or permitted to exist on his premises a source of danger which may give rise to material injury to the property of his neighbour, he cannot be liable in nuisance.[94]

In *Leong Bee & Co v Ling Nam Rubber Works*,[95] a fire broke out in the early hours of one morning in a factory building occupied by the defendants. The fire spread to the building next door which was owned and occupied by the plaintiffs, destroying the latter building. The Privy Council, in dismissing the plaintiff's appeal held that since there was no dangerous state of affairs on the defendants' premises, the only duty that the defendants owed to the plaintiffs in respect of a fire not caused by any act or omission of theirs or of any servant or agent of theirs was a duty based upon knowledge of a fire, ability to foresee the consequences to the plaintiffs of not checking their (the defendants') premises and the ability to abate it. In this case it was found that there was no evidence of any failure of such duty on the part of the defendants and therefore no liability in nuisance was established.

The circumstances in which a temporary or isolated interference may constitute an actionable nuisance may be summarised thus:

(a) The general principle is that the length of time and therefore persistence of the interference is taken into consideration in establishing nuisance. If the interference is continuous, it is very likely to constitute an unreasonable and substantial interference, except if the plaintiff suffers from an abnormal or extraordinary sensitivity. If the interference is temporary or occasional, the general rule is that there will be no liability as we are expected to put up with a certain amount of interference from our neighbours, such as if a neighbour conducts repairs to his house for the duration of two weeks or even a month, provided that he has taken all reasonable precautions to avoid any inconvenience to his neighbours.

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93 [1960] 26 MLJ 166.
94 See also *Sheikh Amin bin Salleh v Chop Hup Seng* [1974] 2 MLJ 125.
95 [1970] 2 MLJ 45, PC.

(b) A temporary interference may give rise to an actionable nuisance if the interference causes physical damage, thereby making the interference substantial. With regards to remedies, an injunction might not be readily granted if the interference is temporary or occurs intermittently. This is because an injunction is an equitable remedy and will not be granted if an award of damages would be sufficient. When damages is prayed for, the length of time of the interference is an important factor. The court will then consider whether the defendant's activity is reasonable or otherwise in the circumstances.

(c) If the interference occurs only once, thereby making it an isolated interference, the principle is that the defendant will only be found liable if and only if, there is a pre-existing dangerous state of affairs on his premises for which damage to the property of the plaintiff is reasonably foreseeable.

(f) Malice

The existence of malice *may* cause the defendant's act to be unreasonable. This is not a certainty in all cases and the facts of each case have to be considered.

In *Christie v Davey*[96] the plaintiff was a music teacher who conducted music classes at her house. Her neighbour, the defendant, did not like the sounds from the musical instruments and in turn shouted, banged at the adjoining walls, and clashed pots and pans whilst the plaintiff was conducting her classes. The court found that the defendant was malicious in his actions and an injunction was granted to the plaintiff.

In *Hollywood Silver Fox Farm Ltd v Emmett*[97] the plaintiff bred special foxes which were extremely sensitive during their breeding season. The defendant intentionally let out a few gunshots near the foxes's cages with the aim of causing damage. The court found the defendant liable. Even though the plaintiff here used his premises for a particular purpose which was extraordinarily sensitive, nevertheless the defendant's act was unnecessary and malicious, rendering it unreasonable; and therefore the fact that the plaintiff's property was 'sensitive' was irrelevant.

The two cases above must be distinguished from *Bradford Corporation v Pickles*[98] where the defendant deliberately prevented the flow of water on his land so that the plaintiff's land received less water. The court held that

96 [1893] 1 Ch 316.
97 [1936] 2 KB 468; [1936] 1 All ER 825.
98 [1895] AC 587, HL.

since the plaintiff did not have a right to an unlimited and continuous supply of water, the defendant was not interfering with any right of the plaintiff that was recognised by the law. The defendant's act was in fact lawful and his bad motive was irrelevant.[99]

The distinguishing factor is that in *Bradford's* case the defendant's act was lawful and did not constitute any actionable interference to the plaintiff's right as the plaintiff had no such right. In contrast, in both *Christie v Davey* and *Hollywood Silver Fox Farm Ltd v Emmett* the defendant interfered with a legally protected interest of the plaintiff which was to indulge in their interests on their land, namely to conduct music lessons on her premises and to breed special foxes on his land, respectively. Since the existence of interference was established the only issue was whether the interference was unreasonable for it to constitute a nuisance.

H. Who can sue

The law of private nuisance has traditionally protected interests in land. Consequently only a person who has some proprietary or other interest in land can maintain an action. This includes a landowner, an occupier whether as tenant, lessee or a person who is in actual possession.[100] A reversioner (a landowner who is not in occupation at the time the interference takes place but who is expected to resume occupation at a future date) may also sue if he can prove that there is a likelihood of permanent damage or interference to his land and in such a situation his interest co-exists with the right of the occupier. The permanent damage or interference is one which continues indefinitely unless something is done to remove it.[101] Examples are where an adjoining landowner constructs a house with its eaves projecting into his neighbour's land and discharging rainwater onto it,[102] and vibrations causing physical damage to the reversioner's property.[103]

If the damage or interference is of a temporary nature such as the emission of noise or smoke, the reversioner is not entitled to claim. This is regardless of the likelihood of such interference recurring in the future, or that the interference has caused tenants to leave the premises or that it has reduced the letting value of the premises.[104] This rule that the person who sues must

99 This principle was affirmed in *Allen v Flood* [1898] AC 1 and followed in both *Langbrook Properties Ltd v Surrey County Council* [1969] 3 All ER 1424 and *Stephens v Anglian Water Authority* [1987] 3 All ER 379; [1987] 1 WLR 1381.

100 *Foster v Warblington UDC* [1906] 1 KB 648, CA.

101 *Jones v Llanrwst UDC* [1911] 1 Ch 393.

102 *Tucker v Newman* [1839] 11 Ad & El 40.

103 *Colwell v St Pancras BC* [1904] Ch 707.

104 *Simpson v Savage* [1856] 1 CBNS 347.

have either a proprietory or possessory interest in the land was illustrated in *Malone v Laskey*,[105] where the wife of an occupier suffered personal injuries caused by a bracket falling off the wall onto her head. The mishap was due to vibrations coming from the defendant's adjoining premises. The court denied her remedy as she did not have any interest in the land.

In 1993 the majority of the Court of Appeal in England extended the category of persons entitled to sue in *Khorasandjian v Bush*.[106] Here the defendant could not accept the plaintiff's rejection of his advances towards her and began to harass her. He pestered her with telephone calls.

The court found that following *Janvier v Sweeney*,[107] which held that verbal threats which are calculated to cause harm, and actually does cause harm, are actionable; the plaintiff in this case could suffer illness through the cumulative effect of continued and unrestrained further harassment. The court further held that telephone harassment is an actionable interference with her ordinary and reasonable use and enjoyment of property where she is lawfully present, and the harassment may be restrained *quia timet* and without further proof of damage.

Thus an interlocutory injunction was granted *quia timet* notwithstanding the plaintiff was a mere licensee in her mother's property and had no proprietary interest. However, the inclusion of someone who has no proprietory interest in land to sue, was short-lived. The rule that only those who have an interest in land may sue has been reasserted and confirmed in *Hunter v Canary Wharf Ltd*.[108] This refers to someone who has the right to exclusive possession of the land, such as a freeholder or a tenant in possession, or a licensee with exclusive possession. A reversioner may sue in respect of a nuisance of a sufficiently permanent character which may damage his reversion. The action is usually brought by a person in actual possession, although he cannot prove title to the land. A mere licensee however, has no right to sue. So members of the occupier's family be it spouse, children and parents; or guests, lodgers or even workers, would not be entitled to sue.

Hunter further held that personal injuries *per se* are not recoverable in an action for private nuisance. Nuisance by encroachment and direct physical damage to the land or property is clearly recoverable. Where a plaintiff

105 [1907] 2 KB 141, CA.

106 [1993] 3 All ER 669; [1993] QB 727, CA.

107 [1919] 2 KB 316.

108 [1997] 2 All ER 426, HL. See also *Pemberton v Southwark London BC* [2000] 3 All ER 924, CA (tolerated trespasser had exclusive possession, although precarious, of property, and could claim in nuisance).

suffers from interference to his use, comfort and enjoyment of the property (amenity nuisance), it is recoverable on the basis that there has been a diminution in the value of the land.[109]

I. Who can be sued

Three categories of persons are potentially liable in private nuisance. They are creators of the interference, occupiers and landlords.

1. Creator

The source or creator of the interference, whether or not he occupies the land from which the interference emanates, will be liable for the nuisance. For instance, if an employee rears animals on a piece of land for his employer-licensee, and the latter does not ensure that the waste of the animals are properly channelled out of that land, he will be liable even though it is the employee and not the licensee himself, who is in occupation of the land. This is because the licensee will be deemed to have been invested with the management and control of the premises.[110] The question is who authorises the activity and whether interference is foreseeable from that activity.[111] There is no requirement that the defendant creator must have an interest over the land or that the land belongs to him.

An example is *Marcic v Thames Water Utilities Ltd.*[112] The defendant company was a statutory sewerage undertaker. It was responsible for the removal of sewage in the area where the claimant lived. Over time, the sewers became inadequate for removing surface and foul water which had on occasion been discharged into the claimant's front and back garden. His house was also damaged. The court held that as owners and those in control of the sewers, the defendant company had a duty to do whatever was reasonable in the circumstances to prevent such hazards from damaging property belonging to others. The court found that the company had or should have had knowledge of the hazard and it was within their capabilities to abate the nuisance.

2. Occupier

In private nuisance suits, it is usually the case that the defendant is the occupier of the land from which the interference emanates. He will be liable for all positive acts of interference, including omissions which give rise to a

109 Not the *capital* value of the land, but its *amenity* value.
110 *Southport Corporation v Esso Petroleum Ltd* [1953] 2 All ER 1204.
111 *Tetley v Chitty* [1986] 1 All ER 663.
112 [2002] 2 All ER 55, CA.

nuisance.[113] The occupier may also be liable for the acts and omissions of third parties in the following situations:

(a) Servant or employee

An occupier is liable for the nuisances caused by persons who are subject to his control, based on the principles of vicarious liability.[114]

(b) Independent contractor

An occupier may also be liable for the act or omission of an independent contractor in circumstances where the duty is 'non-delegable'.

In *Bower v Peate*[115] the defendant was found liable when his independent contractor undermined the support for the plaintiff's adjoining house. The principle that arose from this case is: if the nature of work that a man employs another to do is expected to give rise to injurious consequences to his neighbour, he must do all that is necessary to prevent the injury from materialising and he cannot pass over this burden to the independent contractor. The duty of care on his part is 'non-delegable'.

In *Matania v National Provincial Bank*[116] the occupier was held liable to the plaintiffs who lived on higher floors of the same building when his independent contractors produced a lot of dust and noise in the performance of their job. The court held that there was a special danger of nuisance arising from the work and the occupier was therefore liable for the failure of his independent contractors to take precautions. If the source of the danger is not on the highway but is on the occupier's land which is adjacent to the highway, and the independent contractor is employed to do work on the occupier's land but creates interference on the highway, liability of the occupier for his independent contractor's interference on the highway depends upon whether the work involves any special risk to users of the highway, for if no such risk is foreseeable the occupier will not be liable for the contractor's lack of care.[117]

A defendant who has statutory authority to interfere or conduct work on the highway owes a duty to the general public to exercise his statutory authority carefully, and this duty cannot be delegated to an independent contractor.

113 *McGowan & Anor v Wong Shee Fun & Anor* [1966] 1 MLJ 1.
114 *Spicer v Smee* [1946] 1 All ER 489.
115 [1876] 1 QBD 321.
116 [1936] 2 All ER 633.
117 *Salsbury v Woodland* [1970] 1 QB 324.

So if his contractor causes interference or creates danger, or is negligent with the result that someone suffers special damage, the defendant will be held liable.[118]

(c) Trespasser

The leading case is *Sedleigh Denfield v O'Callaghan*[119] where the defendant owned a piece of land on which there was a big ditch. A trespasser subsequently placed a pipe in the ditch without the knowledge of the defendant, but the person who was responsible for cleaning the ditch knew about the piping of the ditch. No proper precautions were taken to ensure that the pipe would not be clogged up with leaves. During one extraordinarily heavy rainfall the pipe was clogged and the plaintiff's land, which was adjacent to the defendant's land, was flooded. The heavy rain in fact occurred three years after the pipes were placed in the drain. The court found the defendant liable as his employee, who cleaned the ditch should have known that the condition of the pipes gave rise to a risk of flooding and this knowledge was imputed to the defendants. It was stated that[120] when a nuisance has been created by the act of a trespasser or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement.

(d) Licensees

The question of whether an occupier, a highway authority; may be liable for interference committed by a third party on the highway arose in *Parimala a/l Muthusamy & Ors v Projek Lebuhraya Utara Selatan.*[121] The defendant was the highway authority responsible for the construction, maintenance, management and safety of the North-South Highway. The plaintiffs were travelling in a car driven by the deceased when it hit a stray cow which had found its way onto the highway through a breach in the fencing system. The court reiterated the principle that a person can claim in nuisance if his right of free passage or some rights connected to it have been interfered with.[122] However, an occupier of land upon which a nuisance has been created by another person is only liable if he continues the nuisance. The occupier is deemed to continue a nuisance if with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end

118 *Holliday v National Telephone Co* [1899] 2 QB 392.
119 [1940] 3 All ER 349, HL.
120 *Ibid* at p 357; initially a statement of law in *Salmond on Torts*, 5th edn at 258-265.
121 [1997] 4 AMR 3274.
122 See *Howard & Wife v Walker & Ors* [1947] 2 All ER 197.

though with ample time to do so.[123] In this case the court found that it could not be ascertained that the defendant knew or could be said to presume to know that at the relevant time a breach of the fence had occurred, or that a cow was strolling on the highway. Consequently, the defendant could not be said to continue the nuisance since its foreknowledge was not conclusive.[124]

In the English case of *Lippiatt v South Gloucestershire Council*[125] a group of travellers had for a few years occupied the defendant council's land. The plaintiffs who were tenant farmers of adjacent land alleged that the travellers had frequently trespassed on their land, and carried out various activities including dumping rubbish which ultimately interfered with the plaintiffs' use and enjoyment of their farmland. They further alleged that the council was aware of, and tolerated the travellers' conduct. The court found the travellers to be licensees, which meant that the defendant council was the legal occupier of the land. Thus it may be said that it has created the nuisance by allowing the licensees to occupy his land and use it as a base for causing unlawful disturbance to his neighbours. It did not matter that the activities took place on the plaintiffs' land.

(e) Natural causes

Liability for nuisance due to interference caused by acts of nature shares the same principle as that for interference caused by trespassers or third parties, in that the occupier will be liable if the occupier knows or ought to know of the interference.

In *Goldman v Hargrave*[126] a tree, a hundred feet high, on the defendant's land was struck by lightning and started to burn. The defendant requested a third party to fell the burning tree and to saw it into sections, but he did not take any reasonable steps to douse the burning tree after it was felled and sawn into sections. Due to a strong wind and a rise in temperature, the fire spread to the plaintiff's property, causing damage. The court held the defendant liable as there was proof that damage was foreseeable as a result of the defendant's inaction. Thus an occupier must take reasonable steps to remedy a potentially hazardous state of affairs, including those that arise naturally.

123 Citing Lord Romer in *Sedleigh-Denfield v O'Callaghan & Ors* [1940] AC 880, at 913.

124 Is the test subjective or objective? *Sedleigh* arguably laid down an objective test, which is: should the defendant have known about the interference? But the court in *Parimala* interpreted the test subjectively. A related *quaere* is: does foreknowledge relate to the actual interference or does it extend to the *probability* of such an interference, taking into account the surrounding neighbourhood?

125 [1999] 4 All ER 149, CA.

126 [1967] 1 AC 645, PC.

The principle in *Goldman* was adopted in *Leakey v National Trust.*[127] Here the defendants owned a piece of land consisting of a conical shaped hill composed of soil which made it peculiarly liable to cracking and slipping as a result of weathering. The plaintiffs were house owners who lived at the base of the hill. For many years the plaintiffs had to put up with slides of soil, rocks, tree-roots and other debris on their land from the hill. The weathering process finally caused a large crack on the bank from which the hill rose and there was a danger of collapse of that part of the defendants' land onto one of the plaintiff's houses. The plaintiff complained but no action was taken. Several weeks later the bank fell near the plaintiff's house and in fact further falls would have put the house at risk. The defendants refused to clear the fallen earth and debris, and claimed that they were not responsible for what had happened. The plaintiffs then spent money to clear the material and to conduct some protective works and prayed for an injunction requiring the defendants to remove some debris and to prevent future falls of earth, soil and tree-stumps, and damages for nuisance. The Court of Appeal upheld the earlier decision in favour of the plaintiff and stated that a general duty is imposed on occupiers in relation to hazards occurring on their land, whether the hazards were man-made or natural. If an occupier knows that there is a natural hazard on his land, whether it is in the form of something growing on the land, the soil itself or something on the land and this hazard encroaches or threatens to encroach onto another's land so that the other person might suffer damage, the occupier is under a duty to prevent or minimise the risk of damage from materialising. The plaintiff must prove that the occupier knows or ought to know of the risk of encroachment.

In cases where the dangerous state of affairs exist naturally, the defendant's financial and other resources are taken into account. If the expenditure required to discharge the duty to avoid or minimise the interference is substantial, then arguably if the occupier does not take action, he cannot be blamed for not averting the risk.

Rowlatt J in *Noble v Harrison*[128] stated:

> ... a person is liable for a nuisance constituted by the state of his property: (1) if he causes it; (2) if by the neglect of some duty he allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.[129]

127 [1980] 1 All ER 17, CA.

128 [1926] 2 KB 332, at 338; [1926] 1 All ER Rep 284, at 287.

129 Cited and followed in *Thean Chew v The Seaport (Selangor) Rubber Estate Ltd* [1960] 26 MLJ 166.

In *Wu Siew Ying v Gunung Tunggal Quarry & Construction Sdn Bhd & Ors*[130] the plaintiff's plant nursery was destroyed when a natural limestone hill collapsed and fell onto it. The landslide occurred after a heavy rainfall and severe thunderstorm. The plaintiff sued, amongst others, the first defendant, the operator of a quarry on the limestone hill on a plot adjacent to the plaintiff's land. The plaintiff's case in nuisance was that *Leakey* applied – that a person in control of land which has a natural hazard which encroached into the land of another and caused damage, is liable in the absence of reasonable measures to prevent or minimise a known or foreseeable damage. The court however held that *Leakey* is inapplicable in Malaysia by virtue of s 3 of the Civil Law Act 1956[131] and the common law position as it existed before April 7, 1956 was applicable – that the plaintiff must prove that the damage to his property is as a result of the defendant's activity and not due to the latent defect of the limestone hill. Following this pre-*Leakey* principle, the plaintiff's claim could not succeed as he could not prove decisively that the collapse of the hill was caused by the quarrying operation. The court further held that even if *Leakey* was applicable, the plaintiff would not have been able to prove that the first defendant knew or ought to have known that the hill would collapse.[132]

In England the principles governing liability of occupiers for natural nuisances has been further refined in *Holbeck Hall Hotel Ltd v Scarborough Borough Council*.[133] Here the claimants owned a seaside hotel which stood on a cliff overlooking the sea. The hotel collapsed when parts of the cliff on which it rested slipped into the sea. In an action for damages against the defendants, who owned and occupied the cliff area, the Court of Appeal affirmed the lower court's finding that the defendants were or should have been aware of the danger, that they owed a duty to take reasonable steps to reduce any threat to the claimants' property caused by the potential failure of the support provided by their own land.

The court applied *Leakey* – that an occupier could be liable for damage to neighbouring property which is caused by a state of affairs arising naturally on his own property.[134]

However, liability will only be established subject to these factors: where the type and the extent of the harm is foreseeable. Secondly, the occupier is said to adopt or continue the nuisance only after he is aware or should be

130 [1999] 4 CLJ 339.

131 Act 67.

132 It is the author's view that on principle, the second reasoning is to be preferred.

133 [2000] 2 All ER 705, CA.

134 Stuart-Smith LJ at p 718 held that there is no difference in principle between a danger caused by loss of support or any other hazard or nuisance such as encroachment, physical damage or building activities on the defendant's land.

aware of the danger such state of affairs is posing to neighbouring property, *and* he omitted to take reasonable steps to remove or reduce the threat. A related factor is that the danger must be a patent, rather than a latent danger; obvious as opposed to being discoverable only by further investigation.

As the danger of the fatal slip in this case could not have been discovered without further geological investigation, it followed that the magnitude of the damage was unforeseeable and thus outside the scope of the duty owed.

(f) Conduct of previous occupier

If the interference had existed before the defendant occupier acquired the property, he will be liable if the plaintiff can prove that he knows or ought to know of its existence; but not otherwise.[135] So if an occupier has not created the interference and does not know about it he will not be held liable. If he has created it, he will be liable even after he has left the premises.

In summary, an occupier's liability for nuisance is as follows: the general principle is that an occupier is not liable for the act of, or condition created by a trespasser, or due to natural causes. He will however, be liable if he 'accepts' the situation for his own purpose; or if he 'continues' the interference. An occupier is deemed to continue the interference if he is aware of, or ought to be aware of the interference and he does not take reasonable steps to rectify the situation. What amounts to 'reasonable steps' is subject to his capability in the circumstances.

The test is an objective one, which is: would a reasonable man be aware that an interference may result from the prevalent circumstances? Beyond that, the test then becomes subjective in that the particular defendant's ability and means to rectify the interference is taken into account in order to determine whether he has discharged his responsibility in combating or lessening the interference.

3. Landowner or landlord

As a general principle a landowner who has surrendered possession and control of a certain premises will not be held liable for any nuisance that occurs on those premises.[136] There are however, three situations where the landlord may be held liable.

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135 *St Anne's Well Brewery Co v Roberto* [1928] 140 LT 1; followed in *Wilkins v Leighton* [1932] 2 Ch 106.

136 The landlord may instead invoke s 16(1)(d) of the Control of Rent Act 1966 (Revised 1988) Act 363, which provides that if a tenant or any person who resides with the tenant has been found liable for nuisance and that person is still living on the premises, the landlord may make an application to a court for the recovery or possession of the premises.

(a) If he has authorised the nuisance

Where the landlord authorises the nuisance either expressly or impliedly, he will be held liable.[137] A tenant or lessee who uses the land in accordance with and in connection with the tenant or lessee's profession or the purpose for which the land is leased has every right to use the premises for the agreed purpose, but if the agreed purpose gives rise to an unreasonable and substantial interference, the nuisance will also be attributed to the landlord.[138]

The test is whether the nuisance is something that is normal and natural as a result of the tenancy or lease. For instance in *Tetley v Chitty*,[139] a local authority was held liable when nuisance arose from go-karting activities on land which was let by it. In these circumstances the tenant may also be found liable.

If the landowner has an agreement with the tenant or lessee, and the tenant or lessee creates a nuisance in breach of the agreement, the landowner will be excluded from liability. In *Smith v Scott*[140] the defendant local authority had rented out a house to a family who had some domestic problems. This family caused a lot of nuisance to the plaintiffs who eventually had to move from their house. The court found the defendant not liable for although they were aware of the activities of the tenants, the tenancy agreement stipulated that tenants could not cause any nuisance to other people. Furthermore, the nuisance was not as a result of the tenancy, but due solely to the acts of the tenants themselves.[141] By contrast, in *Page Motors Ltd v Epsom & Ewell Borough Council*[142] it was held that a subjective test ought to be applied to an occupier for the acts of third parties who were not under his control in that if the occupier knows that a third party is causing nuisance to others, he must take reasonable steps to stop the nuisance. In this case a group of gypsies occupied the defendant local authority's land and the defendant was found liable when the gypsies' activities caused a nuisance to the plaintiff's business, as the defendant was aware of the gypsies on its land. In *Page* the defendant was an occupier whereas in *Smith v Scott* the defendant was the landlord who was not in occupation. It is submitted that there should not be any watertight distinction between the liability of an occupier or a landlord not in occupation especially where the occupier or landlord knows of the interference.

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137 *Hussain v Lancaster City Council* [1999] 4 All ER 125, CA.

138 *cf Wu Siew Ying v Gunung Tunggal Quarry & Construction Sdn Bhd & Ors* [1999] 4 CLJ 339 where the court found the landowner not liable for the collapse of a limestone hill on the basis that he did not create the state of affairs and was not the occupier of the land at the time.

139 [1986] 1 All ER 663.

140 [1973] Ch 314.

141 This case was criticised by *Merritt* [1973] JPL 154.

142 [1982] 80 LGR 337.

(b) If he knew or ought to have known of the nuisance before the tenancy became effective

Knowledge of the existence of the nuisance before the premises is let will make the landlord liable. This is based on the principle that the creator of the nuisance is liable even though he does not occupy the land himself. The tenant himself may be liable for 'accepting' or 'continuing' the nuisance and on the basis of his occupation. Even if the tenant has agreed to improve the conditions on the premises, the landlord will nevertheless be liable if the nuisance is not abated, as it is his responsibility and not the tenant's to remedy the nuisance before it causes injury to another.[143]

The landowner or landlord is also liable if he ought to have known of the nuisance at the time the tenancy commenced. This rule does not apply if it is not reasonable for him to have known of the situation giving rise to an actionable nuisance.[144] The test is therefore objective. The interference or possibility of interference ought to be known. Added to this the type of interference, be it physical damage to property or personal discomfort must be reasonably foreseeable by a person in the defendant's position.[145]

(c) If he has covenanted to repair or has a right to enter the premises to conduct repair works

Generally, if the nuisance occurs after the tenant has occupied the premises, liability of the landlord depends on the degree of control that he has over the premises. If there is an agreement that the landlord will conduct repair works, then he will be liable for any interference that arises as a result of any disrepair.[146] The duty is owed to anyone who is reasonably expected to be adversely affected by the defects in the state of the premises. A developer of condominiums may be liable in nuisance to resident-owners of apartments if he has covenanted to repair any defect on the premises and has reserved the right to enter the premises to conduct the said repairs.[147] If the agreement is that the tenant or lessee should conduct repair works, liability depends on the following two factors: firstly, if the landlord knows of any existing defect or possibility of nuisance at the time the tenancy commences, he will still

143 *Brew Brothers Ltd v Snax (Ross) Ltd* [1970] 1 QB 612.

144 *Ibid.*

145 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 WLR 53. See also *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors* [2003] 1 AMR 20 at 35, CA – although not a case on nuisance, it clearly illustrates the existence of duty on a landlord who although not in occupation, was aware of the defects (interference) on the premises.

146 *Payne v Rogers* [1794] 2 H Bl 350.

147 *Robert Chin Kick Chong & Anor v Pernas Otis Elevator Co Sdn Bhd & Ors* [1992] 4 CLJ 1907 (failure to repair lifts).

be held liable. Secondly, if the nuisance occurs after the tenancy has commenced, the issue revolves around the degree of control that the defendant as landlord, retains. If he does not have the right to enter the rented premises to conduct any examination as to the state of the premises, then he will not be held liable.[148] If the landlord reserves his right to enter the premises for repair purposes, this is considered as sufficient control to make him liable even though he is not aware of the damage or nuisance that has arisen.[149] Even if the landlord has undertaken to repair or has the right to enter the premises to conduct repair, the tenant can also be liable as the occupier.[150]

J. Defences

1. Prescription

In England this defence is applicable to private nuisance. A continuous private nuisance for the period of twenty years is a good defence. The defendant has to prove that the interference is an actionable nuisance for the whole period of the twenty years and the plaintiff has therefore allowed the interference to occur for twenty years. The defendant also has to prove that the interference is something that is done as part of his right on the plaintiff's premises, which is usually an easement.

In *Sturges v Bridgman*[151] the defendant was a biscuit manufacturer. His machines produced a lot of noise and caused vibrations on the plaintiff's premises, the defendant's neighbour. This had occurred for more than twenty years. The plaintiff who was a doctor, then built a treatment room at the back of his house. The plaintiff claimed for nuisance due to the noise and vibrations which interfered with the treatment of his patients. The court held that the defence of prescription was inapplicable as before the action was taken the interference did not constitute a nuisance, as it did not affect the enjoyment the plaintiff had over his property. An injunction was accordingly issued against the defendant.

In Malaysia, an easement is defined under s 282(1) of the National Land Code 1965[152] (NLC) as any right granted by one proprietor to another for the beneficial enjoyment of his land. It includes any right to do something in, over or upon the servient land[153] and any right that something should not be

148 *Brew Brothers Ltd v Snax (Ross) Ltd* [1970] 1 QB 612.
149 *Mint v Good* [1951] 1 KB 517.
150 *Heap v Ind Coope & Allsop Ltd* [1940] 2 KB 476.
151 [1879] 11 Ch D 852.
152 Act 56 of 1965.
153 NLC 1965, s 282(3) stipulates that the land for the benefit of which an easement is granted is referred to as 'the dominant land', and the land of the proprietor by whom the easement is granted is referred to as 'the servient land.'

so done.[154] The rights however, do not include any right to take anything from the servient land[155] or any right to the exclusive possession of any part of the land but it does not prevent the right to place or maintain in or upon the servient land, any installations or other works.[156]

Section 284(1) of the NLC 1965 further provides:

> No right in the nature of an easement shall be capable of being acquired by prescription that is to say, by any presumption of a grant from long and uninterrupted user.

The grant of an easement is a formal process in Malaysia and an easement of say, a particular installation which belongs to the defendant on the plaintiff's land will stipulate the length of time the easement is granted for.[157] The plaintiff may only release the easement with the consent of the defendant[158] and cancellation of the easement is subject to the easement impeding the reasonable use of the plaintiff's land.[159] Within this 'limited' rights of the plaintiff in releasing and cancelling a validly created easement, it is submitted that an easement, but not a prescription, generally provides a good defence in Malaysia.

However, a prescription not related to an easement might still be a good defence. The facts of each case must be examined in order to determine whether the plaintiff should no longer be allowed to claim on the grounds that he had allowed the defendant to continue with the activity for a long period.

2. Statutory authority

If a statute confers power to the defendant to conduct a particular activity, the defendant will usually escape liability notwithstanding that the activity gives rise to an interference. The defendant must however prove that the interference cannot be avoided even though reasonable precautionary measures have been taken.[160]

Statutory authority is generally not a good defence if the work causes substantial damage to neighbouring property. The defence will ironically stand if the interference is an inevitable consequence of the defendant's

154 *Ibid*, s 283(1)(a) and (b).
155 *Ibid*, s 283(2)(a).
156 *Ibid*, s 283(2)(b).
157 *Ibid*, s 286(2).
158 *Ibid*, s 289(1) and (3).
159 *Ibid*, s 291(d).
160 See *Goh Chat Ngee & 3 Ors v Toh Yan & Anor* [1991] 2 CLJ 1163.

operations, having regard to all reasonable precautions that have been taken by the defendant.[161] In this situation the plaintiff will be without redress due to overriding public interest. In practice however, compensation is provided for under the relevant statutes. An example is the Local Government Act 1976[162] which provides that a local authority has the power to make new public places and enlarge such public places and the owners and occupiers of any land, houses or buildings which are required for such purpose or which are injuriously affected will be compensated in accordance with the provisions of any written law. It is further provided that if the amount of compensation is in dispute the parties may refer the matter to a court of competent jurisdiction.[163] Therefore damage caused to a plaintiff's property arising from nuisance created by a local authority in pursuance of its statutory power will be compensated in the form of damages. An injunction will presumably not be granted against the local authority for the exercise of its powers under the statute.[164]

If the undertaker is under a statutory duty to carry out his operations in a specified place, provided that reasonable care has been taken, he will not be liable.[165] If the particular statute confers a discretion to the undertaker in selecting the site of the operations, liability may arise if he carries out the work in a place where nuisance is caused, especially if he could have carried out the works just as effectively elsewhere without creating any nuisance.[166]

3. Other defences

The defences of necessity, consent or defence of property may be valid defences.[167] Contributory negligence[168] is also a valid defence applicable to nuisances based on negligent conduct.

A plea by the defendant that the plaintiff came to the nuisance, in that the defendant's operations has been carried out before the plaintiff moved into the vicinity is not a good defence.[169]

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161 *Manchester Corp v Farnworth* [1930] AC 171.
162 Act 171, s 64.
163 Local Government Act 1976, s 118.
164 The statutory authority defence here would be the local authority claiming that its activities are justified by the section, and it will pay compensation, the amount is either subject to the ceiling provided under the applicable statute or where no amount is provided for, as determined by the courts.
165 *Ibid*, and see for example the duties of a local planning authority under the Town and Country Planning Act 1976, Act 172.
166 *Metropolitan Asylum District v Hill* [1881] 6 App Cas 193.
167 See above, Chapter 5.
168 See above, Chapter 9.
169 *Bliss v Hall* [1838] 4 Bing NC 183; *Miller v Jackson* [1977] 3 All ER 338, CA.

CHAPTER FOURTEEN

STRICT LIABILITY – *RYLANDS v FLETCHER*

A. Introduction

The tort of strict liability under the rule in *Rylands v Fletcher* originated from the tort of nuisance. It then developed to become quite distinct from the tort of nuisance. However, on account of the decision of the House of Lords in *Cambridge Water Co v Eastern Counties Leather plc*[1] the development of the scope and applicability of *Rylands v Fletcher* is now more restricted.

Strict liability is a term used to describe liability which is imposed on the defendant without any proof of fault on his part. So although the defendant might have taken all reasonable precautions to avoid or minimise risks arising from his activity, he may still be found liable if the tort which has arisen falls under the category of strict liability torts. This may be compared to say, his possible liability in negligence, which would have been negatived under the aforementioned circumstances. Unlike the defendant in a cause of action for intentional torts, the mental state of a defendant in a strict liability action is irrelevant. It is not a requirement that the defendant must intend to do an act which is alleged to give rise to the tort of strict liability.

Strict liability can also arise in a cause of action for breach of statutory duty but the 'strictness' of liability would very much depend on the wording of the relevant statutory provisions.

The rule in *Rylands v Fletcher*

The landmark case in this branch of tort law is *Rylands v Fletcher*.[2] The facts are: the defendant mill owner employed some independent contractors to build a reservoir. Beneath this reservoir were some iron shafts that went through a mining area and which were connected to the plaintiff's mine. The defendant did not know of the existence of these shafts and the contractors were negligent in not blocking the shafts. The plaintiff's mine was flooded when the reservoir was filled with water.

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1 [1994] 1 All ER 53; [1994] 2 AC 264, discussed below at pp 340-342.

2 [1866] LR 1 Ex 265; affirmed [1868] LR 3 HL 330.

The defendants themselves were not negligent and neither were they vicariously liable for the negligence of their independent contractors, but the House of Lords held them liable to the plaintiff.

Blackburn J in the Court of Exchequer Chamber said:[3]

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

This statement is known as the rule in *Rylands v Fletcher*. The learned judge went on to say that the defendant may avoid liability if he can prove that the escape was due to the plaintiff's own fault or that it was caused by an act of God.

Lord Cairns in the House of Lords[4] approved this rule but further added that the rule only applied where the defendant had used his land for a non-natural use.

In all subsequent cases, a non-natural use of land was added to the requirements needed in order to establish liability under the rule in *Rylands v Fletcher*. As a result of this requirement of non-natural use of land, the scope of liability under the rule was narrowed and restricted. The criteria of what constitutes a non-natural use of land is surrounded with uncertainty and is unclear; and so this requirement has given rise to much difficulty in determining the applicability of the rule in *Rylands v Fletcher*.

B. Elements to establish liability

There are four elements required to establish liability under the rule in *Rylands v Fletcher*, and these are discussed below.

1. Dangerous things/Thing likely to cause damage if it escapes

There must exist a dangerous 'thing', and the word 'dangerous' has its own meaning under this tort. What is dangerous is a question of fact. The rule applies to anything that *may* cause damage *if* it escapes. Once this element is fulfilled, then that 'thing' is a 'dangerous thing'.

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3 [1866] LR 1 Ex 265 at 279-80.
4 [1868] LR 3 HL 330 at 338-40.

The object or 'thing' therefore, need not be dangerous *per se* because there are objects which are safe if properly kept, but are dangerous if they escape. This principle has been successfully applied to gas,[5] noxious fumes,[6] explosives[7], fire,[8] electricity, water[9] and sewage. Due to the difficulty and confusion that may arise in drawing a distinction between dangerous and non-dangerous thing, a less confusing phrase would be 'thing likely to cause damage if it escapes'.

This element of the thing being described as a dangerous thing is said to be no longer accurate and practical by authors in England.[10] The reason is that due to the decision in *Cambridge Water* which held that there cannot be liability under the rule in *Rylands v Fletcher* unless the relevant type of damage was foreseeable, it follows that whether the thing is dangerous or not, would be irrelevant. This is indeed true. However, the element of dangerous thing is maintained in this work for a practical reason. It is to assist students in understanding the meaning of the phrase 'dangerous thing' in relation to the rule as older cases refer to this element.

Whether the thing is considered dangerous in that it may cause damage if it escapes is determined through the ordinary experience of mankind. In *Ang Hock Tai v Tan Sum Lee & Anor*[11] the plaintiff rented a shophouse and lived on the first floor of the building. The ground floor was sublet to the defendant, who was in the business of repairing and distributing tyres. The defendant stored petrol for the purposes of his business. One morning the defendant's premises caught fire. The fire spread to the first floor and the plaintiff's wife and child died in the tragedy. The court held the defendant liable under the rule in *Rylands v Fletcher* as the petrol was a dangerous thing.

2. Intentional storage/Accumulation

The rule only applies to an object or thing which the defendant purposely keeps and collects. In other words the defendant will only be liable if he has accumulated the thing. Even if he himself has not accumulated the thing, he

5 *Batchelor v Tunbridge Wells Gas Co* [1901] 84 LT 765; *Dominion Natural Gas Co v Collins* [1908-10] All ER 61.

6 *Dato' Dr Harnam Singh v Renal Link (KL) Sdn Bhd* [1996] 1 AMR 1157; *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145.

7 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co* [1921] 2 AC 465, HL.

8 *Abdul Rahman bin Che Ngah & Ors v Puteh bin Samat* [1978] 1 MLJ 225; *Lembaga Kemajuan Tanah Persekutuan v Tenaga Nasional Bhd* [1997] 3 AMR 3115.

9 *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants & Ors* [1997] 1 AMR 637.

10 See Street, 10th edn p 397, Winfield & Jolowicz, 15th edn p 544 and Jones, 7th edn p 356.

11 [1957] MLJ 135.

may still be found liable if he has authorised the accumulation. In any case liability rests in those who have control over the thing.

The rule is not applicable to anything that is naturally on the land. In *Giles v Walker*[12] the defendant was found not liable under this rule when thistles from his land flew onto the plaintiff's land and seeded. The court held that the thistles were the natural growth of the defendant's land despite the fact that the thistles grew on his land due to his leaving it unattended after he had ploughed it. In cases like this, liability may be sought under the tort of nuisance or negligence.

However, an occupier of land who intentionally causes something that is naturally found on his land to escape may still be held liable for any consequent damage that is caused to the plaintiff.[13]

An occupier of land will not be held liable for damage caused by the escape of a thing naturally on the land, if he has not accumulated it and the escape was independent of the defendant's conduct. In *Pontardawe RDC v Moore-Gwyn*[14] due to changes in the weather some rocks from the defendant's land fell onto the plaintiff's land. The defendant was not liable as he did not accumulate the rocks. Moreover the escape was not caused by the defendant's act.

In *Miles v Forest Rock Granite Co (Leicestershire) Ltd*[15] the defendant used some explosives to blast some rocks on his land. Some of the rocks fell onto the land below and injured the plaintiff. The court found that although the rocks were not purposely collected or kept on the land, the explosives were purposely collected and kept. The defendant was held liable for this deliberate accumulation which caused the escape of the rocks, and because the way in which the injury was sustained was through rock-blasting, which was not a natural use of land.

It was the accumulation of explosives that gave rise to liability. The explosives, if they escaped would be likely to cause damage and therefore, were dangerous things. They were deliberately collected and stored by the defendant. There was escape as the use of the explosives caused the rocks to fall away from the defendant's land; and damage was caused to the plaintiff.

12 [1890] 24 QBD 656.

13 *Whalley v Lancashire & Yorkshire Rly Co* [1884] 13 QBD 131 (rain water). Would trespass to land also apply? See *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985 and *Crown River Cruises Ltd v Kimbolton Fireworks Ltd* [1996] 2 Lloyd's Rep 533.

14 [1929] 1 Ch 656.

15 [1918] 34 TLR 500.

It did not matter that the final damage was in fact caused by another thing (the rocks, in this case). The case might be easier to understand on the ground that the defendant ought to have foreseen that their rock-blasting activity may result in the escape of rocks which may in turn cause damage. So if the thing that escapes is the dangerous thing itself, liability is rather straightforward. If what escapes is not the dangerous thing itself but another object arising from the use of the dangerous thing, the occupier of land may still be held liable provided the escape occurs during a non-natural use of land. In this case, the court did hold that the use of explosives on private land constituted a non-natural use of land.

The rule in *Rylands v Fletcher* is only applicable where the occupier brings, collects or keeps something on his land. It follows that when something that is naturally on the land escapes and causes damage, the occupier will not be liable unless he intentionally allows the escape to occur[16] or that the escape is foreseeable and yet the defendant does nothing to prevent the probable escape.

The storing of the things must be for the defendant's own purposes. The principle is not applicable where the thing is brought onto the defendant's land by or for the use of another person. So if a licensee accumulates the thing on the land, and the thing escapes and causes damage, the licensee will be held liable. The landowner would only be liable if the licensee accumulates the thing with the authorisation of the owner, or if the accumulation was done in pursuance of a contractual duty owed by the owner to a third party. *Rainham Chemical Works v Belvedere Fish Guano*[17] is a good example. *X* and *Y* set up a company Z Ltd. The function of Z Ltd was to perform a contract entered into by both *X* and *Y*, with another party, to manufacture explosives. Z Ltd was to manufacture the explosives on *X* and *Y*'s land. So Z Ltd was a licensee. An explosion occurred, damaging neighbouring property. The House of Lords found Z Ltd liable as the licensee which had accumulated the thing. *X* and *Y*, as occupiers and landowners were also liable for the escape of the thing accumulated by their licensee as the accumulation was a discharge of *X* and *Y*'s contractual duty to another party.

3. Escape

The plaintiff must prove that there has been an escape. Escape means the thing has escaped from a place over which the defendant has control and authority to a place over which the defendant has no control and authority.[18] It is not necessary that the defendant has a proprietary interest in the land

16 *Noble v Harrison* [1926] 2 KB 332.
17 [1921] 2 AC 465, HL.
18 *Read v J Lyons & Co Ltd* [1947] AC 156; [1946] 2 All ER 471, HL.

from which the escape occurs. In *Weng Lok Mining Co Ltd v Hiap Lee Brickmakers Ltd*[19] the court held that escape must be proven before the principle in *Rylands v Fletcher* is applicable. The leading authority is *Read v J Lyons & Co Ltd.*[20] An inspector of munitions was injured when a shell that was being manufactured at the defendants' factory where she was employed, exploded and caused her substantial injuries. The defendants were not liable as there was no escape.[21] In *Ponting v Noakes*[22] the plaintiff's horse reached its head into the defendant's land and ate the poisonous leaves of a yew tree which was planted on the defendant's land. The court held that there was no escape as the tree and its leaves did not extend beyond the defendant's boundary and so the plaintiff failed in his action.

In *Midwood & Co Ltd v Mayor, Aldermen, and Citizens of Manchester*[23] the defendants were held liable when an explosion on their property caused inflammable gas to escape into the plaintiff's house and consequently set fire to the plaintiff's property.[24]

The meaning of escape has been extended to include a situation where the use of the dangerous thing causes or creates an event from which damage is sustained.[25]

Allowing an escape to occur from one's own land onto another person's property over which one has no control is not the same as damage incurred by another person as a result of one preventing a danger from occurring on one's land. Liability will be imposed in the former situation but not in the latter.[26]

Damage caused by the spread of fire

There is a common law presumption that a man is answerable for the damage that results from a fire which began on his property.[27] This presumption does not apply in Malaysia.[28] The plaintiff is still required to prove either the

19 [1972] 1 MLJ 156.
20 [1946] 2 All ER 471, HL.
21 Perhaps if she had sued for negligence she might have succeeded.
22 [1894] 2 QB 281.
23 [1905] 2 KB 597.
24 See also *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772; water from mains damaged electric cable of the plaintiff.
25 *Miles v Forest Rock Granite Co (Leicestershire) Ltd* [1918] 34 TLR 500 (use of explosives).
26 *Gerrard v Crowe* [1921] 1 AC 395; *Baird v Williamson* [1863] 15 CB NS 376.
27 *Becquet v Mac Carthy* [1831] 2 D & Ad 951; *Musgrove v Pandelis* [1919] 1 KB 314; *Mason v Levy Auto Parts* [1967] 2 QB 530.
28 *Leong Bee & Co v Ling Nam Rubber Works* [1970] 2 MLJ 45; *Sheikh Amin bin Salleh v Chop Hup Seng* [1974] 2 MLJ 125; *Lembaga Kemajuan Tanah Persekutuan v TNB* [1997] 3 AMR 3115.

defendant himself or a person for whose conduct he was answerable has been negligent (whether through an act or an omission). The negligence must have caused either the commencement of the fire or of its spreading to the plaintiff's premises; or that the defendant has caused or permitted to exist on his premises, a source of fire danger which constituted a material injury to the plaintiff's property.

In circumstances where there is no escape of anything brought onto the defendant's land, the defendant must be proved to have satisfied the following conditions as laid down in *Lembaga Kemajuan Tanah Persekutuan v TNB*,[29] following *Musgrove v Pandelis*[30]:

(a) firstly, that the defendant had brought onto their land things likely to catch fire, and kept them there in such a condition that if they did ignite, the fire would be likely to spread to the plaintiff's land,[31] and

(b) the defendant did these things in the course of some non-natural use of land, and

(c) the things had ignited and the fire had spread to the plaintiff's land.

This test was successfully applied in *Lembaga Tanah Persekutuan v TNB*. The plaintiff's rubber trees were destroyed by several fires which started in the defendant's adjoining land. The court found for the plaintiff as the burning vegetation on the defendant's land had been cut by the defendant's employees or agents and left there in hot, dry weather. The defendant should have known that fires could break out from the combustible cut vegetation and would spread to the plaintiff's property. Moreover, the defendant's use of the land was found to be a non-natural use.

Similarly in *Lee Kee v Gui See & Anor*[32] the defendant was found liable when a third party whom he had hired to burn some rubbish on his land did so without taking any precautions, which resulted in the fire spreading onto the plaintiff's land, destroying the latter's rubber trees. The court held that if a person makes a fire on his land in order to burn something which is inflammable, he must take reasonable steps to prevent the fire from spreading. This duty is absolute and non-delegable.

In summary, liability is imposed for the spread of fire if the spread was due to the default of the defendant's servant, his guest and even his independent

29 [1997] 2 MLJ 783.
30 [1919] 1 KB 314; [1919] 2 KB 43, CA.
31 *Mason v Levy Auto Parts of England Ltd* [1967] 2 QB 530.
32 [1972] 1 MLJ 33.

contractor.[33] Liability will be excluded where the fire spread or occurred due to an act of nature or the act of a stranger or trespasser over whom the defendant has no control. However, knowledge of the fire, albeit started by a party over whom the defendant has no control imposes a duty on him to extinguish it within a reasonable time.

4. Non-natural use of land

This requirement is shrouded in much uncertainty. The defendant will only be liable if in bringing or accumulating the thing onto his land, he makes a non-natural use of the land.

The meaning of non-natural use of land was explained in the case of *Rickards v Lothian*[34] where Lord Moulton stated:

> It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

Lord Porter in the case of *Read v Lyons & Co Ltd*[35] said that all factors such as time, location and the ordinary activities of mankind must be taken into consideration, so that what is dangerous or constitutes a non-natural use of land may differ in different circumstances. For instance in the seventeenth century, the building of skyscrapers was most probably a dangerous activity and constituted a non-natural use of land, but in the twenty-first century this is regarded as usual and is arguably a natural use of land. Street[36] notes that the current tendency is to interpret 'non-natural use' narrowly. The public benefit of an activity will probably be considered by the courts to constitute a natural use of land but this has to be weighed against the extent of risk that arises from that activity.

The non-natural use of land has been equated with unreasonable risk in the tort of negligence. Therefore the courts will balance the probability of damage occurring plus the seriousness of the probable damage compared to the social benefit derived from it.[37] The perception by the courts as to what constitutes a non-natural use of land will change in accordance with social and economic changes as well as the needs of the public. No conclusive test may therefore be given as to what constitutes a non-natural use of land. It is often equated with extraordinary use. Factors which the courts have taken into account

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33 *Balfour v Barty King* [1957] 1 QB 496; *Mulholland & Ted v Baker* [1939] 3 All ER 253; *H & N Emanuel Ltd v Greater London Council & Anor* [1971] 2 All ER 835.

34 [1913] AC 263 at 280, PC.

35 [1947] AC 156 at 169.

36 10th edn at p 403.

37 See Winfield & Jolowicz, 14th edn at p 453.

were the quantity of the thing, the way in which it was stored and also the location of the defendant's land.[38]

On the other hand, an ordinary or natural use of land would include erecting a house, installing water, electric wiring and gas pipes. It also includes doing something ordinary and usual, though artificial, such as constructing a fish pond.

The following are examples of non-natural use of land:

- In *Crowhurst v Amersham Burial Board*[39] the defendant planted a yew tree on his land. The branches and leaves of the trees extended into the plaintiff's land. Yew leaves are poisonous to cows. The plaintiff's horse died upon eating the leaves. The court held the defendant liable as planting a poisonous tree[40] is not a natural use of land. This decision may be justified on the basis that an 'escape' of the tree had occurred as the branches and leaves had encroached onto the plaintiff's land.

- In *Yat Yuen Hong Co Ltd v Sheridanlea & Anor*[41] the appellants were developing their land which was adjacent to the respondent's land. The appellant's land was situated on higher ground than the respondent's land. Some earth fell onto the respondent's land and damaged the respondent's nursery. The court held that piling loose earth on a steep slope so that more flat land would be available was a non-natural use of land. *Rylands v Fletcher* applied.

- In *Abdul Rahman bin Che Ngah & Ors v Puteh bin Samat*[42] the defendant was a contractor engaged to clear an irrigation canal which went through the plaintiff's rubber estate. The work involved clearing bushes and weeds in the stream and on the banks. These bushes and weeds were negligently set on fire by the defendant and the ignition escaped on to the plaintiff's land, destroying the rubber trees on it. The court found the defendant liable in negligence and under the rule in *Rylands v Fletcher* for the escape of fire resulting from a non-natural use of the land.

- In *Hoon Wee Thim v Pacific Tin Consolidated Corporation*[43] the defendants had built a reservoir on their land which was above ground level. A heavy rainfall caused the water-bunds to collapse, as a result of which water escaped onto the adjacent land, causing the death of the deceased

38 *Mason v Levy Auto Parts of England Ltd* [1967] 2 QB 530.
39 [1878] 4 Ex D 5.
40 Compare this decision with that in *Ponting v Noakes* [1894] 2 QB 281; above at p 336.
41 [1963] 29 MLJ 279, CA Singapore.
42 [1978] 1 MLJ 225.
43 [1966] 2 MLJ 240; affirmed [1967] 2 MLJ 35, FC.

by drowning. The administrator of the deceased's estate claimed for damages. The court held that using sand-bunds to separate ponds of water constituted a dangerous and non-natural use of land and any resulting damage would be caught under the rule in *Rylands v Fletcher*. As the reservoir was situated close to an area which was thickly populated, the defendants were using their land in a special way bringing with it increased danger to others. The court added that even if a landowner uses his property for a natural use it does not mean that he may conduct hazardous activities causing adverse effects to his neighbours.

- The artificial accumulation of rainwater on higher ground, which then seeped underground, causing increased infiltration rate and saturation of soil has been held to be a non-natural use of land in *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants & Ors*.[44] That was what happened in this case, as a result of which a landslide occurred and damaged the plaintiff's house. The accumulation of water was held to be a non-natural use as the excavation of a trench, purportedly for the foundation of a retaining wall, constituted an alteration to the nature of the land. It further interfered with the natural flow of water.

An example where the court held that the use of land was not a non-natural use is *British Celanese v AH Hunt*.[45] The plaintiff claimed that foil strips from the defendant's factory caused a disruption to the electrical power and supply to that area which in turn caused resulting damage to the plaintiff's property. The court found the defendant liable in negligence and nuisance but not under the rule in *Rylands v Fletcher* as the use of land was not a non-natural use. The defendant's factory was situated in an industrial area and its use was considered suitable with the purpose of that area.

5. Foreseeability of damage

A defendant will not be liable for all consequential damage that results from an escape. The concept of 'reasonable and foreseeable damage' as laid down in the case of *Wagon Mound*[46] is applicable in the tort of strict liability and this has been confirmed by the decision in *Cambridge Water Co Ltd v Eastern Counties Leather plc*.[47] For liability to arise under the rule in *Rylands v Fletcher*, the type of damage must be foreseeable.

In *Cambridge Water*, the defendant who was a leather manufacturer used a chemical, PCE, in the process of manufacturing. The chemical had been

44 [1997] 1 AMR 637
45 [1969] 1 WLR 959; [1969] 2 All ER 1252
46 [1961] AC 388, above at pp 173-174
47 [1994] 1 All ER 53

spilled little by little on the concrete floor of their factory. PCE was not soluble in water and it had seeped through the factory floor until fifty metres below the ground. It had then spread at the rate of eight metres per day until it reached the area the plaintiff used to pump water for the daily consumption of the residents in that area. The distance between the defendant's factory and the plaintiff's borehole was 1.3 miles and it had taken nine months for the PCE spillage to reach the borehole. The plaintiff had to spend about £1m in order to find and operate another borehole.

In a claim for negligence, nuisance and strict liability under the rule of *Rylands v Fletcher*, the High Court dismissed the claims for negligence and nuisance as it was unforeseeable that the spillage would accumulate underground or that it would spread and cause damage to the plaintiff. On the claim for strict liability the court held that the defendant's activity was not a non-natural use of land taking into account the public benefit in the form of employment that arose from the activity. The court further held that the rule in *Rylands v Fletcher* was inapplicable unless it could be foreseen that damage of a relevant type would occur as a result of an escape and the defendant does not take any steps to prevent the escape from occurring. If the damage that occurs is not known through any scientific knowledge at the time the escape occurred, no liability will be imposed. The Court of Appeal reversed this decision.

The House of Lords affirmed the High Court decision and held that in both the torts of nuisance and strict liability, foreseeability of the type of damage is a prerequisite to liability. The defendant's use of their land was not exactly a natural use of land but because the damage was not foreseeable they therefore could not be held liable.

As a result of this case, it is now more difficult for the plaintiff to succeed in an action for strict liability. Although the plaintiff may be able to prove that there is a dangerous thing, that the thing has been actively accumulated and could reasonably be foreseen to escape, and escape in fact occurred, he must also prove that the defendant is using his land for a non-natural purpose, and further, that the type of damage incurred by the plaintiff is reasonably foreseeable.

What is unclear from the decision in *Cambridge* is whether it is only the kind of damage that needs to be foreseeable or that the escape too, must be foreseeable. Lord Goff, in holding that the seepage of the chemical was unforeseeable seemed to suggest that the escape too, need be foreseeable.[48]

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48 Street, 10th edn at p 406 states that if escape too must be foreseeable, then it undermines the strictness of *Rylands* as it introduces a fault requirement to the rule. In *Ellison v Ministry of Defence* [1996] 81 BLR 101 it was suggested *obiter*, that it is only the type of damage and not the escape that must be foreseeable.

It is submitted that if the element of foreseeability of escape is a prerequisite to liability in the tort of strict liability, then the 'no-fault' liability of this tort is no longer true. It would indeed favour potential defendants in this area of the law of tort, as non-foreseeability is followed by no liability, but it does not provide any remedy to a plaintiff whose property is 'unexpectedly' damaged due to hazardous activities conducted by the defendant.[49]

C. Defences

1. Consent of the plaintiff

If the plaintiff either expressly or impliedly consents to the existence of the dangerous thing and the defendant is not negligent in any way, the defendant will not be liable for any escape and resulting damage.[50]

In *Sheikh Amin bin Salleh v Chop Hup Seng*[51] the plaintiff owned a piece of land on which eight terrace houses were built, four of which were rented by the defendants. The defendants used their rented premises for the purpose of a bakery, a fact known by the plaintiff. A fire caused by the defendants' negligence destroyed all eight houses. The court found on the evidence that the plaintiff assented to or acquiesced in the use of the defendants' premises as a bakery with an oven therein and therefore the defendants could not be liable under the rule in *Rylands v Fletcher*. The consent or acquiescence of the plaintiff to the defendants' activity negatived the latter's liability under *Rylands*.[52]

In this case it is true that the plaintiff landlord consented to the defendant using their rented premises as a bakery. However, and as the learned judge himself stated:[53]

> ... a person who consents to the dangerous thing being brought to a place from which it may cause him injury if it escapes has no right of action unless he can prove negligence.

The defendant was negligent in failing to ensure that the fire had been properly extinguished, and since he was negligent should the plaintiff's consent have

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49 See also, Muhammad Naeem, *Strict Liability Under Attack: The Need to Protect It – A Criticism of Cambridge Water v Eastern Counties Leather Plc* [1994] 4 CLJ at ci.

50 *AG v Cory Brothers Ltd* [1921] AC 521.

51 [1974] 2 MLJ 125.

52 Might this decision be different now in light of the decision in *Lembaga Kemajuan Tanah Persekutuan v TNB* [1997] 3 AMR 3115. See the discussion on liability caused by the spread of fire above at pp 336-338.

53 [1974] 2 MLJ 125 at 130.

been irrelevant to the issue of his liability? The case is nonetheless instructive on the applicable principles relating to consent as a defence.[54]

Implied consent may be raised as a defence in cases where different floors of the same building are occupied by different persons who are aware of, yet do not complain of any activity conducted by any one of them. Implied consent may also be raised if a tenant of either business or domestic premises, allows the condition of adjoining premises to become such that the likelihood of an escape under the *Rylands v Fletcher* rule is probable. In these circumstances the tenant is said to have consented to run the risk of such an escape occurring.[55] Occupiers of different floors in the same building have been held to have consented to the accumulation of rain water on the roof of the building.[56] Provided the accumulation of the thing was usual, and not dangerous, the plaintiff would be said to have consented, unless of course the occupiers were not aware of the fact of the accumulation.[57] If however, a person occupies land that is situated near a dangerous thing, such as a mine or a quarry, this does not necessarily mean that he consents to the consequences of any escape from that mine[58] or quarry. This rests on the principle that an occupier is not presumed to have consented to inherently dangerous activities or state of affairs on the defendant's land, or installations being left in a dangerous and unsafe state.[59]

2. Common benefit

If the dangerous thing is allowed to exist for the common benefit of both the plaintiff and the defendant, the defendant will not be held liable if it escapes and causes damage.

In *Carstairs v Taylor*[60] the plaintiff rented the ground floor of a factory from the defendant, who occupied the floor above. Water from the roof was collected through by gutters which were connected to a box, and from the box it flowed into some pipes and then into a drain. Rats had made holes in the box. Water dripped from it and damaged the plaintiff's property. The defendant was in no way negligent and the court found that even though the

54 The defendant was found liable in negligence for their failure to guard or attend to the fire. The action in nuisance failed as there was no evidence that the defendant had caused or permitted to exist on their premises, a source of fire danger constituting a material injury to the plaintiff's property.

55 *Kiddle v City Business Properties Ltd* [1942] 2 All ER 216; See also Winfield & Jolowicz, 15th edn at p 550 and Street, 10th edn at p 407.

56 *Carstairs v Taylor* [1871] LR 6 Exch 217.

57 *Prosser & Sons Ltd v Levy* [1955] 3 All ER 577, CA.

58 *Thomas v Lewis* [1937] 1 All ER 137.

59 *Prosser & Sons Ltd v Levy* [1955] 3 All ER 577, CA.

60 [1871] LR 6 Ex 217.

method in which water was disposed of was dangerous, the defendant was not liable as the act was done for the common benefit of both parties. Indeed, common benefit is an important element in deciding whether the plaintiff has impliedly consented to the existence of the thing purported to be dangerous.[61]

The scope of activities that may be regarded as giving rise to common benefit is rather unclear. In *Dunne v North Western Gas Board*[62] the court held that 'common benefit' is an important factor in determining liability. Even though the plaintiff does not have a choice in the matter such as an explosion due to the escape of gas, nevertheless if the gas was for the common benefit of both parties and the escape was not due to any negligence on the part of either party, it would relieve the defendant from liability.

Winfield & Jolowicz[63] suggests that this defence is misleading and redundant on its own. It is submitted that perhaps common benefit ought to be considered only as a factor in determining whether the plaintiff has consented to the risk of damage arising from the defendant's activity, subject of course, to the defendant's non-negligence.

3. Act of a third party

The test used to determine whether a person is a third party or otherwise is whether that person acts outside the defendant's control. However even if the act is outside the defendant's control, the defendant may still be held liable if he ought reasonably to have foreseen the act of that third party.[64] Generally trespassers and those who act on land that does not belong to the defendant are said to be third parties. The defendant's workers or employees as well as any independent contractors employed by him will not be regarded as third parties.

The unforeseeable act of a third party who is not under the defendant's control, has been accepted to be a good defence. In *Box v Jubb*[65] the defendant's reservoir overflowed and damaged the plaintiff's property. The cause was the overflowing of the defendant's neighbour's reservoir which in turn flooded the defendant's reservoir. It was held that since the sequence of events were not foreseeable and the defendant was not negligent, the defendant was not liable.

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61 *Peters v Prince of Wales Theatre (Birmingham) Ltd* [1942] 2 All ER 533.
62 [1964] QB 806.
63 15th edn at pp 550-551.
64 *Hale v Jennings Bros* [1938] 1 All ER 579, CA.
65 [1879] 4 Ex D 76.

In *Rickards v Lothian*[66] a third party deliberately blocked the waste-pipe of a lavatory basin in the defendant's premises and thereafter turned on the water tap. The water overflowed and damaged the plaintiff's property which was situated on the floor below. The defendant was not liable for the damage.

Similarly in *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd*[67] the defendant was held not liable under the rule in *Rylands v Fletcher* on the defence of the unforeseeable act of a third party for failing to inspect whether there was any damage to their main gas supply which exploded when a third party constructed a sewerage nearby, causing damage to the plaintiff's hotel. They were however, found liable in negligence for failing to foresee that non-inspection of their pipes might lead to foreseeable injury.

Therefore where the third party's act is foreseeable or that the consequences to the plaintiff may have been prevented, the defendant will be held liable for any ensuing damage. In a very persuasive argument, it is advanced in Street[68] that the legal doctrine upon which *Box v Jubb* and *Rickards v Lothian* ought to have been decided is mistaken. These two cases are negligence and not *Rylands* cases. The reasoning is that *Rylands* is a strict liability tort and therefore any negligence – as in breach of duty of care – on the part of the defendant is irrelevant in determining liability. It follows that it should not matter that the defendant could not have reasonably foreseen the act of the stranger on his land. It might be added that liability in *Rylands* is primarily based on the escape of a dangerous thing that has been purposely accumulated on the defendant's land. This means that the activity by itself is already potentially risky. It is only fair and right that such activities, indulged in knowingly; comes with a high price (strict liability). Allowing a defendant to escape liability for the unforeseeable act of a third party may be a sound basis for the exclusion of liability in other torts, but perhaps it should not be an acceptable defence under the rule in *Rylands* as liability is strict and ought to be maintained as such.

4. Act of God

The use of this defence is very limited. The condition for its use is when the escape occurs through natural causes which is unforeseeable and without any human intervention.[69]

In *Nichols v Marsland*[70] the defendant owned many artificial lakes. A heavy rainfall caused the artificial embankments of the lake to collapse and water

66 [1913] AC 263.
67 [1936] AC 108, PC.
68 10th edn at p 409.
69 *Tennent v Earl of Glasgow* (1864) 2 Macph (Ct of Sess) (HL) 22; 36 Sc Jur 400.
70 [1876] 2 Ex D 1.

from the lake swept away four bridges in respect of which damage the action was brought. The court held the defendant not liable as he was not negligent; it was not reasonably foreseeable and was an act of God. By contrast, the defence of act of God failed in *Greenock Corporation v Caledonian Railway Co.*[71] An extraordinary heavy rainfall caused the defendant's pool to flood. Water flowed from it onto the highway and then onto the plaintiffs' land, causing damage to their property. The court held the defendant liable and rejected the defence of act of God. *Nichols* was distinguished in that the flood was so great that it could not reasonably have been anticipated, and so the escape of water was an act of God.[72] The defendant in this case was found liable because in collecting and damming up the water of a stream, it had a duty to ensure that people who were staying on lower ground would not be injured or adversely affected as a consequence of their activities. Thus any one who interferes with the course of a stream has a duty to ensure that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall. The defence of act of God is not available to him if damage results from his deficient substitute. Note however, that a heavy rainfall in a tropical country such as Malaysia cannot be held to be an act of God.[73]

Whether an occurrence may properly be described to be an act of God or otherwise depends on the facts of the case. Nowadays the courts are reluctant to allow the use of this defence easily. This rests upon the belief that mankind's level of knowledge has increased and therefore more often than not, mankind is able to foresee a certain event as a result of their actions and should accordingly be liable for any resulting damage.

The defence of act of God must therefore involve an act that is not influenced in any way by mankind's activities. The important question is whether foresight and rationality may comprehend the possibility of the event occurring. If a man conducts an activity and subsequently a natural disaster occurs, the court will nonetheless consider whether the possibility of the event occurring could have been reasonably anticipated and prevented. Only if the answer is 'no' would the defence prevail and vice versa. It was stated in *A-G v Cory Brothers & Co*[74] that an artificial danger which escaped through natural causes was no excuse to the person who brought the artificial danger there in the first place.

71 [1917] AC 556, HL.

72 Note that the correctness of the decision in *Nichols* itself was questioned in *Greenock* – see [1917] AC 556 at 580, 581.

73 *Hoon Wee Thim v Pacific Tin Consolidated Corporation* [1966] 2 MLJ 240 at 251.

74 [1921] 1 AC 521.

5. The plaintiff's default

If the damage is caused by the plaintiff's own action or wrongdoing, he will not be compensated. If the plaintiff contributes to the end damage he may be held to be contributorily negligent under s 12(1) of the Civil Law Act 1956.[75]

If however, the damage should not have been incurred but for the sensitivity of the plaintiff's property, the law is rather unclear as to whether the defence may be raised successfully. Two cases are illustrative.

In *Eastern and SA Telegraph Co Ltd v Cape Town Tramways Corpn*[76] the defendants' tramways operation, which was electrically operated, affected the sending of messages by the plaintiff through their submarine cable. The court held that the plaintiffs were not entitled to any compensation as they did not suffer any damage to their cable. The court stated that a person could not impose liability on his neighbour just because he used his property in a special or an extraordinary way, whether it be for business or pleasure.

By contrast, in *Hoare & Co v McAlpine*[77] where tremors under the earth caused by the defendant's activities had caused damage to the structure of the plaintiff's hotel, the defendant was held liable. The defence that the structure of the hotel was already unstable due to age (which was not established) was not accepted.

Perhaps these two cases may be distinguished on the grounds that in the latter case the plaintiff did not use his land for any special purpose or in any extraordinary manner. Nevertheless the question remains unresolved as to whether this defence will avail a plaintiff who uses his property in a manner slightly different than what is considered normal and usual.

6. Statutory authority

Liability will not be imposed on a defendant who acts under the authority of a statute which excludes liability for such acts. If a statute imposes a duty on the defendant to do something which consequently causes damage to the plaintiff, the defendant will not be held liable. On the other hand if the statute only gives a power of discretion to the defendant, the defendant may still be held liable if he is found to be careless in exercising his discretionary power.[78]

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75 Act 67; see above, Chapter 9.

76 [1902] AC 381.

77 [1923] 1 Ch 167.

78 See for example the powers conferred upon a local authority under the Local Government Act 1976, Act 171; s 72(1)(a)-(j).

D. Who may sue

The earlier cases[79] suggest that anyone may maintain a claim and a person need not have an interest in land in order to institute an action under the rule. Clearly a person who has an interest in land and who has suffered damage to his land or other property has a right to claim under this rule.

Rylands itself is a good example. Damage to chattels is also recoverable.[80] *Cambridge Water* held that the rule in *Rylands* is a variety of private nuisance, and the House of Lords in *Hunter v Canary Wharf Ltd*[81] held that a plaintiff in a nuisance action must have an interest in land or be in exclusive possession of it. If this requirement is extended to liability under *Rylands*, then the earlier cases mentioned in this chapter would appear to have been wrongly decided. However since this is not clearly stated to be the case, the preferable view is that a plaintiff suing under the rule need not have an interest in land. This is simply because the foundation of strict liability is and should be, to impose liability for damage resulting from hazardous activity on the defendant's land rather than to insist on the claimant having a proprietary interest in land.[82]

E. Who may be sued

The defendant need not be the owner of land on which the dangerous thing is accumulated. What is important in identifying the party to be sued is – who is responsible for the accumulation of the dangerous thing and has control over it at the time of the escape. Accumulation could be the direct act of the defendant himself, or indirect such as where he authorises another to accumulate the dangerous thing.

F. Claims for pure economic loss

Damage to land[83] and property (chattels) are clearly recoverable under the rule. Economic loss arising from damage to land and chattels are accordingly recoverable. What about the recoverability of pure economic loss?

79 *Miles v Forest Rock Granite Co (Leicestershire) Ltd* [1918] 34 TLR 500; *Perry v Kendricks Transport Ltd* [1956] 1 All ER 154.

80 *Musgrove v Pandelis* [1919] 2 KB 43, CA.

81 [1997] 2 All ER 426.

82 See Jones, 7th edn at p 361 for a contrary view.

83 *Milik Perusahaan Sdn Bhd v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6; [2002] 4 AMR 4890, CA – earthworks on defendant's land resulted in a mudslide, destroying plaintiff's adjoining land which was on a lower level. Over RM7 million was awarded applying the reinstatement principle.

It is submitted that it ought to be recoverable under the rule provided it is a direct consequence of the escape and is foreseeable. Recoverability of pure economic loss is not inconsistent with Blackburn J's judgment in *Rylands*, where his Lordship stated that there would be liability in respect of '*all the damage* which is the natural consequence of its escape.'[84]

G. Claims for personal injuries

The only case on this point is *Hale v Jennings Bros*,[85] where the plaintiff who was a tenant of a stall at a fair was compensated for personal injuries sustained as a result of an escape of the defendant's chair-o-plane. This is a straightforward case as the plaintiff was an occupier of land. Where the plaintiff is not an occupier of land or has no interest in land, although there has not been clear *dicta* on the issue, it has been suggested *obiter*[86] that personal injuries are recoverable even though the plaintiff does not have an interest in land.[87] It is doubtful however, that personal injuries would be recoverable on the authorities of *Hunter* (which also requires a plaintiff to have a proprietary interest in land) and *Cambridge Water* (which equates *Rylands* with nuisance).

In Malaysia claims for personal injuries are recoverable under this rule but it is unclear whether the claimant must at the material time have interest in land although this seems to be the position.[88]

It is submitted that claims for personal injuries under the rule in *Rylands* should be allowed and it should not matter that the plaintiff does not have an interest in land as the rationale and objective of the rule ought to be that of ensuring the accountability of an occupier for dangerous or hazardous activities on his land. If his accumulation of the thing results in an escape and harms someone or his property, liability ought to be imposed. A restriction in the rule by requiring a plaintiff to have an interest in land (as well as the type of damage to be foreseeable) would give rise to a situation where a visitor or guest at any premises might be without a remedy if while he is a visitor or guest, he suffers damage as a result of an adjoining occupier's dangerous but non-negligent activities.

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84 [1866] LR 1 Exch 265 at 279, emphasis added.

85 [1938] 1 All ER 579.

86 In *Perry v Kendricks Transport Ltd* [1956] 1 All ER 154, CA and *British Celanese Ltd v AH Hunt (Capacitors) Ltd* [1969] 2 All ER 1252.

87 Note however the House of Lords' view to the contrary in *Read v J Lyons & Co* [1947] AC 156, HL at 173 (*per* Lord Macmillan), at 178 (*per* Lord Porter) and at 180-1 (*per* Lord Simonds).

88 *Hoon Wee Thim v Pacific Tin Consolidated Corporation* [1966] 2 MLJ 240 above at pp 339-340; *Dato' Dr Harnam Singh v Renal Link (KL) Sdn Bhd* [1996] 1 AMR 1157 (injury to plaintiff's health due to escape of noxious gas).

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Chapter Fifteen

BREACH OF STATUTORY DUTY[1]

The action for breach of statutory duty must not be confused with the action for the tort of negligence. Lord Wright in *LPTB v Upson*[2] described the differences as follows:

> ... a claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty ... it is not a claim in negligence in the strict or ordinary sense ... At the same time it resembles actions in negligence in that the claim is based on a breach of a duty ... whatever the resemblances, it is essential to keep in mind the fundamental differences of the two classes of claim.

The same damage entitles a plaintiff to institute a claim for breach of statutory duty and negligence in the alternative but since they are two separate wrongs, the defendants may be held liable in negligence but not, on the same facts, liable for breach of statutory duty and vice versa.[3]

A. Accrual of a right of action in tort

A right of action in tort for breach of a statutory duty will arise if the statutory provision clearly states such an intention. Unfortunately all too often this is not the case, as the statute is usually silent with regards to a separate action in tort.

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1 See also RA Buckley, *Liability in Tort for Breach of Statutory Duty* (1984) 100 LQR 204.

2 [1949] AC 155 at 168.

3 See *Lim Thong Eng v Sungei Choh Rubber Co Ltd* [1962] 28 MLJ 15; *Tay Cheng Teck v Tropical Produce Co Pte Ltd* [1971] 2 MLJ 247; *Yeo Kian Ann & Son v Railway Administration* [1973] 1 MLJ 43; *Zakaria bin Putra Ali v Low Keng Huat Construction Co (S) Pte Ltd & Ors* (Suit No 1140 of 1991), HC Singapore.

1. Development of the law

Initially the courts were of the opinion that whenever a breach of statutory duty caused damage to a person, that person had a right of action in tort.[4] A different view began to be taken in the first half of the nineteenth century[5] when a right of action in tort for damage sustained as a result of breach of a statutory duty was no longer automatic, especially if the statute provided for the enforcement of the duty in a specified manner. In the latter half of the nineteenth century the automatic right of action in tort for damage arising from breach of a statutory duty was rejected.[6]

2. The present position

The current approach is to treat the breach of statutory duty on a case by case basis. The intention of Parliament in the enactment of the statute will be scrutinised in order to ascertain whether, on the construction of the particular statute, some other remedy, be it civil or criminal, should be the only one available when damage occurs. In *Scally v Southern Health and Social Services Board*[7] the plaintiff's action for damages against his employer failed as the relevant statute provided that recourse to an industrial tribunal was the only remedy available.

The most common sanction provided for breach of statutory duty is a criminal penalty. Whether a civil action for damages may be maintained depends on the existence of two factors; firstly whether on the construction of the statute it is apparent that the obligation or prohibition was imposed for the benefit or protection of a certain class of individuals[8]; or secondly where the statute creates a right for the public and the particular plaintiff suffers damage which is direct and substantial as well as different than that suffered by the public at large.[9] In *Lonrho Ltd v Shell Petroleum Co Ltd*[10] the plaintiff oil company who had complied with government sanctions orders which prohibited trade with the illegal regime in Rhodesia, suffered losses when their competitors violated the government orders. The court held that the plaintiff could not recover damages from its competitors as the claim was outside the scope of the two factors mentioned above. These two factors are by no means conclusive. Ultimately, a right of action in tort rests on the purpose and intent of Parliament. The courts have to look into the purpose Parliament

4 *Couch v Steel* [1854] 3 E & B 402; *Anon* [1704] 6 Mod 26.
5 *Doe d Murray v Bridges* [1831] 1 B & Ad 847.
6 *Atkinson v Newcastle Waterworks Co* [1877] 2 Ex D 441.
7 [1991] 4 All ER 563.
8 *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1981] 2 All ER 456.
9 *Benjamin v Storr* [1874] LR 9 CP 400; *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440.
10 [1981] 2 All ER 456.

intended to achieve by the statute, and in doing so, the statute has to be taken as a whole.

3. Other factors affecting a right of action in tort

A right of action in tort is obscure and rather uncertain, but the general principle is that a claim for damages in tort may be denied, in the following circumstances:

(a) Claims against public authorities

The courts in England had in the past, been reluctant to allow claims against public authorities which violate general statutory duties to provide public services. Consequently it has been held that no action lies against the Minister of Education for his failure to 'promote the education of the people of England and Wales.'[11] A claim made against the Minister of Health for his failure to provide an efficient and comprehensive health service also failed.[12] It was also unclear, whether an action for breach of a more defined and specified statutory duty imposed upon local authorities may succeed, as the cases seemed to go both ways. In illustration, in *Saunders v Holborn District Board of Works*[13] the action against a local authority for failing to clear snow from the streets failed; whereas in *Thornton v Kirklees Metropolitan Borough Council*[14] an action for damages against a local authority for its failure to provide accommodation for homeless persons succeeded.

In *X v Bedfordshire County Council*,[14a] *M v Newham London BC*,[14b] and *E v Dorset County Council*[15] the House of Lords held that in actions for breach of statutory duty, the breach by itself is not sufficient to give rise to any private law cause of action. The private law cause of action arises only where it can be shown, on the construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public. Further, it must be shown that Parliament intended to confer on members of that class, a private right of action for breach of the duty.

Applying this principle, all three appeals by the claimants were struck out. In the first two cases, the allegation was the action or inaction of the local authorities in relation to children who were suspected of being abused. It was held that the purpose of the relevant child care legislation was the

11 *Watt v Kesteven County Council* [1955] 1 All ER 473.
12 *R v Secretary of State for Social Services, ex p Hincks* [1979] 123 Sol Jo FJ 436.
13 [1895] 1 QB 64.
14 [1979] 2 All ER 349.
14a *The Times*, June 30, 1995, HL.
14b [1994] 2 WLR 554.
15 [1995] 3 All ER 353, HL.

promotion of the social welfare of the community and within that system difficult decisions had to be taken. Thus there was no parliamentary intention to create a private cause of action against those entrusted with this difficult task.

In the third case, which concerned the failure of the local authority to provide proper schooling for children with special educational needs, again the House of Lords held that the relevant legislation did not suggest the availability of a private law right to damages in cases of breach of statutory duties.

However, the reluctance of English courts to allow claims against public authorities was swept away in *Barrett v Enfield London BC*.[16] Here, the claimant alleged that the defendant local authority had failed in its statutory duty to act as a responsible 'parent'. Consequently the claimant did not have a stable upbringing resulting in him leaving the defendant's care at the age of 18 without any family attachments and suffering from a psychiatric illness which in turn led to other social problems. The Court of Appeal dismissed the claimant's appeal, on the grounds that it was contrary to public interest to impose a duty of care on the local authority – to impose a duty would not be 'fair, just and reasonable.'

On appeal to the House of Lords which allowed the appeal, it was held that acts which are done pursuant to the lawful exercise of discretion may still be subject to a duty of care.[17]

The pro-claimant tendency continued in *Phelps v Hillingdon London BC*,[18] where it was held that educational psychologists, education officers and teachers may owe a duty of care to a specific pupil, *provided* sufficient proximity exists between the pupil and the teacher. Foreseeability that the educationist's advice would be relied and acted upon would establish this proximity requirement.

In Malaysia it is statutorily provided that the State Authority, local authority and any public officer or employee of the local authority cannot be subjected to any action, claim or liabilities arising out of any building or other works carried out in accordance with the provisions of the Street, Drainage and Building Act 1974.[19] So if the authority concerned does not inspect any building, building works or material, or the site of any proposed building, to ascertain that the provisions of the aforementioned Act or any by-laws made

16 [1999] 3 All ER 193, HL.

17 See the comments on the future direction of the law by Mullis A & Nolan D, *Tort*; All ER Rev 1999 at 408–413.

18 [2000] 4 All ER 504, HL.

19 Act 133, s 95.

thereunder are complied with, no tortious claim may be made against the authority in respect of any damage sustained. Even if the authority fails to ensure that any plans, certificates and notices submitted to it are accurate, any consequential damage arising from such failure is not actionable.[20]

If the performance of the statutory duty requires the exercise of the authority's discretion, then no action may be brought for the authority's failure to perform that duty unless the refusal is actuated by malice.[21] It has been held that any challenge with regards to the authority's exercise of discretion has to be brought by means of an application for judicial review and not by means of an action by writ.[22]

In *Parimala a/p Muthusamy v Projek Lebuhraya Utara-Selatan*[23] a driver was killed when he hit a stray cow which had entered onto the highway through a hole in the fence surrounding the highway. In a claim against the defendant highway authority which was statutorily responsible for the construction, maintenance, management and safety of the highway, the court held that there had been a clear breach of the relevant statutory duty. This was so even though the carrying out of the statutory duties had been subcontracted out to an independent contractor.[24]

(b) Whether redress under other torts is sufficient

In England the courts will also take into account the existing law of torts. If there are any other torts, specifically negligence, which may adequately protect the plaintiff's interest, then a claim for breach of statutory duty may not be allowed. Malaysian courts are much more lenient in this regard. Claims for breach of statutory duty as well as for breach of duty under the common law principles of negligence are accepted and the defendant may be found liable in both torts.[25]

(c) Where the breach arises from the regulation under the parent Act

If the alleged breach of duty derives not from the statute itself, but from the regulations made under the statute, the question will be whether the statute

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20 *Ibid.*

21 *Hu Sepang v Keong On Eng* [1991] 1 MLJ 440.

22 *Cocks v Thanet District Council* [1982] 3 All ER 1135.

23 [1997] 4 AMR 3274.

24 In *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee* [1998] 3 AMR 2847, it was held that despite the failure to ensure that house owners complied with all building by-laws, public policy would protect a local authority from liability. This was set aside by the Court of Appeal, reported in [2003] 1 MLJ 273, CA.

25 *Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor* [1995] 4 CLJ 317; *Mohamed Husin v Shum Yip Leong Rubber Works Ltd* [1972] 1 MLJ 17; *Wong Soon San v Malayan United Industrial Co Ltd* [1967] 1 MLJ 1; *Abdul Rahim Mohamed v Kejuruteraan Besi dan Pembinaan Zaman Kini* [1998] 4 AMR 4202.

empowers the Minister to make regulations which confer a private right of action on individuals.[26] Again, no specific rule or principle of law may be laid down, as the statute and the regulations thereunder have to be taken as a whole in order to ascertain the existence or otherwise, of a private right of action.

(d) Where the statute is silent

The statutory duty must be precise in its term so that the availability of a right of action in tort is clear. If the statute is silent on the question of civil remedies for its breach the courts might well be faced with a 'no way out' situation. The Law Commission Report in England has suggested that there should be a general presumption in favour of actionability.[27] It has been held that where the statute is silent as regards the defendant's obligation towards members of the public, this would not necessarily relieve him from the common law obligation to take care.[28]

B. Elements of the tort

An important case which laid down several principles relating to a cause of action based on breach of statutory duty is *Hu Sepang v Keong On Eng & Ors*.[29] The plaintiff was assaulted by four persons in the presence of D1, a police inspector; and D2 who was the Chief Police of Malacca at that time. The plaintiff subsequently brought an action for damages against D1 and D2 for failing to render assistance to him. He claimed they were therefore in breach of their statutory duty under the Police Act 1967 to prevent the assault. The Government of Malaysia was joined as D3. The court held that the Act was intended, among others, for the maintenance of law and order, the prevention and detection of crime and preservation of peace and security of the Federation, the powers to effect these intentions being given to the police. Section 20(3) of the Police Act 1967 imposes a duty on the police to apprehend a person whom the law authorises the police to apprehend, and to give assistance in the protection of life and property. In dismissing the defendants' claim and holding that the plaintiff had no cause of action, the court laid down the following principles:

Firstly, to establish civil liability for a breach of statutory duty, the plaintiff must show that:

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26 *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733.

27 Law Com No 21 (1969); See also KM Stanton, *Breach of Statutory Duty in Tort* (1986), which argues for a presumption the other way.

28 *Yeo Kian Ann & Son v Railway Administration* [1973] 1 MLJ 43.

29 [1991] 1 MLJ 440.

(a) the injury he has suffered is within the ambit of the statute,

(b) the statutory duty imposes a liability to civil action,

(c) the statutory duty is not fulfilled, and

(d) the breach of the statutory duty has caused his injury.

Secondly, if a statute imposes a duty towards persons generally, no question can arise whether the plaintiff is within the class protected.

Thirdly, where a statute confers a power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie. By contrast, where a statute confers a power coupled with a discretion to exercise it, failure to exercise the power will not attract any liability. The plaintiff is however, still entitled to compensation if the refusal to exercise the discretionary power is malicious.

Fourthly, if a statute creates a duty but does not provide for any remedy, be it civil or criminal, upon its breach, the injured party will have a right to a civil action for otherwise the statute will be meaningless.

A discussion of these elements is as follows:

1. The statute allows a cause of action in tort

The most important question is whether the statute intends to give a right of action in tort. If this intention is clearly stated, the plaintiff would have passed the first hurdle. Some statutes clearly prohibit a separate right of action in tort, such as the Occupational Safety and Health Act 1994,[30] the Employees' Social Security Act 1969,[31] and the Street, Drainage and Building Act 1974.[32] More often than not the legislative intention is unexpressed and the courts would have to consider a few factors before allowing a right of action in tort. If the statute merely confirms the interest already protected under the existing law of torts, the plaintiff's claim may be allowed.[33] The plaintiff also has a stronger case to argue in favour of a right of action in tort if the statute is silent as to the means of enforcement in the event of a breach of the particular statutory duty.[34] It has been held that if a statute creates a

30 Act 514, s 59.
31 Act 4, ss 31, 42.
32 Act 133, s 95.
33 *Ashby v White* [1703] 2 Ld Raym 938.
34 In *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733 this 'right' was rejected as against the plaintiff prisoners but perhaps this should be treated as a case falling within the exception on grounds of policy.

duty but imposes no civil or criminal remedy for its breach, there is a presumption that a person who is injured will have a right of civil action for otherwise the statute would be 'but a pious aspiration'.[35] If the statute provides for an administrative remedy, such as a proper complaint made to the relevant Ministry, the general rule seems to be that this prevents any separate action in tort. In England this rule is not watertight especially in situations where the plaintiff has suffered physical injuries.[36]

If the statute provides for a criminal penalty, the general rule is that there is no separate cause of action in tort.[37] The exceptions are when the plaintiff can prove that the statute is not just to regulate a particular activity for the general public but to protect and benefit a class of persons to which he belongs.[38] The second exception is when the statute is for the benefit of the public but the plaintiff can prove that he has suffered a greater and a more substantial damage than members of the public.[39] These two exceptions are sound in principle as in the absence of an express exclusion of a right of action in tort or any other civil cause of action, the courts should construe the statute in favour of a plaintiff who has sustained physical injuries due to the breach of statutory duty by the defendant. In *Tan Chye Choo & Ors v Chong Kew Moi*[40] the relevant statute imposed a public duty on owners of motor vehicles to keep their vehicles free from danger to any person in the vehicle or on a road. The defendant's taxi collided into vehicle *A*, causing the death of two occupants and serious injuries to the plaintiff who were all riding in vehicle *A*. The collision was caused by a brake failure in the taxi. The plaintiff alleged that the defendant was in breach of his statutory duty in permitting the taxi to be used in a condition in which it was a danger to persons on the road. The court held on the evidence adduced that the defendants had not been negligent in the maintenance and inspection of the taxi; and since the statute provided for a criminal penalty for its breach, it precluded the plaintiff from obtaining compensation in a civil action. The court further stated that the duty imposed by the statute was a public duty which was not enforceable by an individual.

35 *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440.

36 *Reffell v Surrey County Council* [1964] 1 All ER 743 (pupils injured on dangerous school premises), *cf Wyatt v Hillingdon London Borough Council* [1978] 76 LGR 727 where the plaintiff's action for the defendant's failure to provide her with home-help failed.

37 *Tan Chye Choo & Ors v Chong Kew Moi* [1966] 2 MLJ 4, FC; Occupational Safety and Health Act 1994, Act 514.

38 *Atkinson v Newcastle and Gateshead Waterworks Co* [1877] 2 Ex D 441.

39 *Benjamin v Storr* [1874] LR 9 CP 400.

40 [1966] 2 MLJ 4.

In *Toh Muda Wahab v Petherbridge*[41] the defendant was in breach of the duty to fence mining land as required under s 81 of the Mining Enactment 1904. The plaintiff's elephants strayed on the mining land and one fell down the unfenced mining pit. The plaintiff's claim was denied. The court held that no action could lie for injuries sustained through the non-performance of a statutory duty, when penalties for non-performance were provided for under the statute. To establish a right of action, the cause of injury *per se* must be an actionable wrong independent of the statute.

In *Iskandar Gayo v Datuk Joseph Pairin Kitingan & Ors*[42] the plaintiffs as Malaysians and residents of Sabah as well as beneficiaries or persons having an interest in the Sabah Foundation (the Trust) sued the defendants, alleging mismanagement of the Trust. The crux of the allegation was that timber lands belonging to the Trust were sold to the defendants below the market price, thus resulting in losses to the plaintiffs. The Trust was established under the Sabah Foundation Enactment 1966 and upon construction of its provisions the court held that the Trust was a governmental obligation for the public at large – namely Malaysian citizens who reside in Sabah. The Trust was not created for a limited class of the public. Thus it was not justiciable at the instance of the plaintiffs.

2. The defendant must be in breach of his statutory duty

This element may be further divided into three separate factors as follows:

(a) The breach is within the scope of the duty

Most statutes define the spheres of their application, and if the claim is outside the defined sphere, the plaintiff's action will fail.[43] So a claim that is brought for damage arising from circumstances that are not covered by the statute cannot be a claim for breach of statutory duty. The plaintiff might however have a better cause of action in other torts, such as negligence or nuisance.[44]

(b) The duty imposed on the defendant must be a mandatory duty to act.

A mere conferral of a power to act is insufficient. There must be a requirement of a positive obligation on the part of the defendant, and this obligation must be sought in the wording of the statutory provision or the regulation itself.

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41 [1905] SSLR App 1.

42 [1997] 2 AMR 1264.

43 *Longhurst v Guildford, etc., Water Board* [1963] AC 265, where the plaintiff's claim failed as the place where the accident occurred was not a factory as defined under the relevant statute.

44 *Sequerah Stephen Patrick (Mrs) v Penang Port Commission* [1990] 2 MLJ 232.

(c) There is a breach of an absolute duty

The duty imposed may either be 'absolute' or 'so far as is reasonably practicable'. In cases where the duty is absolute the obligation or state of affairs must be actually fulfilled and not merely that the defendant must do his best to fulfil the obligation or state of affairs.[45] It follows that non-performance of the obligation or non-existence of the state of affairs will certainly constitute a breach.[46] In construing the statutory duty to be absolute, the courts may resort to the test of 'reasonable foreseeability', in that if it is reasonably foreseeable that damage is likely to occur as a result of non-compliance with the duty, the duty may then be described as an absolute duty.[47] For instance, although it was due to the worker's own carelessness that a log fell onto his arm causing permanent disability, his contributory negligence did not wipe out the defendant's statutory duty to ensure that timber logs were safely stacked.[48]

In *Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor*[49] the defendants failed to display warning notices *via* 'danger signs' at relevant places at an electric substation owned by them. They had also failed to switch off the switch cable prior to repair works, in contravention of certain regulations of the Electricity Supply Regulations 1990. As a result of non-compliance with the relevant regulations the plaintiff suffered severe burns due to an explosion which occurred when he came into contact with the switch cable in order to effect repair works. The court held that the statutory duty under the regulations was absolute and once a plaintiff proves that such a duty has not been complied with, the breach is actionable without the plaintiff having to prove any lack of care or diligence on the part of the defendants. The defendants in this case were liable for breach of their statutory duty as well as negligence under the common law for failure to ensure that the substation was safe.

A duty that is imposed 'so far as is reasonably practicable' is not an absolute duty. The standard is very similar to the standard of common law negligence

45 *Carroll v Andrew Barclay & Sons Ltd* [1948] AC 477.

46 *Galashiels Gas Co v Millar* [1949] AC 275.

47 *John Summers & Sons Ltd v Frost* [1955] AC 740.

48 *Goh Eng Chye v Amalgamated Lumber Sdn Bhd* [1982] 2 MLJ 180, FC. See also *Seng Chong Metal Works v Lew Fa* [1966] 2 MLJ 63, FC where the court held that although the accident could not have happened without the inadvertence of the workman, nevertheless because the fundamental cause of the accident was the defendant's failure to comply with the machinery regulations, having regard to the policy of the law in protecting workmen operating potentially dangerous machinery, the workman's inadvertence did not constitute contributory negligence.

49 [1995] 4 CLJ 317.

and the defendant must prove that the performance of the duty is not reasonably practicable in the circumstances. The risk of damage to the plaintiff will be weighed against the cost of precautions to the defendant in determining whether the performance of the duty is reasonably practicable or otherwise.[50] The particular statutory provision in question must be analysed in order to discover whether the duty imposed is 'absolute' or 'as far as is reasonably practicable'. It seems that where the duty is not absolute, liability for breach of that duty may be imposed if the defendant is 'negligent' in the common law sense.[51]

3. A duty must be owed to the plaintiff

The plaintiff must prove that he is a member of the class of persons protected under the statute. In *Lim Thong Eng v Sungei Choh Rubber Co Ltd*[52] the plaintiff's hand was crushed in a machine while he was working at the defendant's factory. The relevant statutory provision provided that the machine must be installed in a specific manner so as to prevent the hands of the operator being brought into dangerous proximity to the point of contact with the machine. The court held that the plaintiff clearly belonged to the class of persons for whose protection the provision was enacted and his claim for breach of statutory duty succeeded.[53]

No problems will arise if he clearly belongs to the protected class of persons expressly provided under the statute, but if the provision is unclear, then it is a question of the construction of the particular statutory provision whether the plaintiff is a member of the protected class.

In *Knapp v Railway Executive*[54] a train driver who sustained injuries could not recover under the statute as the protection under the relevant statute was conferred on road users and the plaintiff as an engine driver on the railway was not within the scope of the Act. Similarly in *Hartley v Mayoh & Co*[55] a fireman's widow was denied compensation under the relevant statute as the protection was only extended to 'persons employed' which did not include a fireman who came onto the premises.

50 See *Adsett v K and L Steelfounders and Engineers Ltd* [1953] 1 WLR 137; *Richards v Highways Ironfounders (West Bromwich) Ltd* [1955] 1 WLR 1049; [1957] 1 WLR 781.

51 *Tan Chye Choo & Ors v Chew Kew Moi* [1965] 2 MLJ 198.

52 [1962] 28 MLJ 15.

53 See also *Goh Eng Chye v Amalgamated Lumber Sdn Bhd* [1982] 2 MLJ 180; *Kee Su Ngoy v Teh Bok* [1989] 2 CLJ 841.

54 [1949] 2 All ER 508.

55 [1954] 1 QB 383.

4. The statutory breach must have caused the damage

The plaintiff must prove that the breach has caused the damage or that it has materially contributed to the damage.[56] If the injuries sustained by the plaintiff is solely as a result of his own act, his claim against the defendant will fail.[57] Contributory negligence of the plaintiff will not defeat a claim for breach of statutory duty committed by the defendant, although it will have the effect of reducing the amount of damages recoverable by the plaintiff. In *Wong Soon San v Malayan United Industrial Co Ltd*[58] the defendant employers were held to be in breach of their statutory duty for failure to provide goggles or face shields to their machine operators, but since the plaintiff employee's injuries were also probably due to his own act in adjusting the machine without consulting the supervisor on duty, he was found to be contributorily negligent to the extent of 20%. The defendants were also found to be in breach of duty which they owed to the plaintiff under the common law.

In *Gan Kim Thye v The Union Omnibus Co Ltd*[59] the plaintiff bus conductor's claim against his employers for causing his stroke and subsequent paralysis on the grounds that he was overworked, thus giving rise to a breach of statutory duty on the part of his employers was rejected by the court. In the first place, there had been no breach but even if there had been a breach, the plaintiff did not prove that his injuries were in fact caused by such alleged breach.

In *Ginty v Belmont Building Supplies Ltd*[60] the relevant statute required that crawling boards should be used for work done on fragile roofs. This provision was binding on both the plaintiff employee and the defendant employer. The defendant supplied the boards but the plaintiff neglected to use them and he fell through a roof and suffered injuries. Both parties had been in breach of the relevant provision, the defendant for his failure to ensure the boards were used and the plaintiff, for failure to use the same boards. The court rejected the plaintiff's claim as the defendant's breach was co-extensive with the plaintiff's breach. The injury was caused by the plaintiff's own wrongdoing and he could not transfer responsibility to his employer who had complied with the statutory provision in supplying the boards.

Whether actual damage in itself is an essential element under this tort is not quite clear. Earlier judgments seem to suggest that if the right created in the plaintiff is absolute, then an action for breach of statutory duty would lie

56 *Bonnington Castings Ltd v Wardlaw* [1956] 1 All ER 615, see above at p 165; *Gan Kim Thye v The Union Omnibus Co Ltd* [1969] 1 MLJ 186; *Seng Chong Metal Works Ltd v Lew Fa* [1966] 2 MLJ 63.

57 *Yusoff v Central Electricity Board* [1964] 30 MLJ 374.

58 [1967] 1 MLJ 1.

59 [1969] 1 MLJ 186.

60 [1959] 1 All ER 414.

even though the plaintiff has in fact suffered no actual damage. This in effect would make this tort actionable *per se*.[61]

Later cases suggest however, that damage must in fact be sustained by the plaintiff, and the damage must be of a kind for which the law awards damages.[62]

There is room for arguing that liability should be strict. The emphasis should be on the breach of the statutory duty and not on whether damage has in fact occurred. Damage should only be a relevant factor in the determination of the amount of damages awarded, or in considering the various types of remedies available.

5. The injury or damage must be of the kind which the statute is intended to prevent

The plaintiff's action will fail if he suffers injury or damage different in kind from what the statute intends to prevent.

In *Gorris v Scott*[63] the defendant shipowner was under a statutory duty to provide pens of a specified size for the carriage of animals on his ship. The defendant violated this order and the plaintiff's sheep were swept overboard as a consequence of the breach. The plaintiff's action failed as the court held that the statute was intended to prevent the spread of disease, and not to prevent animals from drowning at sea.

In *Straits Steamship Co Ltd v The AG*[64] the relevant statute required vessels to be provided with certificated officers. Subsequently the Government of the Colony exempted six vessels from this requirement. The plaintiffs alleged that due to the exemption the six vessels were run at a very low cost and competed unfairly with their own ships and that they had thereby suffered damage. The court held that even though the Government had clearly committed a breach of their statutory duty, the statute was aimed at the regulation of merchant shipping and not the protection of individuals from damage in their trade. Consequently the damage suffered was not of a kind which the statute was intended to prevent and the plaintiff's action failed.

Where the intention or object of the statute is to promote safety, then the damage or hazard that occurs must be foreseeable as being within the Act, and once this is satisfied it should be irrelevant how the damage occurs.

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61 *Ashby v White* [1703] 2 Ld Raym 938; *Ferguson v Earl Kinnoull* [1842] 9 Cl & Fin 251.
62 *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 1 All ER 622.
63 [1874] LR 9 Exch 125.
64 [1933] 2 MLJ 170.

C. Defences

Three main defences are relevant in an action for breach of statutory duty. These are *volenti non fit injuria*, contributory negligence and delegation.

1. Volenti non fit injuria[65]

In *Wheeler v New Merton Board Mills Ltd*[66] it was held that *volenti non fit injuria* was no defence to an action by an employee against his employer for breach of the employer's statutory duties. This decision was approved in *Imperial Chemical Industries Ltd v Shatwell*.[67]

In *Mohamed Husin v Shum Yip Leong Rubber Works Ltd*,[68] the plaintiff sustained serious injuries on his right hand when his co-worker negligently brought down the machinery which function was to cut rubber sheets into small pieces. The defendant had breached certain regulations of the Machinery Regulations 1959, which required them to provide or erect a guard to prevent an operator's fingers from reaching the danger zone. In any event they raised the defence of *volenti*, on the basis that the plaintiff was fully aware of the danger of operating the machine, and had by implication voluntarily undertaken the risks.

It was held that the fundamental cause of the accident was a breach of the statutory duty by the employers. Thus any supposed agreement by the workman to waive any breach of the law imposed on the employers and to consent to their contravening such statutory provisions were deemed highly undesirable, if not void, on grounds of public policy.

2. Contributory negligence

The plaintiff's contributory negligence will serve to reduce the amount of damages he may recover from the defendant. This defence has already been considered elsewhere.[69]

3. Delegation

(a) Delegation of duty to the plaintiff

Sometimes the defendant may delegate his statutory duty to the plaintiff who subsequently suffers injury through breach of the duty. The general

65 See above, Chapter 9.
66 [1933] 2 KB 669.
67 [1964] 2 All ER 999.
68 [1972] 1 MLJ 17.
69 See above, Chapter 9.

principle is that delegation is not a good defence. Delegation, if any, will provide the defendant with a defence if he can prove that the default was solely due to the plaintiff's act or omission and therefore the plaintiff himself has been in breach of the statutory duty. Even so, damages may be apportioned in accordance with each party's contribution to the damage. So where the duty is imposed on the defendant alone the plaintiff may recover compensation from the defendant.[70]

(b) Delegation of duty to a third party

Where a duty is imposed by law or statute on a person or body of persons, they do not release themselves from discharging their duty, or free themselves from liability, by delegating or handing over that duty, to another person to perform it.

In *Paterson v Municipal Commissioners*[71] the plaintiff's horse was injured when one of the bridges which was under the defendant's statutory duty to maintain and repair, collapsed. Although the duty to repair was contracted out to a third party, the defendant was held liable.

70 *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414; *Ross v Associated Portland Cement Manufacturers Ltd* [1964] 2 All ER 452; *Boyle v Kodak Ltd* [1969] 2 All ER 439.

71 [1882] 1 Ky 561.

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Chapter Sixteen

VICARIOUS LIABILITY

The doctrine of vicarious liability applies to all forms of torts: intentional torts, negligence, nuisance and all other torts.

Vicarious liability refers to a situation where *A* is liable to *C* for damage or injury suffered by *C* due to the negligence or other tort committed by *B*. *A* need not have done anything wrongful and *A* further need not owe a duty of care to *C*. The most important condition for imposing liability on *A* is the nature of relationship between *A* and *B* and the tort committed by *B* is connected to the nature of this relationship. This relationship is usually that of master and servant or employer and employee and as between a principal and his agent.

A. Reasons for vicarious liability[1]

Many reasons have been put forward in justification of this doctrine, some of which are that a master is to be held liable for employing a negligent employee; for failure to control the employee; that since the master derives benefit from the employee's work, he should be made liable for any tortious conduct of the employee in the performance of his work. Another reason is because the master is in a better financial standing to compensate the third party. This last reason ensures, if nothing else, that the third party will in fact receive compensation for his injuries and the doctrine therefore secures actual compensation to the tort victim.

However, in *Imperial Chemical Industries Ltd v Shatwell*[2] Lord Pearce said:

> The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his servant within the scope of it. The doctrine maintains that liability even in respect of acts which the employers had expressly prohibited (see *Canadian Pacific*

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1 See Winfield & Jolowicz, 15th edn at pp 727-8.

2 [1965] AC 656 at 685.

Railway v Lockhart [1942] 2 All ER 464) and even when the employers are guilty of no fault themselves (*Staveley Iron & Chemical Co Ltd v Jones* [1956] 1 All ER 403). It follows that they are liable for the torts of one servant against another.

Certainly where the employer's business is in the form of public service, such as operating a public bus service, policy dictates that the employer should be liable even for unauthorised acts of his employee.[3]

B. Requirements of vicarious liability

Three requirements must be satisfied in order for vicarious liability to arise; firstly there must be a wrongful, or tortious act; secondly there exists a special relationship that is recognised by law between the person alleged to be vicariously liable and the tortfeasor, and thirdly the tort is committed within the course of employment. Each requirement will be discussed in turn.

1. Wrongful or tortious act

The court will first and foremost decide whether a tort has been committed.[4] All the elements of the particular tort must be satisfied. Once a tort is established, the nature of the relationship between the defendant and the tortfeasor will examined.

2. Special relationship

There must be a special relationship between the defendant and the tortfeasor; and such relationship usually exists between an employer and his employee. If a tort is committed on the defendant's premises but not by his employees, he cannot be vicariously liable for the tort.[5] The special relationship referred to here is limited to the employer-employee relationship. Although an employer may also be held liable for the torts committed by his independent contractors and agents, these are dealt with below.[6] It is possible for a person to be an employee of more than one employer, provided the master and servant relationship is established between the parties.[7] Whether a person is an employee, and whether there is a special relationship, is dependent on a determination of whether the relationship is one based on a contract of service or a contract for services. A special relationship exists in the former but not in the latter.

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3 *Bohjaraj Kasinathan v Nagarajan Verappan & Anor* [2001] 3 AMR 3260.
4 See *Pui Lai Ong v Kassim bin Yunus & Anor* [1993] 2 AMR 3208.
5 *Ravindran a/l Kunji Kuttan v Tenaga Nasional Berhad* [1996] 2 CLJ 1060.
6 See below sections C and G.
7 *Chang Fah Lin v United Engineers (M) Sdn Bhd* [1978] 2 MLJ 259.

A person who is in a contract of service is an employee whereas one who is in a contract for service is an independent contractor. The general rule, subject to the exceptions discussed further below is that an employer is not liable for the torts of his independent contractors.

(a) Determining the existence of a contract of service and the employer-employee relationship

(i) Control test

Initially the test used to determine the nature of the relationship between the two parties was the control test, which was laid down in the case of *Short v J & W Henderson Ltd*[8] where Lord Thankerton said that there were four factors to be considered in determining the existence of a contract of service. Firstly the power of selection by the employer, secondly the power in determining salary or other remuneration, thirdly the power or right of the employer to control the method in which the work was done and fourthly the power and right of the employer to terminate the employee's services. In *Collins v Hertfordshire County Council*[9] the court held that a contract of service existed if the employer had the power to instruct the employee, and to control the method in which the work was to be done. Control over the hiring and dismissal of the worker has been held to be evidence of an employer-employee relationship.[10]

The element of control is no longer an accurate test nowadays to determine the existence of an employer-employee relationship. For instance the captain of a ship or a doctor at a government hospital is an employee, but the employer does not control the method in which the job is to be done. Not only is there an absence of control on the part of the employer because the above-mentioned employees are professionally-trained persons and so how they perform their services is outside the control of the employer; but more often than not employers are more likely to be a corporate entity and not a natural person – how then, does a corporate entity 'control' the method of work of its employees? This does not mean that the control test is no longer valid, however it must be borne in mind that lack of control does not necessarily mean that a person is not an employee and is not in a contract of service with his employer.[11] It has been suggested[12] that a composite approach might be better, in which all the relevant factors in the relationship are

8 [1946] 62 TLR 427 at 429.
9 [1947] KB 598.
10 *Mariasusai s/o Suminader v Nam Hong Trading Co Ltd & Anor* [1975] 2 MLJ 271.
11 See *Mat Jusoh v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 at 74.
12 *Lee v Cheung* [1990] 2 AC 374, PC.

considered as a whole. It follows that although control is a consideration, the criteria in determining whether there is in fact control is broader in nature. So for instance it must be considered whether the employer controls the details of the work, the level of skill required in performing the work, whether the worker provides his own equipment, whether he hires his own helpers, the degree of financial risk he takes and how far he has an opportunity of profiting from the work undertaken.[13]

(ii) Organisation test

A few years after the control test was laid down what has been described as the organisation test was developed. In *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans*[14] Lord Denning said that it would be rather easy to identify a contract of service but not as easy to know the difference between a contract of service and a contract for services. A captain of a ship, a driver and a journalist all work under a contract of service; but a ship's pilot, a taxi driver and a contributor to a newspaper are all employed under a contract for services. A common element in all these situations is that in a contract of service, the person concerned works as part of the organisation and his work forms an integral part of that organisation, whereas in a contract for services, even though the work is done for the organisation, it is not integrated into it but is only accessory to it.

So if the worker is in business on his own account, then it is more likely that he will not be deemed to be an employee.[15]

In *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd*[16] the plaintiff who worked as a sawyer at the defendants' sawmill sustained injuries while carrying a log with a co-worker and was consequently refused further employment at the defendants' sawmill. In an action for damages against the defendants, liability was denied by the latter who contended that the plaintiff was not their employee but an employee of *X*, who was the contractor of the defendant. The court held that since wages and the number of logs to be sawn were determinable by the defendants, the plaintiff's work was an integral part of the defendants' business and he was therefore an employee of the defendants. In the alternative the defendants pleaded that even if the plaintiff was held to be their employee, the accident was solely due to the negligence of the plaintiff. The court held that an employer must take reasonable care so as not to subject the persons employed to unnecessary risks, which is a duty not to subject the employee to any risk which the

13 *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 185.
14 [1952] 1 TLR 101 at 111.
15 *Lee Tin Sang v Chung Chi-Keung* [1990] 2 WLR 1173, HL.
16 [1982] 2 MLJ 71.

employer can reasonably foresee and which he can guard against. This duty includes the provision of a competent workforce, adequate material and a proper system of work and effective supervision. On the evidence the court found the defendants negligent for not providing a sufficient number of workmen to do the job the plaintiff was doing and for not providing a proper and effective system of work.

(iii) Multiple test

The 'control' test has been increasingly difficult to apply due to the 'lack of control' of employers over the method in which the work is to be done. The 'organisation' or 'integration' test has also been criticised for not being able to present a clear and candid answer in many situations. The dissatisfaction with these two tests have led the courts to prefer a third test, which is the 'multiple' or 'mixed' test. This test is said to be based on the common sense approach.

In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*[17] the court held that three factors need to be fulfilled before a contract of service is established; firstly that the employee or servant agrees that he will use his own expertise and the employer pays him either in monetary form or in any other form of remuneration. Secondly the employee or servant agrees, whether impliedly or expressly, that he will be bound by the employer's instructions and thus is reflective of the employer-employee relationship. Thirdly, all other conditions in the agreement are consistent with the nature of the job, which is a contract of service.

Of the three tests above that are available in determining the existence of a contract of service, in Malaysia the courts generally favour the control test. Workers have been held to be non-employees on the basis that the defendant was not responsible for payment of wages and did not have control over the manner in which the work was to be performed.[18] Other factors include non-involvement in determining the working hours, leave and non-selection of the workers.[19] In the majority of cases there is no difficulty in determining whether a worker is an employee. Examples are office clerical staff, live-in domestic help and factory workers. Examples of independent contractors would be contractors (house-builders), grass-cutters and car service-centres. They are the independent contractors of the members of the public who employ them.

17 [1968] 2 QB 497.
18 *Bata Shoe Co (Malaya) Ltd v Employees Provident Fund Board* [1967] 1 MLJ 120.
19 *Ibid.* Followed in *Employees Provident Fund Board v MS Ally* [1975] 2 MLJ 89.

(b) Grey areas

Sometimes however, it may be difficult to ascertain whether a worker is deemed to be an employee or otherwise. Two particular situations in which this difficulty may arise are discussed below.

(i) Hospital staffs

One dissatisfaction associated with the control test is the vicarious liability of hospitals for the negligence of their staff. Surgeons and consultants are experts in their own fields and it seems absurd to describe the hospital board as 'controlling' the work of these professionals. The uncertainty surrounding the nature of the relationship between these professionals and the hospital was settled when a series of cases held that nurses, radiographers,[20] house-surgeons,[21] and assistant medical officers[22] are employees of the hospital for purposes of vicarious liability. In any case the liability of a hospital for the negligence of its health care professionals is dependent on whether the professional is engaged in his own business or that of the hospital, and only if the conduct of the medical officer is deemed to be part of the hospital's business will the hospital be vicariously liable.[23] In *Cassidy v Ministry of Health*[24] and *Roe v Ministry of Health*[25] the courts held that if negligence occurs in a hospital, and the tortfeasors cannot be identified, the hospital will be vicariously liable for the negligence. Lord Denning in *Roe* stated that the hospital would still be held liable even though the negligence is committed by a part-time employee as the employee is still part of the organisation. Negligent acts of consultants would also render the hospital vicariously liable and in fact the hospital may be independently liable if the negligence of the consultants is due to the hospital's failure in ensuring that it has the recommended basic equipment.[26] An exception would undoubtedly apply to consultants and surgeons at hospitals where the consultant or surgeon has a contract with the patient that the hospital would not be vicariously liable for any negligence committed by the consultant or surgeon. This would mean that the treatment which is performed by the consultant or surgeon is not on behalf of the hospital but is pursuant to a direct engagement with the patient.

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20 *Gold v Essex County Council* [1942] 2 All ER 237.
21 *Collins v Hertfordshire County Council* [1947] 1 All ER 633; *Cassidy v Ministry of Health* [1951] 1 All ER 574, CA.
22 *Cassidy v Ministry of Health* [1951] 1 All ER 574, CA.
23 See *Ellis v Wallsend District Hospital* [1989] 17 NSWLR 553.
24 [1951] 1 All ER 574, CA.
25 [1954] 2 QB 66.
26 *Ng Eu Khoon v Dr Gwen Smith & 2 Ors* [1996] 2 AMR 1980.

It has been suggested that a hospital's liability for the torts committed by its employees rests not on the principle of vicarious liability, but the breach of its primary duty to the patients.[27]

(ii) Lending a worker

If *B*, who is the employee of *A* is 'lent' to *C* and *B* subsequently commits a tort, the general principle is that *A* will be vicariously liable for the tort committed by *B* unless *A* has divested himself of all possession and control. This principle was laid down in *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd.*[28] Here *B* worked as a crane-driver for *A*, who hired out the crane, together with *B*, to *C*. The agreement between both *A* and *C* stipulated that *B* would be working for *C* but *A* was to continue paying *B*'s wages as well as retaining the power to terminate *B*'s employment. *B* was negligent in the course of doing his job and injured *X*. At the time of the accident *C* had control over which cargo was to be moved but he had no control over the method in which *B* handled the crane. The House of Lords held that *A* was his permanent employer, it was therefore vicariously liable to *X*.[29]

3. The tort must occur within the course of employment

An employer is only vicariously liable for the torts of his employee which occur in the course of employment. Conduct is said to be within the course of employment if firstly, it is either expressly or impliedly allowed by the employer, or secondly, when the employee does something that is authorised in an unauthorised manner or thirdly, the employee does something that is closely connected to what he is employed to do, in the course of doing the job.[30] Whether an act is construed as what ought or should be done in the course of doing the job depends on the facts of each case.[31] Some cases in which the term 'course of employment' may be better understood are discussed under the different subheadings below.

(a) Carelessness of worker in the performance of his job

The commission of a careless act may still be within the course of employment provided the worker is not 'on a frolic of his own'.[32] Clearly the employer is

27 *Gold v Essex County Council* [1942] 2 KB 293.
28 [1947] AC 1, HL.
29 See also *Teo Kim Kien & Ors v Lai Sen & Anor* [1980] 2 MLJ 125.
30 *Staton v National Coal Board* [1957] 1 WLR 893 (cycling across employer's premises to go to an office in order to collect wages).
31 *Marsh v Moores* [1949] 2 KB 208.
32 *Joel v Morrison* [1834] 6 C & P 501 at 503 *per* Parke B.

liable if the employee is careless with regard to the mode of doing authorised work. The employer however, will not be liable if the employee is careless in doing something that he is not employed to do in the first place.

In *Century Insurance Co Ltd v Northern Ireland Road Transport Board*[33] the defendant's worker who was the driver of an oil tanker, had stopped at the plaintiff's petrol station to transfer petrol from the lorry to an underground tank at the garage. He lit up a cigarette and threw the burning match on the floor. An explosion ensued and the plaintiff's property was destroyed. The court held the defendant liable for his worker's negligence as the act was done in the course of his employment, even though the actual act of smoking did not benefit the employer. Liability was also based on the fact that the driver did what he was employed to do (which was to deliver the petrol) albeit he performed his work in a negligent and unauthorised manner.

In *Mohd Yeanikutty v Far East Truck Inc Manufacturing (Pte) Ltd*[34] *A* was a mechanic at the defendant's workshop. *A*, together with another worker, were sent to repair a machine at a lift factory. Due to their own negligence *A's* hand was crushed. The defendant stated that *A* was to blame for his own injury as they had disobeyed instructions. *A* was found to be contributorily negligent, but since the other worker was partly liable for the negligence, the defendant as his employer was vicariously liable for the same negligence.

In *Lim Ah Tong v Ang Yau Chee & Anor*[35] the plaintiff's son was killed due to the careless driving of D1, who was on an errand for his employers, D2. The court held that since the journey was undertaken for the benefit of the employers, they were vicariously liable for the negligence of D1.

(b) Unauthorised mode of doing something authorised/Mistake of worker

If the employee or worker commits a mistake in the course of performing his job, generally the courts will hold the employer liable. This mistake will be construed as doing something authorised in an unauthorised manner. In *Bayley v Manchester, Sheffield and Lincolnshire Rly*[36] the defendants were held liable when their porter pulled out a passenger from a train as the porter (mistakenly) thought that the passenger was on the wrong train.

An interesting but difficult question arises in relation to sexual acts committed by an employee – can the employer be held vicariously liable? Yes, according

33 [1942] AC 509, HL.
34 [1984] 2 MLJ 91.
35 [1969] 2 MLJ 194.
36 [1873] LR 8 CP 148.

to the House of Lords in *Lister v Hesley Hall Ltd*,[37] where the employer was found vicariously liable for their warden's acts of sexual abuse on boys in a residential school.

(c) Tort committed in protection of employer's property

If the worker commits a tort in order to protect the employer's property, the general rule is that the employer will be vicariously liable. The worker's conduct in these circumstances may be construed as being impliedly authorised by his employer. The employer may however, escape liability if the employee's conduct is excessive, as excessive conduct might take it outside the course of employment. What amounts to excessive conduct is a question of degree and fact. There is therefore, room for argument for both the imposition and exclusion of liability. In *Poland v Parr & Sons*,[38] the defendants' worker, *X*, reasonably believed that a boy was stealing sugar which belonged to his employer. *X* struck the boy, who fell and consequently had to have his leg amputated. The defendants were held liable for even though *X*'s act was somewhat excessive, it was not sufficient to make it fall outside the scope of employment.

(d) Worker delegating his responsibility

A servant does not have the power to delegate his responsibility to a third party, even in an emergency situation. Thus an employer will not be held liable if the third party commits a tort.[39] Delegation must be contrasted with an obviously negligent conduct, as in *Ilkiw v Samuels*[40] where a lorry driver who was working for the defendant had allowed a third party to drive the lorry. The third party was negligent and an accident occurred. The defendant was held liable, not for the third party's negligence, but because his employee was negligent in the course of his employment by allowing a third party to drive the lorry.[41]

(e) Worker acting for his own benefit

If the worker does an act for his own benefit, it does not necessarily mean that he has acted outside the scope of his employment.

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37 [2001] 2 All ER 769, HL.
38 [1927] 1 KB 236, CA.
39 *Houghton v Pilkington* [1912] 3 KB 308.
40 [1963] 1 WLR 991.
41 See also *Ricketts v Thomas Tilling Ltd* [1915] 1 KB 644, CA, where a bus company was held liable for the negligence of its driver in allowing the conductor to drive a bus.

In *Zakaria b Che Soh v Chooi Kum Loong & Anor*[42] the plaintiff was a driver with a research institute in Ipoh. After sending the director home he drove home for lunch and an accident occurred on the way. The court found the state government liable. Even though the purpose of that trip did not have anything to do with his employer, but it was something that was expected to be done in the course of his employment and thus the accident occurred within the course of his employment.[43]

The test is whether the conduct of the worker is reasonable; in that it is not too remote from the contemplation of both parties as to take the act out of the employment. So for instance if a driver had driven a hundred kilometres for lunch, the employer would not be vicariously liable.

By contrast, in *Samin bin Hassan v Govt of Malaysia*[44] the plaintiff was knocked down by the first defendant who was driving a land rover which belonged to the Telecoms Department. The first defendant had driven the vehicle back to his house and the accident occurred whilst he was on his way back to the depot. The first defendant had written down in a logbook that the purpose for bringing the vehicle out of the compound was to test its brakes. Evidence was tendered later that the brakes did not require any testing. The court held that at the time the accident occurred, the first defendant was not acting as the employee or agent of the government and his employer was therefore not vicariously liable to the plaintiff.

(f) Acting against employer's express prohibition

If the worker acts contrary to the express prohibition of his employer, it does not necessarily mean that he is acting outside the scope of employment. It is important to scrutinize what it is that the worker has done – if he has done something which he is not employed to do it is more likely than not that he would be construed to be acting outside the scope of employment. If however, although he was doing something expressly forbidden by his employer, but the conduct was related to the mode of performing his job, it might be construed to be within the course of employment.[45]

In *Rand v Craig*[46] the employer was not vicariously liable when his employees deposited some rubbish on the plaintiff's land as the employees were instructed to carry rubbish from point *A* to *B* and not merely to carry rubbish generally.

42 [1986] 1 MLJ 324.
43 See also s 24(1)(c) and 24(2) of the SOCSO 1969.
44 [1976] 2 MLJ 211.
45 See *Plumb v Cobden Flour Mills Co Ltd* [1914] AC 62, HL.
46 [1919] 1 Ch 1.

The employees were doing something which was impliedly forbidden for them to do.

In *Harrison v Michelin Tyre Co Ltd*[47] the defendants were held liable when one of their workers deliberately steered the truck which he was driving away from the designated passageway and in consequence injured the plaintiff. It was held that the momentary horseplay by the employee did not take him outside the scope of his employment.

Similarly in *Limpus v General Omnibus Co*[48] a bus driver was clearly forbidden from racing with, or obstructing, other buses from rival bus companies. He nevertheless obstructed the plaintiff's bus and caused a collision. The driver's employers were held liable as the driver was doing an authorised act (driving the bus) but in an improper and unauthorised manner.

Another example is *London County Council v Catermoles (Garages) Ltd.*[49] A garage worker who was employed to move vehicles in a garage but was expressly forbidden to drive them, drove a van out of the garage onto the highway in order to make room in the garage for another vehicle. On the highway, he collided with the plaintiff. The employers were held vicariously liable as the worker was held to be acting within the course of his employment.

A persons' act may still be considered as being within the course of employment even if the employer expressly prohibits it. But in order for it to be so, the act must be related to his job and it is done for the benefit of the employer.

There are a number of cases involving employees giving lifts to third parties in direct contravention of their respective employers' instructions. Is the employer liable if the third party is subsequently injured due to the negligent driving of his employee?

In *Twine v Bean's Express Ltd*[50] the employee, acting contrary to his employer's instructions, gave a lift to a third party who was subsequently injured due to the negligence of the employee. The employer was not vicariously liable as giving free lifts was not the job the employee was employed to do and therefore he was acting outside the scope of his employment.

In *Chuan Seng & Co Pineapples Factory v Idris & Anor*[51] the defendant's employee gave a lift to two persons in his lorry. An accident occurred in

47 [1985] 1 All ER 918.
48 [1862] 1 H & C 526.
49 [1953] 2 All ER 582.
50 [1946] 175 LT 131.
51 [1962] 28 MLJ 239.

which the two persons died. The defendant was found not vicariously liable. The court followed the *dicta* in *Twine v Bean's Express Ltd*[52] and stated that giving a lift was outside the scope of employment as the driver was prohibited from giving lifts to other persons.[53]

By contrast, in *Rose v Plenty*,[54] a worker, acting against the instructions of his employer, employed a thirteen year old boy to help him deliver and collect milk bottles. The boy suffered injuries due to the negligence of the worker and the employer was held vicariously liable as the prohibition only affected the manner or method in which the worker was to perform his duties as a milkman, and the tort occurred while he was delivering milk, which was what he was employed to do.

An employee who acts contrary to an express prohibition and who subsequently commits a tort does not necessarily exempt the employer from being vicariously liable. The cases seem to suggest that only transgressions from prohibitions which do not confer benefit to the employer will exempt the latter from being vicariously liable.[55]

In *State Government of Perak v Muniandy*[56] the respondent who worked for the appellant had taken a lift on one of the appellant's lorries, which was driven by his co-worker, to go home. The driver did not tell the respondent that the latter was in fact prohibited from riding on the lorry. An accident occurred in which the respondent sustained injuries. The court found the appellant vicariously liable as it was not pleaded that the driver was acting in breach of the appellant's instructions. The *dicta* of Scarman LJ in the case of *Rose v Plenty*[57] was followed, where it was stated[58]:

> ... the employer is made vicariously liable for the tort of his employee not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion, should be liable if the motion that he has originated leads to damage to another.

52 [1946] 175 LT 131.
53 See also *Yunus v Annuar & Anor* [1965] 31 MLJ 46.
54 [1976] 1 All ER 97.
55 See *Teh Hwa Seong v Chop Lim Chin Moh & Anor* [1981] 2 MLJ 341, where the employer was held vicariously liable for injuries sustained by a trespasser riding on the employer's vehicle, but only because the express prohibition to the driver from carrying trespassers was not pleaded.
56 [1986] 1 MLJ 490, SC.
57 [1976] 1 All ER 97.
58 *Ibid* at p 103.

It is argued that even if the appellant had included in his pleadings that the driver was prohibited from giving lifts, the decision that the appellant is vicariously liable is nonetheless justifiable on the ground that the driver was performing his job in an unauthorised way. He was driving as an employee of the appellant. Therefore he was still acting within the course of his employment, unlike the driver in *Samin bin Hassan*.

In *Conway v George Wimpey & Co Ltd*[59] the driver of a lorry, acting against clear oral instructions of his employer, took a passenger onto the lorry. There was a notice in the lorry indicating that the driver was under strict orders not to carry passengers other than employees of the company and anyone driving on the vehicle did so at his own risk. The passenger was subsequently injured by the negligent driving of the lorry driver and in an action against the employer, the court held the passenger to be a trespasser and therefore no duty was owed to him by the employer.

Street[60] suggests that the employer's liability in cases of an unauthorised passenger sustaining injury due to the negligent driving of an employee should not be based on the fact that the passenger is a trespasser.[61] The issue remains whether the prohibition against giving lifts is outside the scope of employment or merely an unauthorised way of performing the employee's work.

(g) Employee acting 'on a frolic of his own'

The general principle is that if the employee's act is intended to benefit himself alone, that will be sufficient to prevent the tort from being within the course of his employment.

Parke B in *Joel v Morrison*[62] stated:

> If he was going out of his way, against his master's implied commands when driving on his master's business, he will make his master liable; but if he was going on a *frolic of his own*, without being at all on his master's business, the master will not be liable.

Whether an employee is deemed to be acting for his own purposes is a question of fact in each case and the courts have to consider, among others, whether the act benefits the employee alone and whether that act is in any way connected to that which he is employed to do. Clearly if the employee

59 [1951] 1 All ER 363.
60 10th edn at p 519.
61 See also, Winfield & Jolowicz, 15th edn at p 708.
62 [1834] 6 C & P 501 at 503.

uses his employer's vehicle for his own purposes, any tort that occurs during that time cannot be the liability of his employer.[63]

The commission of an assault (and/or battery) may still be within the course and scope of employment if it is committed in furtherance of the employer's interest.[64] Where however, the assault (and/or battery) is an independent act of violence, the employer will not be liable. Consider these cases:

In *Keppel Bus Company Ltd v Saad bin Ahmad*[65] the respondent who was a passenger on a bus was not pleased with the way in which the bus conductor was treating an elderly woman. The respondent and the conductor argued about the latter's treatment of the elderly lady. Shortly afterwards, the lady got off the bus. When the bus was in motion again the conductor and the respondent got into a heated argument. The conductor hit the respondent with his ticket machine. The respondent suffered serious injuries and became blind. The High Court and Court of Appeal found the conductor's act was committed within the course of employment and the bus company was held liable. The Privy Council however, found that the act was done outside the scope of employment as when the battery occurred, the source of the battery, namely the elderly lady, was no longer on the bus. The conductor was therefore acting on his emotions, which were unrelated to his employment. His employer was therefore not liable.[66]

In *Roshairee Abd Wahab v Mejar Mustafa Omar & Ors*[67] the plaintiff was a participant in an orientation programme, having joined the Royal Malay Regiment. He was ragged and assaulted by both D1 and D2 which led to deafness in both ears. The government as the employer of the defendants claimed that the defendants' actions were unauthorised as ragging was prohibited under military regulations. However the court held that although D1's acts were unauthorised, they were carried out during his normal course of duty. Therefore the acts were so connected with his authorised acts that they constituted modes, albeit improper, of doing authorised acts. This was especially so as the plaintiff was directly under the charge, supervision and control of D1. The court reaffirmed the principle that a master is responsible

63 See *Samin bin Hassan v Govt of Malaysia* [1976] 2 MLJ 211, above at p 376.

64 See above under heading (c).

65 [1974] 2 All ER 700, PC.

66 See also *Warren v Henly's Ltd* [1948] 2 All ER 935 (garage attendant assaulted customer when latter threatened to report the former's behaviour to his employers); *Aldred v Nacanco* [1987] IRLR 292, CA (employee shoved an unsteady washroom basin against a colleague; *Makanjuola v Metropolitan Police Comr* [1992] 3 All ER 617 (police officer extracted sexual favours from the plaintiff in return for a promise not to report her to the immigration authorities). In all these cases the employees were held to have acted outside the scope and course of their employment.

67 [1997] 1 CLJ Supp 39.

not merely for what he authorises his servants to do, but also for the way in which they perform it.

The Government was not liable for D2's acts as he was not assigned any official duty towards the plaintiff and so his acts were independent.

The third case is *Bohjaraj Kasinathan v Nagarajan Verappan & Anor.*[68] The plaintiff who was a passenger on a bus operated by D2, was assaulted by D1 the bus conductor when he, the plaintiff, commented on D1's rudeness to a few schoolchildren who were also on the bus. The learned magistrate found D1 wholly liable. The plaintiff appealed, contending that D2 was vicariously liable for the act of D1. The High Court stated the applicable law as follows: citing Lord Esher MR in *Dyer and Wife v Munday & Anor*[69] – that the liability of a master does not rest merely on the question of authority because the authority given is generally to do the master's business rightly. The law is that if in the course of carrying out his employment the servant commits an excess beyond the scope of his authority, the master is liable.

The issue therefore, is whether although the act done by the employee is unauthorised, it is connected to acts which the employer has authorised. If so, then they are considered as modes of doing the authorised acts.

In the instant case it was the duty of D1 to maintain order and discipline in the bus. D1 was also in charge of the safety of the passengers. Although D2 never authorised D1 to use abusive language or to use force when performing his duties, D1 was clearly in the course of employment at the time. The situation required D1 to exercise his duty as a conductor to ensure all passengers were seated and that order was maintained. He did do this, but exceeded his authority by using abusive and vulgar words and force. D1's conduct was so closely connected with the acts which he was authorised to do that it may be regarded as modes – although improper modes – of doing it. D2 was therefore held to be vicariously liable.[70]

(h) Fraud of the worker

The leading case is *Lloyd v Grace, Smith & Co.*[71] The defendants, a firm of solicitors employed a clerk who was responsible for conveyancing matters. His duties were not under the supervision of the defendants. The plaintiff

68 [2001] 3 AMR 3260.

69 [1895] 2 QB 742.

70 See also, *Foong Chee Chong v Inspector Mohd Nasir bin Shamsudin & Anor* [1998] 4 AMR 3420 where the Government of Malaysia was held liable for a conversion committed by a police officer as the act of taking the item into custody was a necessary act in the sphere of his employment.

71 [1912] AC 716, HL.

who had some difficulties in handling her property went to the defendants' office and the clerk fraudulently transferred some of the properties into his own name. He then disposed of the properties for his own benefit. The House of Lords held the defendants vicariously liable due to the position in which they had placed the clerk so as to enable him to do what he did. His act was within the scope of apparent or ostensible authority which had been given to him by the defendants.

The liability of employers for the fraud of their employees might seem puzzling, particularly where the fraud is committed solely for the benefit of the employee. The justification for attaching liability to employers for the fraud of their employees (which fraud benefits the employees) is that there must be some statement or conduct by the employer, which represents to the plaintiff; that the employee is authorised to do as he has done. This situation is described as the plaintiff acting on the apparent or ostensible authority of the employer.

So where the employers expressly forbade their employee to act for a particular group of clients but the employee nonetheless did so, the employer was not liable for the plaintiffs' financial loss as the employee had clearly acted outside the scope of his authority.[72] Certainly a plaintiff who is aware that the employee has no authority to enter into the transactions concerned will not be compensated for any losses, by the employer.[73]

(i) Commission of theft by employee

An employer may be liable for the theft committed by his employee, so long as the theft occurred within the course of employment. In *Morris v CW Martin & Sons Ltd*[74] the defendants' employee stole the plaintiff's mink stole, which she had sent to be cleaned. Liability in this case is justifiable on the ground that the employee was performing his job in an unauthorised and unlawful manner. Of course if he was employed say, as a gardener on the defendants' premises, the theft would be totally unconnected to his employment.

(j) Time and its relevance in determining 'course of employment'

It is not only conduct *per se* that is relevant in determining whether the employee is acting within the course of his employment. Time is also a relevant factor. It is said that an employee is acting within the scope and course of his employment during his authorised period of work,[75] or in any

72 *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1981] 3 All ER 65, PC.
73 *Armagas Ltd v Mundogas SA, The Ocean Frost* [1985] 3 All ER 795, HL.
74 [1965] 2 All ER 725, CA.

case, if the time is not unreasonably disconnected from the authorised period. So an employee who prefers to begin his day 30 minutes earlier and end the day 30 minutes later than his scheduled working hours is arguably working within the scope of employment. This would of course be a certainty if he is being paid for overtime work. Where no overtime pay is involved, an interesting question arises in relation to employees who commit a tort outside the prescribed working-hours, but who are nonetheless doing the job that they are employed to do.[76] Can it not be argued that just as employers are not liable for employees who, despite being 'within working-hours' but who act on a 'frolic of their own', so they could, in principle, be liable for the torts of their employees which are committed in the course of performing their work, albeit 'outside working-hours'?

Where the performance of the work is less flexible, in that work must be done at the employer's premises, entry into the premises without the employer's permission on a non-working day is clearly outside the scope of employment.[77]

What of torts committed not on the premises of the employer? An employee in Malaysia is subject to one of three possible situations. In the case of an employee who is subject to the Workmen's Compensation Act 1952,[78] (WCA 1952) s 4(1)(b) provides that he is deemed to be in the course of employment if he is travelling to or from work in a vehicle operated by or on behalf of his employer. He is outside the course of employment if he travels in a public transport.[79] So if he commits a tort on the way to or from work while riding in his provided transport, his employer will be vicariously liable.[80]

Secondly, with regards to an employee who is subject to the Employees' Social Security Act 1969 (SOCSO 1969),[81] s 24(1)(a) states that an employee who is travelling to or from work is deemed to be in the course of his employment. This would mean that should the employee commit a tort whilst travelling to or from work, the tort is deemed to have been committed in the course of employment, and the employer may be held to be vicariously liable.[82]

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75 See Street, 10th edn at pp 517-518.

76 Researchers and academics are but one example.

77 *Compton v McLure* [1975] 1 CR 378.

78 Act 273.

79 Unless he is himself an employee of the public transport service concerned.

80 This section provides for injuries sustained by the employee himself, but the same principle should also apply to third parties. See also s 4(1)(c) and (d).

81 Act 4.

82 This section has been interpreted to mean that the employee must have been travelling to or from *his* home, and not say, from his parents' house. The SOCSO 1969 therefore provides a wider definition of the meaning of 'in the course of employment' as compared to the WCA 1952. See also s 24(1)(b) and (c) and s 24(2) of the SOCSO 1969. The transport must be one provided for by the employer.

The third situation is that of employees who are not subject to either the WCA 1952 or SOCSO 1969. For these employees, common law principles apply. Travelling to and from his place of work is not within the course of employment. If the employee is obliged to travel in the transport provided by the employer, he would usually be regarded to be within the course of employment.

If he is travelling to (or from) his home, from a workplace other than his regular workplace, to or from the scene of an emergency, or between workplaces at his employer's instruction, he will be acting in the course of his employment.[83]

In jobs where travel is the essence of the employment, such as sales representatives and taxi-drivers, as long as he is in the performance of his job or doing something connected or closely connected to what he is employed to do, the employee would still be acting within the scope of his employment. So an employee who has been instructed by his employer to work away from home was held to be in the course of employment when he was involved in a road accident whilst driving home.[84]

C. Liability in respect of independent contractors

An independent contractor is a person who, although working for the employer, is not controlled by the employer in the method or conduct relating to the performance of that work. An independent contractor is one who works under a contract for services.[85] In principle an employer is not liable for the tort committed by his independent contractor. An employer may however be liable for the tort committed by his independent contractor if the employer is deemed to have committed a tort himself. This may arise in the four situations discussed below.

1. Employer authorising the commission of a tort[86]

A person who instigates, procures or authorises another to commit a tort is deemed to have committed the tort himself.[87] The principle applies even though the authorisation or ratification is made after the commission of the

83 *Smith v Stages* [1989] 1 All ER 833, HL.
84 *Ibid.*
85 *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101.
86 See Street, 10th edn at p 509.
87 *Ellis v Sheffield Gas Consumers Co* [1853] 2 E & B 767.
88 *Freeman v Rosher* [1849] 13 QB 780; *Hilberry v Hatton* [1864] 2 H & C 822.

tort.[88] Liability is imposed irrespective of the nature of the relationship between the employer and the primary tortfeasor, be it an employee, independent contractor or agent.

2. Torts which do not require intentional or negligent conduct by the tortfeasor

In the torts of nuisance, strict liability under the rule in *Rylands v Fletcher*[89] and breach of statutory duty, liability does not depend on either intentional or negligent conduct on the part of the employer, employee or independent contractor. The tort need not be authorised or instigated by the employer. As long as the requirements under each particular tort are fulfilled, the tort is established and liability may be shifted over to the employer.[90]

3. Negligence of the employer

The general principle is restated once again: that the employer is not vicariously liable for the negligence of his independent contractors, as the negligence will be attributed to a breach of duty to take care on the part of the independent contractors themselves. However, the employer may be liable, if the damage is caused by the incompetence of his independent contractors in carrying out their duty, as this will be construed as the employer's personal negligence in failing to employ competent and skilled independent contractors.[91] In *Robinson v Beaconsfield RDC*[92] the defendants employed contractors to clean out cesspools in their district but no arrangements were made for the disposal of sewage taken from the cesspools. The contractors deposited some sewage on the plaintiff's land. The court found the defendants liable for failing to take proper precautions to dispose of the sewage.

4. Non-delegable duties

An employer is also liable in situations where the duty is non-delegable. Non-delegable duties include activities that are inherently dangerous so that the employer cannot shift his duty of care to the independent contractor.[93] Hazardous activities have been held to be non-delegable and employers have been liable for the lighting of open fires on bush land[94] and for negligence

89 [1868] LR 3 HL 330.

90 See *Matania v National Provincial Bank Ltd* [1936] 2 All ER 633; *Bower v Peate* [1876] 1 QBD 321; *Alcock v Wraith* [1991] 59 BLR 16 (for cases on nuisance); *Rylands v Fletcher* [1868] LR 3 HL 330 (for strict liability); *Hosking v De Havilland Aircraft Co Ltd* [1949] 1 All ER 540 (breach of statutory duty).

91 *Datuk Dewan Bandaraya v Ong Kok Peng & Anor* [1993] 2 AMR 1195.

92 [1911] 2 Ch 188.

93 *Datuk Dewan Bandaraya v Ong Kok Peng & Anor* [1993] 2 AMR 1195.

94 *Black v Christchurch Finance Co* [1894] AC 48, PC.

in re-roofing a row of terraced-houses where difficulties with the joins between the houses were well known.[95] The test seems to be whether the activity is inherently dangerous so as to make the employer liable for any ensuing damage. In *Lee Kee v Gui See & Anor*[96] the defendants were liable for the negligence of their independent contractor who set fire to some unwanted branches and tree trunks on the defendants' land and then left the fire unattended that it spread to, and destroyed the property of the plaintiff. The court held that if a man lights a fire on his land to burn highly combustible material, he must take all reasonable precautions to prevent the fire from spreading. This duty is absolute and non-delegable and it is irrelevant that the performance of this duty was given to a third party whose negligence subsequently causes the damage.

Other examples in which the courts have held that the duty is non-delegable are: the withdrawal of support from neighbouring land. This is in fact the earliest example of a non-delegable duty. The principle is that if a landowner employs an independent contractor to do some work on his land and due to the negligence of the contractor, the work causes subsidence to adjoining land which is entitled to the support of the first-mentioned land, the landowner would be liable.[97]

Inherently dangerous operations on or near a highway imposes a duty that is non-delegable, on the employer. Examples are the negligence of independent contractors in laying telephone wires along a street,[98] and injury caused to a passer-by by a falling lamp, which was overhanging a footway.[99] In *Gray v Pullen*[100] the defendant whose house was adjoining a highway employed a contractor to cut a trench across the highway in order to connect a drain from his house to a sewer. A passenger on the highway was injured when the trench was not filled in properly. The defendant was held liable although he himself was not negligent. By contrast the defendant in *Salsbury v Woodland*[101] was not liable when his contractor was negligent in felling a tree which was near a highway. The tree fell on some telephone wires which in turn fell onto the highway and caused injury to the plaintiff. The distinguishing factor between *Gray v Pullen* and *Salsbury* is that in the former case, the nature of the job necessarily involved an obstruction of the highway whereas in *Salsbury* if the contractor had been competent the ensuing series of mishaps would not have occurred. The work was not an inherently dangerous activity.

95 *Alcock v Wraith* [1991] 59 BLR 16, CA.
96 [1972] 1 MLJ 33.
97 *Bower v Peate* [1876] 1 QBD 321.
98 *Holliday v National Telephone Co* [1899] 2 QB 392, CA.
99 *Tarry v Ashton* [1876] 1 QBD 314.
100 [1864] 5 B & S 70.
101 [1970] 1 QB 324, CA.

The categories of non-delegable duties are not closed. Should it now include the provision of proper medical treatment, so that a patient who might not be able to claim successfully against the specific healthcare personnel involved in her mistreatment,[102] may nonetheless receive compensation from the hospital?[103] What about an employer's liability to his employee as a result of a tort committed by the employer's independent contractor while in the course of the contractor's employment? The question that is raised here is whether the employee might or should be able to claim on the basis that the employer has failed to provide a safe system of work.[104]

Certainly the development of new categories of non-delegable duties is very much a question of public policy particularly if the duty is to be placed on the shoulders of public authorities.

D. Non-liability in respect of independent contractors

An employer is only liable for the torts committed by his independent contractor if there is a breach of duty on the part of the employer himself. Therefore if the employer is able to satisfy the court that he has taken care in the selection of an independent contractor, and the contractor subsequently commits negligence or other torts and causes damage to a third party, the employer will not be held liable for any breach of duty by that contractor.[105]

An employer is only liable for damage that results due to the inherent danger in the work. If there is no such inherent danger, in that damage is not foreseeable as likely to occur as a result of the work, but damage in fact occurs due to the contractor's negligence in performing the work, the employer

102 A patient might well face real problems in identifying the healthcare personnel who has been negligent and additionally, proving causation in medical negligence claims is no easy task.

103 See *Cassidy v Ministry of Health* [1951] 1 All ER 574, CA where Lord Denning suggested there should be a non-delegable duty. See also, *Lindsey Country Council v Marshall* [1936] 2 All ER 1076, HL; *Gold v Essex County Council* [1942] 2 All ER 237, CA and *Collins v Hertfordshire County Council* [1947] 1 All ER 633.

104 In Malaysia, employers are under a statutory duty to provide for a safe system of work under the Occupational Safety and Health Act 1994 (OSHA) (Act 514). Note however, that OSHA is silent on an employee's possible civil cause of action. For the failure of the employer to provide a safe system of work, an employee who is subject to the SOCSO 1969 is barred from suing his employer by virtue of s 31 of the SOCSO 1969. An employee subject to the WCA 1952 may claim under s 41 of the WCA 1952. An employee who is independent of both the SOCSO 1969 and the WCA 1952 can sue for breach of the employer's non-delegable duties based on common law principles.

105 *Phillips v Britannia Hygienic Laundry Co* [1923] 1 KB 539; affirmed [1923] 2 KB 832. (lorry owner not liable when plaintiff's vehicle was damaged due to the negligent repair of the lorry by a garage proprietor).

will not be held liable.[106] This is of course subject to the employer engaging a competent contractor to do the work, for if the employer engages a contractor who is not competent and skilled for that work, then damage is foreseeable and the tort would be attributed to the employer.

Employers are not liable for the casual or collateral negligence of their independent contractors. *Padbury v Holiday & Greenwood Ltd*[107] illustrates the principle. The defendants employed a subcontractor to fit casement windows into a house the defendants were building. The subcontractor's worker negligently placed a tool on a window sill. The wind blew the casement open and the tool was knocked off the sill and injured a passer-by. The court held the defendants not liable.

E. Where third party is also an employee

The employer will be vicariously liable for any tort that is committed by his employee during the course of employment; and this principle is generally applicable to claims by third parties or amongst the employees themselves.[108] The principle has been codified. Section 14 of the Civil Law Act 1956[109] provides that if an employee sustains personal injuries caused by the negligence of his co-employee, the injured employee may claim for damages against his co-employee and their common employer. Personal injuries includes any disease and any impairment of a person's physical or mental condition. This section is applicable notwithstanding any contrary provision in a contract of service or any agreement made before the commencement of this Act. In short, an employer may be vicariously liable for the negligence of his employee which causes injuries to another employee.

However, for those who are subject to the Employees' Social Security Act 1969 (SOCSO),[110] s 31 prohibits an employee from recovering compensation or damages from his co-employee or their common employer for any personal injuries sustained by the employee due to the negligence of his co-employee. The same applies if the employee claims directly from the employer. This is because SOCSO provides for its own compensation scheme applicable to employees registered under SOCSO. Suffice it to state here that this 'automatic compensation' is not always favourable to the employee as the amount of

106 *Padbury v Holiday & Greenwood Ltd* [1912] 28 TLR 494, CA.
107 [1912] 28 TLR 494, CA.
108 See *Palaniayee & Anor v Toh Whye Teck Realty Ltd & Anor* [1973] 1 MLJ 34.
109 Act 67.
110 Act 4, to which all employees who earn not more than two thousand ringgit a month are subject to.

damages guaranteed under SOCSO is limited.[111] So an employee who earns not more than two thousand ringgit a month[112] is subject to SOCSO and is barred from claiming compensation or damages under s 14 of the Civil Law Act 1956.[113]

Another exception is a worker who is subject to the Workmen's Compensation Act 1952[114] (WCA). Section 41 of the WCA primarily allows a worker to claim for damages as against a co-worker and their common employer, and therefore allowing a claim under s 14 of the Civil Law Act 1956, provided the worker does not elect any one of the three possible steps that are set out in the section itself. The WCA 1952 is in effect a much more permissive piece of legislation insofar as it allows the injured worker a choice of actions in recovering compensation for personal injuries sustained.

F. Where a claim is made in respect of one party only – whether contribution may be claimed in a subsequent cause of action

Usually the plaintiff will claim against both the negligent employee or co-worker, and the employer. If however, the claim is only made against one party, can the defendant subsequently seek compensation from the other party? This issue was raised in the case of *Lister v Romford Ice and Cold Storage Ltd*[115] where both father and son worked for the same employer. The son was a driver and during the course of his employment had injured his father. The father claimed from the employer for the negligence of his employee and the claim was allowed. In a subsequent action, the employer successfully claimed from the driver, the amount of compensation that they had paid to the father. The House of Lords, in a majority decision, held that

111 SOCSO 1969, s 15(a)-(g). For a more exhaustive analysis of this Act, see Siti Zaharah Jamaluddin; *Employees' Social Security Act 1969 – An Insurance Scheme?*; in *A Collection of Socio-Legal Essays* edited by Mimi Kamariah Majid; 1996; University of Malaya Press; Chapter III at 39-64.

112 This includes an employee whose starting salary is two thousand ringgit a month – see the SOCSO 1969, First Schedule, proviso to paragraph (1).

113 Act 67. There is however, a proviso to s 31. The prohibition does not apply in cases of motor vehicle accidents where the employer or servant of the employer is required to be insured against third party risk under Part IV of the Road Transport Act 1987 (Act 333). This proviso was enacted by the Employees' Social Security (Amendment) Act 1997 (Act 981) and came into force on January 27, 1997. See *Cheng Siak Hor & Anor v Rozali Ahmad* [2002] 4 CLJ 223 for the application of the new s 31. For cases on employees being barred from claiming under common law principles against their employer, see *Liang Jee Keng v Yik Kee Restaurant Sdn Bhd* [2002] 2 AMR 2286; *Che Noh b Yacob v Seng Hin Rubber (M) Sdn Bhd* [1982] 1 MLJ 80, FC.

114 (Revised 1982), Act 273, which is applicable to workers earning less than five hundred ringgit a month.

115 [1957] AC 555.

the driver had a contractual duty to take care towards his employer whilst in the course of his employment, and the employer may claim for any loss if the obligation under this contract has been breached. The court found that there was no implied term in the contract of service that the driver had a right to receive compensation from the employer, even though the employer had taken out insurance whether it be voluntary or under the orders of a statute, or that the employer should have taken insurance.

Lords Radcliffe and Somervell dissented and held that there was an implied term in such employment that the employer would ensure that the driver would be protected by insurance for any liabilities to third parties as a result of his negligence and so the employer or the insurance company cannot institute a claim against the driver.

In *Majlis Perbandaran Pulau Pinang v Lim Soo Seng*[116] the respondent was a bus driver who worked for the appellant local authority. In the course of his employment the respondent caused injury to a passenger. The passenger was successful in his claim against the respondent, and the latter subsequently claimed compensation from his employer. The issue that arose was – if due to the negligence of an employee in handling a motor vehicle in the course of his employment, a third party is injured and he makes a claim and recovers damages only as against the employee, can the employee then claim reimbursement from the employer? In this case the bus was not insured against any injury to a third party as the bus belonged to a local authority and was exempted from such insurance under s 74(5) of the Road Traffic Ordinance 1958. The Supreme Court held that in road accident cases the third party will usually claim against the driver and his employer. If the claim succeeds, payment will be made by the insurance company as the employer would be vicariously liable for the act of his employee towards the third party. The court further held that there was no implied term in the contract of employment that the employer would indemnify the driver for injuries to third parties arising out of the negligent driving of the employer's bus. *Lister's* case was distinguished as in that case the employer claimed from his employee whereas in the instant case the employee was seeking reimbursement from the employer.

The court further held that the effect of s 10(1)(c) of the Civil Law Act 1956[117] is that an employer may claim compensation from his negligent employee, but the employee cannot claim contribution from the employer.

116 [1991] 1 MLJ 162.
117 Act 67.

Section 10(1)(c) provides:

> Where damage is suffered by any person as a result of a tort (whether a crime or not) – any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

G. Liability in respect of agents

A person who does work for another may be an agent of the other. An agent is sometimes a 'servant' and therefore employee but an agent may also be an independent contractor. The general principle is that an employer will be vicariously liable for the acts of his agents who are also his employees, but not for the acts of his agents who are independent contractors. The principles previously discussed in relation to the imposition of liability on the employer for the acts of his employees or independent contractors, similarly applies to acts of agents. The question is whether the agent is acting on behalf of, and within the scope of the authority conferred by the principal?

An issue which requires some consideration under this heading is the liability of *A* as a vehicle owner to injury caused to *C*, a third party through the negligent driving of *B*. Naturally *A* will be liable if *B* is his employee who causes the accident in the course of employment. This principle has been extended to cases in which *B* is not *A*'s employee.

It was held in *Yeo Tin Sang v Lim Choo Kee*[118] that where injury or loss is caused to a third person by the wrongful act of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent. Here the plaintiff recovered damages from the defendant, who owned the car in question, when the driver, *X*, through his negligent driving caused injuries to the plaintiff.

In *Wong It Yong v Lim Gaw Teong & Anor*[119] the issue was whether the owner of a car which was taken away for a few days to be test-driven prior to a potential sale can be vicariously liable for the negligence of the driver. The court answered in the affirmative, and held that it was to the advantage of the owner who wanted to sell the car, to allow the intending purchaser to

118 [1961] 27 MLJ 23.
119 [1969] 1 MLJ 79.

test-drive the car for one or two days and therefore when the accident happened the car was being driven partly, if not wholly, for the owner's purposes.[120]

The owner of a car who hires out his car for reward to another party with the knowledge that the car is to be used for teaching a third party to drive is vicariously liable for any negligent driving of the learner-driver as the owner would be a person who has an interest or concern in the purpose for which the vehicle is hired out.[121] Driving a car at the owner's request would also make the owner vicariously liable for any ensuing negligence.[122] It follows that driving a car without any interest or concern of the owner would not make the owner vicariously liable for any ensuing negligence.[123] So where the borrower of a car uses another's car for the borrower's own benefit and on his own concern the owner cannot be vicariously liable for the negligence of the borrower.[124] Where however, the owner of a motor vehicle hands over both actual possession and right of control to another person, that person and not the owner will be liable for any damage caused by his negligent driving[125] – for having handed over possession to the other party would mean any driving thereafter would be for the purpose of that other person and not the owner, any more. *Adnan bin Haji Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor*[126] is an example. D2 allowed D1 to use her car. D1, while driving the car, collided into the plaintiffs. The Court of Appeal held that D2 could not be vicariously liable merely for allowing someone else to drive her car. Moreover she had no interest or concern in the purpose for which the car was being used. Added to that, D1 was not acting as either agent or servant of D2.

The court noted however that an owner would be vicariously liable if he had authorised or requested the driver to drive the car in order to carry out a task or duty delegated to him, as in these circumstances the owner would be said to be in control of the driver's conduct.[127]

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120 In reaching this decision, the court relied on the principle laid down in *Ormrod v Crosville Motor Services Ltd* [1953] 2 All ER 753. See also *Ramachandran a/l Mayandy v Abdul Rahman bin Ambok Laongan & Anor* [1997] 4 MLJ 237.

121 *Noor Mohamed v Palanivelu & Anor* [1956] 22 MLJ 114; *EA Long v Wong Chiu Wah & Ors; The Public Insurance Co Ltd, Third Party* [1957] 23 MLJ 163.

122 *Su Key & Ors v Shanmugam & Anor* [1966] 1 MLJ 98.

123 *Morgans v Launchbury* [1973] AC 127; *Alice Ang Etc v Mrs Lau Ek Cheng & Ors* [1940] MLJ Rep 140.

124 *Teoh Khoon Lim v Lim Ah Choo & Anor* [1970] 2 MLJ 220.

125 *Raja Singh v Chin Fatt* [1936] MLJ Rep 127.

126 [1997] 3 AMR 2390, CA.

127 Following the decision in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 and *Ormrod v Crosville Motor Services Ltd* [1953] 2 All ER 753.

Chapter Seventeen

REMEDIES[1]

The victim of a tort may avail himself of two types of remedies, being either judicial or extra-judicial remedies. This chapter will examine the remedies commonly sought after by, and granted to, the victim of a tort. There may also be circumstances where the liability of the defendant is extinguished and these circumstances are briefly outlined at the end of this chapter.

A. Extra-judicial remedies

Extra-judicial remedies are remedies obtained by way of self-help, where the aggrieved party need not resort to judicial proceedings in order to assert his right. The instances in which extra-judicial remedies may be appropriate are discussed below.

1. Self-help

The principle is that when a mishap befalls a person or his property, he must act accordingly so as to minimise the extent of his loss or damage. For instance, if one is falsely imprisoned, one should try to find a reasonable way out. If a trespasser comes onto one's land, one may peaceably request the trespasser to leave the premises or land and one may even use reasonable force to oust the trespasser. Similarly one may be justified in committing what would otherwise amount to the tort of battery if it is done in self-defence or the defence of property. Another example is where one retakes one's goods from another, which goods were wrongfully taken in the first place. The person exercising self-help can use no more force than is necessary to achieve his objective.[2]

Self-help is a remedy which is always available unless expressly excluded.[3] It is however, generally not encouraged by the law as the plaintiff might be

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1 See generally, Burrows.

2 *The Trustee of Leong San Tong Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611 at 616-7.

3 See for example, Specific Relief Act 1950, Act 137, s 7(2) which provides that where an immovable property has been let under a tenancy and the tenancy ends, but the occupier continues to remain in occupation of the property or part of it, the person entitled to the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in court.

too emotional and therefore not impartial in judging the extent of necessary steps that he ought to take. The plaintiff therefore, might act more than what is reasonably necessary in the circumstances and in doing so, he might exceed his own rights despite his efforts towards self-help.

2. Abatement of nuisance

An occupier of land or any other person by the authority of the occupier may abate or remove a nuisance. Prior notice ought to be given to the offending party as to the proposed act of abatement, except where there is a situation of emergency where either life or property is in grave danger, or, in order to reduce the nuisance, one is not required to enter onto the land of the other party. For instance I may cut off some branches of my neighbour's mango tree which project onto my front lawn without notice to him.[4] I cannot however, appropriate what I sever.[5] In reducing the nuisance, the plaintiff must exercise care so as not to cause unnecessary damage as a result of his own reaction. For instance, if there are two methods of reducing the nuisance, the plaintiff should adopt the safer of the two methods. Abatement of a public nuisance is a statutory duty of the local authority under the Local Government Act 1976[6] and indeed under the same Act a local authority has the power to prohibit, remove, abate and prevent any nuisance occurring within its area.[7]

In *Burton v Winters & Anor*[8] the plaintiff in 1986, commenced proceedings in trespass and nuisance against the defendant, her neighbours, for a mandatory injunction requiring them to pull down that part of their garage which she alleged was built on her land. The defendant's predecessor had built the garage in 1975 and it encroached four and a half inches onto the plaintiff's land. The mandatory injunction was refused, and the plaintiff's appeal was dismissed. The plaintiff then built a wall on the defendant's land in front of the garage. An injunction was granted against the plaintiff but she persisted. She was then sent to prison for twelve months. Another injunction was later issued to prevent her from trespassing and interfering with the defendant's land and property. She however, attempted to build another wall, and damaged the garage – and for this, she was sentenced to two years' imprisonment. The plaintiff appealed against that order.

The question that arose was whether the plaintiff was entitled to exercise her common law right of abatement of the nuisance or whether she was restricted

4 *Lemmon v Webb* [1894] 3 Ch 1.
5 *Mills v Brooker* [1919] 1 KB 555.
6 Act 171, s 80.
7 *Ibid*, ss 73(1)(a)(iii), 82(4).
8 [1993] 3 All ER 847.

to her right to damages. The court held that although there was a common law right of self-redress for trespass by encroachment, such a right was restricted to simple cases which did not include urgent cases which required an immediate remedy. In this case it was too late and inappropriate for the plaintiff to exercise the right of self-redress. The demolition of the garage wall was out of proportion to the damage suffered by the plaintiff. Thus, the two year sentence was justified in the circumstances.

B. Judicial remedies

A judicial remedy is one that is sought and obtained by the plaintiff through action in a court of law. The judicial remedies that will be discussed in this chapter are damages, injunction, and specific restitution of property. These remedies will be discussed under separate headings below.

C. Damages

This remedy comprises monetary compensation and is the main and most common form of remedy sought by a plaintiff in a tort action. In order to successfully claim for damages the plaintiff must prove two things; firstly that a tort has occurred; and secondly, that the plaintiff has suffered some damage. It must be stressed that the requirement of proving damage is a general principle as there are torts which are actionable *per se* that is; these torts are actionable without proof of damage such as intentional torts. Damages may still be awarded by the court as a recognition of the plaintiff's right. Where actual damage is suffered by the plaintiff, the amount of damages will differ accordingly to reflect the loss incurred.

1. Damages recoverable only once

The general principle is that there is only one cause of action for each tort and damages must be recovered once and for all and must be awarded in a single lump sum. In *Fetter v Beale*[9] the plaintiff recovered damages from the defendant for assault and battery. Several years later he discovered his injuries were much more serious than he had at first thought and he brought a second action against the defendant for additional damages. The court denied his second claim and stated that a person may only claim for damages once for a single tort. The plaintiff may not claim again for the same tort for the reason that the injury that he suffers is more serious than at the date judgment was given. Of course, if the defendant commits another tortious act against the plaintiff, albeit the same kind of tort but at a later date, the plaintiff would have a separate cause of action in respect of the second tort.

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9 [1701] 12 Mod 542.

There are however, two exceptions to this general principle:

(a) Violation of two separate rights

Where the defendant's single wrongful act challenges two or more different rights of the plaintiff, or a series of the defendant's wrongful acts challenges several rights of the plaintiff, he may institute separate actions in respect of each of his rights. In *Brunsden v Humphrey*[10] the plaintiff's taxi collided with the defendant's van due to the latter's negligence. The plaintiff had received damages for the damage to his taxi, but subsequently brought a second claim for personal injuries sustained in the collision. The court held that the plaintiff was entitled to bring the second claim as two of the plaintiff's rights had been infringed in the collision.

However, in the case of *Talbot v Berkshire County Council*[11] it was held that *Brunsden v Humphrey* might have been wrongly decided as it failed to apply *Henderson v Henderson.*[12] In *Henderson v Henderson,* applying the doctrine of *res judicata,*[13] it was held that the parties must bring their whole case before the court so that all aspects of the case may be considered before a final decision is made once and for all. The parties cannot return to court to advance arguments or claims which they failed to put forward on the first occasion – as was the situation in *Brunsden v Humphrey.* It is different however, if the second issue could not have been dealt with in the first action.[14]

In *Talbot v Berkshire County Council* the Court of Appeal however stated that the rule would not apply, in that the plaintiff may make a second claim, if there exists 'special circumstances' and these are:

(i) where the plaintiff was unaware of the existence of the claim, or

(ii) where there was an agreement between the parties that the action would be held in abeyance, or

(iii) where the plaintiff had not brought his case on the (second) issue in reliance on a representation made by the defendant.

10 [1884] 14 QBD 141.
11 [1994] QB 290.
12 [1843] 3 Hare 100.
13 This is a doctrine which requires that there must be an end to litigation, upon the court having pronounced its final decision on a particular issue.
14 In *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, 260 Thomas Bingham MR stated that it is a rule of public policy that litigation should not drag on indefinitely and moreover that a defendant should not be oppressed by successive actions when one would suffice.

In *Wain v F Sherwood and Sons Transport Ltd*[15] the plaintiff was involved in a road traffic accident. He claimed damages for damage caused to his van but did not bring any claim for personal injury, namely his acute back-pain as a result of the accident. When he later mentioned about his back-pain to his counsel, the latter failed to advise the plaintiff that if the pleadings were not amended to include a claim for personal injury, such action might be barred in future. As a result of his counsel's negligence, when the plaintiff brought a second action in respect of his back injury, the Court of Appeal refused him remedy. The fact that the claim for the back injury was not made was due to his counsel's error, did not fall within 'special circumstances' as mentioned in *Talbot's* case.

Thus *Brunsden v Humphrey* might no longer be good law on its facts applying *Talbot* and *Wain*.

Although the general rule in *Henderson v Henderson* is that two actions will not be allowed to arise from the same facts and by the same litigant, in Malaysia this might have been 'literally interpreted' in the case of *Malbai v Nawi*.[16] Here the plaintiff and defendant were in a fight and *X*, after helping the defendant, beat the plaintiff up. The plaintiff, who had successfully claimed from *X*, subsequently claimed from the defendant. The defendant contended that the assault was a joint assault, and since the plaintiff had claimed from *X*, he could not claim from the defendant. The court held that the attacks from *X* and the defendant were different in nature, and the plaintiff's claim against the defendant was allowed.

(b) Continuing injury

The second exception is where the damage is continuous, such as a continuing trespass to land[17] and continuing nuisance. Trespass is actionable *per se* and gives rise to a fresh cause of action from day to day. In the case of continuing nuisance a fresh cause of action arises upon meterialisation of further or subsequent damage.

In *Darley Main Colliery v Mitchell*[18] the defendant mined underneath the plaintiff's land. The plaintiff's land subsequently caved in and the defendant paid damages accordingly. Fourteen years later the plaintiff's land caved in again. The House of Lords held that the plaintiff was entitled to damages in the second cause of action. Damages however could only be recovered for

15 [1999] PIQR P 159.
16 [1962] 28 MLJ 99.
17 See *Tay Tuan Kiat & Anor v Pritam Singh* [1987] 1 MLJ 276; *Konskier v Goodman Ltd* [1928] 1 KB 421.
18 [1886] 11 App Cas 127.

any damage up to the day of the trial. A plaintiff cannot claim for any prospective damage, however probable the future damage may be. In *West Leigh Colliery Co Ltd v Tunnicliffe & Hampson Ltd*[19] the court held that a plaintiff cannot recover damages for any reduction in the value of his land based on damage that might occur in the future.

2. Restitutio in integrum

The general rule is that damages is to be assessed on a compensatory basis, which is to restore the plaintiff to his position prior to the commission of the tort. This is known as the principle of *restitutio in integrum.*[20]

In *Livingstone v Rawyards Coal Co*[21] it was held that *restitutio in integrum* is that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

Restitutio in integrum is easily achieved if the loss is financial, but is rather impossible with pain and suffering incurred as a result of personal injury.

Limitations to the principle

(i) Mitigation of damage

Even though the defendant is generally fully liable for the damage sustained by the plaintiff, the plaintiff has a corresponding duty to minimise his loss. For instance, if the plaintiff loses his job due to an injury, he should look for alternative employment if he is still capable of working. If he takes a lower paid job, he can only recover from the defendant, as lost wages, the difference between his previous and his present earnings. If the value of his damaged property is say, RM50, the plaintiff cannot claim for instance, RM80 as repair costs, when buying a similar new item would only cost him RM50.

The plaintiff will not be able to claim as damages, any loss that he has incurred due to lack of reasonable steps on his part. What is reasonable depends on the facts and circumstances in each case. Where however, the reasonable steps taken to minimise the consequences of the defendant's tort actually increases the plaintiff's final loss, the increased expenses and loss would still be attributable to the defendant's tort and may be fully recovered

19 [1908] AC 27.

20 *Liesbosch Dredger v Edison SS* [1933] AC 449; *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352.

21 [1880] 5 App Cas 25 at 39.

from the defendant.[22] The duty to mitigate does not however, protect a defendant from any inflationary increases in the amount of damages.[23]

(ii) Final damage caused by plaintiff's impecuniosity

In *Dodd Properties (Kent) Ltd v Canterbury City Council*[24] it was held that if the plaintiff cannot minimise his loss due to his impecuniosity, the defendant will be held to be fully liable, but where the damage itself is a product of the plaintiff's impecuniosity, then it becomes too remote.[25]

This latter principle operates extremely unfairly particularly to the impecunious plaintiff. From the legal standpoint, firstly it does not sit well with the eggshell skull principle under which the defendant is required to take the plaintiff as the defendant finds him. Secondly it does not accord with the principle of *restitutio in integrum* itself. Thirdly it is irreconcilable with the principle laid down in *Dodd Properties* that if the plaintiff is unable to mitigate his loss, the defendant must compensate the plaintiff fully.

From a social-engineering perspective, the purpose behind awards made to plaintiffs is to compensate them and to fulfil the ideal of wealth distribution. Might it not be argued that a rule which specifically precludes an impecunious plaintiff from receiving any compensation for the tortious act of a defendant, *because he is impecunious,* alters one fundamental purpose of tort law?[26]

Naturally, if it is not the fact of impecuniosity but some other factors, such as the negligence of the plaintiff which materially contributes to his final damage, no unfairness arises. A case on point is *The Flying Fish*[27] where the plaintiff's ship was destroyed as a result of the defendant's negligence. After the collision the captain of the plaintiff's ship refused any help, as a result of which the ship was destroyed. The court held that the plaintiff was entitled to compensation for the collision but not for the consequential damage as that was due to the negligence of the captain.

3. Claims for personal injury[28]

Two types of claims may be made under this category; one for pecuniary losses and the other for non-pecuniary losses.

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22 *The Oropesa* [1943] 1 All ER 211.
23 *Lee Tai Hoo & Anor v Lee Swee Keat & Anor* [1987] 1 MLJ 304.
24 [1980] 1 All ER 928.
25 Applying *Liesbosch Dredger v Edison SS* [1933] AC 449.
26 See also Jones' comments at 247 paragraph 4.3.4.2.
27 [1865] 3 Mod PCCNS 77.
28 See Civil Law Act 1956, Act 67, s 28A(1).

For pecuniary losses the claim could be for loss of earnings or loss of future earnings.[29] Any expected expenses as a result of the injury such as medical and nursing bills and domestic help are also recoverable. Funeral expenses are also recoverable.[30]

For losses that are non-pecuniary in nature, the claim could be for the injury itself, pain and suffering, and loss of amenity or enjoyment of life.

Interest and inflation are taken into account in determining the amount of compensation awarded.[31] In *Liong Theo v Sawiyah & Ors*[32] it was held that awards tended to increase in value in recent years because of the fall in the value of money. The award has to be a comparable amount in current monetary value.

4. Claims for damage to property

The general principle is that the defendant is liable for all the damage or loss to the plaintiff's property as a result of the defendant's tort. Just as in claims for personal injury, interest and inflation are taken into account in computing the amount awarded to the plaintiff.

In cases where damage is caused to real property, *restitutio in integrum* is achieved by the application of one or the other of two different measures of damage (and sometimes a combination of the two).[33] One measure is to take the capital value of the property in the undamaged state and to compare it with its value in a damaged state. This is generally referred to as the 'diminution in value' assessment. The other is to take the cost of repair or reinstatement. Generally the 'diminution in value' assessment applies where the plaintiff intends to sell the property and the 'reinstatement' assessment applies where he intends to occupy the premises. In Malaysia, it is not necessary that the diminution in value must be considered first before the cost of reinstatement.[34] Indeed even where the owner intends to occupy the premises, the diminution in value principle may also be appropriate.[35]

5. Claims for pure economic loss

The general principle is that pure economic loss is recoverable, subject to some requirements; if the loss is caused by a negligent misstatement. If the

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29 *Ibid*, s 28A(2)(c). See *Chang Ming Feng & Anor v Jackson Lim @ Jackson ak Bajut* [1999] 1 AMR 575.

30 *Ibid*, s 7(3)(ii). See also *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153, FC.

31 *Walker v John MacLean & Sons Ltd* [1979] 1 WLR 760.

32 [1982] 1 MLJ 286.

33 See *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, CA.

34 *Milik Perusahaan Sdn Bhd v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6; [2002] 4 AMR 4890, CA.

35 *Liew Choy Hung v Shah Alam Properties Sdn Bhd* [1997] 3 AMR 2145, SC.

loss is caused by the defendant's negligent act, recovery is possible provided it is foreseeable.[36]

6. Joint and several tortfeasors

Where there is more than one tortfeasor and the plaintiff only claims against one of them and obtains judgment in his favour, this shall not bar the plaintiff to an action against that other person who if sued, would have been liable as a joint tortfeasor in respect of the same damage.[37] In a situation where more than one action is brought in respect of the same damage, a plaintiff is entitled against each of the joint tortfeasors for the whole of the damage.[38] A plaintiff cannot recover in the aggregate more than the sum at which the damage is assessed.[39] Where however, several tortfeasors commit one tort, (in the sense that their actions cause the same or indivisible damage); they are deemed as joint tortfeasors and if the claim is made against all at the same time, only a single award is permissible against all the tortfeasors.[40] If the claim is made against only one of them then that tortfeasor is liable for the whole damage.[40a]

In *Jayakumar v Chen Kit Hong & Anor*[41] it was held that where injury inflicted onto the plaintiff is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. The defendant may subsequently in a separate action seek to recover any contribution from a joint tortfeasor.[42]

The difference between joint and several tortfeasors is that with joint tortfeasors they are deemed to have participated in some common enterprise. An example is where an employer is held to be vicariously liable for the tort committed by his employee during the course of employment or where a person has authorised another to commit a tort or where the parties have all 'agreed' to

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36 See *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn & 9 Ors* [2000] 3 AMR 3567; *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon* [2003] 2 AMR 6, CA.

37 Civil Law Act 1956, Act 67, s 10(1)(a); see also *Wah Tat Bank Ltd & Ors v Chan Cheng Kum* [1975] 1 MLJ 97, PC.

38 *Razman bin Hashim v South East Asia Insurance Co* [1995] 2 AMR 1502.

39 Civil Law Act 1956, Act 67, s 10(1)(b).

40 *Liew Yew Tiam v Cheah Cheng Hoc* [2001] 2 AMR 2320, CA.

40a *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244; *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165, FC and *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon* [2003] 2 AMR 6, CA.

41 [1984] 1 MLJ 376.

42 Civil Law Act 1956, Act 67, s 10(1)(c). However, the section provides that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him (e.g. recovering contribution from an employer who would have been vicariously liable.

commit a tort. Where however, independent acts of the defendants coincide to produce the final damage to the plaintiff, the defendants are referred to as several tortfeasors. One distinction between joint and several tortfeasors is that with the former, a discharge from liability to one will be an effective discharge to all the other joint tortfeasors whereas this rule does not apply to several tortfeasors.

In *Malbai v Nawi*[43] it was stated that where there are two assaulters but one has been forgiven, then both parties are discharged from the assault. This principle is not applicable if the assaults are separate. In the case of joint tortfeasors, what is important is the conspiracy between both parties towards the final damage. Mere similarity of design on the part of the independent actors, causing independent damage, is not sufficient to make them joint tortfeasors.

7. Suits between spouses

Section 4A of the Married Women Act 1957[44] provides that a husband or a wife shall be entitled to sue each other in tort for damages in respect of injuries to his or her person.[45] Further a husband or a wife shall be entitled to sue each other in tort for the protection or security of his or her property.[46]

8. Types of damages

(a) General and special damages

General damages refers to damage or loss that the law presumes a person incurs as a consequence of a tort. The exact amount is not or cannot be quantified at the time of the trial. An award for general damages includes for instance, damages for pain and suffering, and society's prejudice as a result of a libel or slander.[47] A claim for loss of future earnings and loss of earning capacity come under general damages.[48]

Special damages refers to damage or loss which the law does not presume to arise from the tort. The plaintiff must give notice in his pleadings that he is claiming for special damages. A special damage may be described as

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43 [1962] 28 MLJ 99.

44 Revised 1990, Act 450.

45 Section 2 of the Married Women (Amendment) Act 1994, Act A893.

46 Section 9(2) of the Married Women Act 1957, Act 450, by virtue of s 3 of Act A893.

47 For factors taken into account in assessing damages for defamation, see above at pp 291-293.

48 *Hj Ariffin Hj Ismail v Mohamaad Noor Mohammad* [2001] 2 CLJ 609, CA. Future loss of earnings are awarded for loss that is capable of assessment at the trial date. The loss must be substantial, not remote or speculative. Absent this evidence, loss of earning capacity may be awarded if there is substantial or real risk that the plaintiff will end his working life, lose his job or get a less paid employment.

something particular, other than the general damage that is suffered by the plaintiff. It is capable of pecuniary assessment such as medical bills or the loss of earnings right up to the date of trial. It must be specifically pleaded and strictly proved.[49] Special damage also refers to damage that the plaintiff needs to prove in torts that require proof of damage, examples being the torts of negligence, nuisance, slander which are not actionable *per se* and strict liability under the rule in *Rylands v Fletcher*.[50]

In *Ong Ah Long v Dr S Underwood*[51] it was held that general damages are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act so far as money can compensate.[52]

General damages are normally unliquidated damages in that the amount is not fixed. Special damages are calculated from the date the tort occurred until the time the case is brought to court. They consist of liquidated damages, or an amount which may be computed or determined monetarily. The learned judge stated[53]:

> It is a well-established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved. They are recoverable only where they can be included in the proper measure of damages and are not too remote ... The reason that special damages have to be specifically pleaded is to comply with its object which is to crystallise the issue and to enable both parties to prepare for trial ... the exact loss must be pleaded ... the purpose is to put the defendants on their guard and tell them what they have to meet when the case comes on trial ...

It has already been mentioned that the purpose of an award of damages is to compensate the plaintiff for his loss. There are however, three types of damages that are not compensatory in nature but serve their own purpose. These are:

(b) Contemptuous damages

Contemptuous damages are awarded to a plaintiff when the court feels that the plaintiff does not have a good claim. It is awarded when the court does not in fact support the plaintiff's claim and the amount of damages is the smallest denomination of money. Contemptuous damages are common when

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49 *Ngooi Ku Siong & Anor v Aidi Abdullah* [1984] 2 CLJ 163, FC; *Hj Ariffin Hj Ismail v Mohamaad Noor Mohammad* [2001] 2 CLJ 609, CA.

50 [1868] LR 3 HL 330.

51 [1983] 2 MLJ 324.

52 *Ibid* at p 334.

53 *Ibid* at pp 327-8.

the court feels that morally, the plaintiff deserved what happened to him, such as libel, assault and false imprisonment. The usual practice is that the party who loses the case pays for the cost of the trial. Where contemptuous damages are awarded however, the judge has a discretion to instruct the plaintiff to bear the costs of both parties. Contemptuous damages may be awarded for all types of torts, whether actionable *per se* or otherwise.

(c) Nominal damages

Nominal damages are awarded when the plaintiff proves that the defendant has committed a tort, even though the plaintiff has not suffered any actual loss. The plaintiff is awarded damages in recognition of the fact that there has been a violation of his right. Nominal damages is also awarded in cases where damage is shown but its amount is not sufficiently proved. Nominal damages is only granted to torts which are actionable *per se*, and does not necessarily involve a small sum of money.[53a]

The difference between contemptuous damages and nominal damages is that in the latter, there is no moral connotation and both parties may be ordered to bear their own costs. In *Guan Soon Tin Mining Co v Wong Fook Kum*[54] the court held that if the liability of the defendant is established without the plaintiff having suffered any damage, he will only receive nominal damages.

In *Tay Tuan Kiat v Pritam Singh Brar*[55] the defendant built a retaining wall on the plaintiff's land. The plaintiff sued the defendant for trespass to land. The court held that there was trespass to land, but the trespass did not result in any injury to the plaintiff. Furthermore, if the wall had not been built the plaintiff would not have used that particular section of his land. Nevertheless, in recognition of the fact that the plaintiff's right had been infringed, nominal damages of RM500 was awarded.[56]

(d) Exemplary damages

Exemplary damages are awarded to deter the defendant from repeating his act in future. Therefore its function is not compensatory, but as a punishment and deterrent to the defendant. Exemplary damages may be awarded in addition to general or aggravated damages, discussed below.

53a See *Syarikat Kemajuan Kuari (M) Sdn Bhd v Su bin Abdullah* [2003] 1 AMR 787, where RM5,000 was awarded as nominal damages.

54 [1969] 1 MLJ 100 at 103.

55 [1987] 1 MLJ 276.

56 See also *Constantine v Imperial Hotels Ltd* [1944] KB 693.

The leading case is *Rookes v Barnard*[57] and the facts are these. The plaintiff was an employee of BOAC and a member of its trade union. The plaintiff was not satisfied with the trade union and wanted to terminate his membership. The defendants who were the union officials met the employer and threatened to go on strike unless BOAC forced the plaintiff to resign. The plaintiff's employment was subsequently terminated, and he claimed against several of the trade union members. The House of Lords held that exemplary damages could not be awarded in this situation. Exemplary damages may only be awarded in the following circumstances:

(i) where the plaintiff has been a victim of oppressive, arbitrary or unconstitutional acts of servants of the government; or

(ii) where the defendant's act has been calculated by him to bring in profit which exceeds the amount of compensation that he has to pay to the plaintiff; or

(iii) where a statute allows for the award of exemplary damages.

In addition, a court must consider three additional factors before an award of exemplary damages may be made; firstly the plaintiff cannot recover such damages unless he himself is a victim of such 'punishable behaviour'; secondly since exemplary damages can be used for and against liberty and is a form of punishment without the safeguard of the criminal law, the weapon must be used with restraint and in this regard awards of exemplary damages should be moderate, but at the same time reflect the gravity of the wrongdoing.[58] Thirdly, the financial means of the parties, though irrelevant to compensatory damages, are relevant in assessing an award of exemplary damages.

The application of the second category laid down in *Rookes v Barnard* is illustrated in *Cassell & Co Ltd v Broome*.[59] The defendant, a publisher and writer of a book, wrote that the plaintiff, who was a retired but once well-known naval officer, committed a wrong which led to a wartime disaster. The court found that the defendant realised the profits that he would obtain from the sale of the book would more than compensate for the amount of damages that he would have to pay to the plaintiff. Thus the defendant was ordered to pay £15,000 as general damages and £25,000 exemplary damages to the plaintiff.

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57 [1964] AC 1129; [1964] 1 All ER 367, HL.

58 *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352.

59 [1972] AC 1027; [1972] 1 All ER 801, HL.

In *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor*[60] the plaintiff and defendant were neighbours. The plaintiff claimed for trespass and nuisance as the construction work which was being carried out on the defendant's land obstructed the way out from the plaintiff's land. There was also earth and debris in the plaintiff's compound. The court allowed the plaintiff's claim for aggravated and exemplary damages as the defendant's act fell under the second category enunciated in *Rookes v Barnard*.[61]

Exemplary damages may also be awarded to a plaintiff who has been defamed in a newspaper if the statement concerning him has been deliberately or recklessly published and further, that any damages likely to be paid is likely to be less than the profit to be made from the publication of the matter,[62] as this would fall under the second category laid down in *Rookes v Barnard*.

A controversy surrounding the award of exemplary damages is whether a claimant wishing to recover such damages is required to prove that his case merely comes within one of Lord Devlin's three categories in *Rookes v Barnard*; or if additional to that, he must also prove that the cause of action is one in respect of which exemplary damages was available prior to *Rookes v Barnard*.

In *AB v South West Water Services Ltd*[63] the court denied a claim for exemplary damages because the claim did not fall within the ambit specified in *Rookes v Barnard* and because exemplary damages had never been awarded for public nuisance cases.[64] However, *AB* was criticised for introducing irrationality into the law[65] and was overruled in *Kuddus v Chief Constable of Leicestershire Constabulary*.[66]

The position now is that an award of exemplary damages is not conditioned on it having been recognised as justifying such an award before *Rookes v*

60 [1989] 2 MLJ 202.

61 See also *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352. In *Janaki & Anor v Cheok Chuan Seng & Ors* [1973] 2 MLJ 96 exemplary damages was awarded to the plaintiff whose action did not fall under any of the three categories laid down in *Rookes v Barnard* and it is respectfully submitted that the case is bad law as an illustration of circumstances warranting the award of exemplary damages. (Defendant trespassing on plaintiff's land, widened an existing drain with consequence of exposing plaintiff's land to inundation of sea water).

62 *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408.

63 [1993] 1 All ER 609, CA.

64 A large number of plaintiffs (a hundred and eighty, in this case further made the claim unsuitable for the award of exemplary damages).

65 See Winfield & Jolowicz, 15th edn at p 746.

66 [2001] 3 All ER 193, HL.

Barnard. The House of Lords in *Kuddus* held that adopting such a rigid rule would limit the future development of the law. In deciding whether the claimant's case falls within one of the categories in *Rookes v Barnard*, it is the features of the behaviour, rather than the cause of action, which ought to be the focus.

(e) Aggravated damages

All of the three types of damages discussed above – contemptuous, nominal and exemplary damages are not compensatory in nature. There is another type of damages which is said to be compensatory in nature – aggravated damages. Aggravated damages are awarded when the plaintiff has suffered injury or loss other than pecuniary loss, such as a smear on his reputation, feeling of shame, pain and so forth. Aggravated damages may be awarded for malicious falsehood.[67] In awarding aggravated damages the court will take into account the defendant's act and his motive when the tort was committed. Aggravated damages may be awarded in addition to general damages. Libel cases are good examples of the award of this type of damages.[68] The difference between general damages and aggravated damages is that with the inclusion of the latter, the total amount of damages is higher than usual to denote the extra injury or loss that the plaintiff has suffered. Aggravated damages should not be confused with exemplary damages, although they often are in practice. Aggravated damages are not intended to punish the defendant, as is the case with exemplary damages; but it serves to compensate the plaintiff for the mental distress he has suffered arising from the tort. A good example is *Roshairee Abdul Wahab v Mejar Mustafa Omar & Ors*[69] where the court awarded aggravated damages to a ragging victim, for instead of being protected by his seniors, he was made to suffer humiliation, loss of pride and self-esteem. The court also stated that in assessing aggravated damages, all the circumstances of the case including the character of the plaintiff, is to be taken into account.

In *Bisney v Swanston*,[70] as a result of a disagreement with the plaintiff, the defendant who was a trailer driver parked his trailer in front of the plaintiff's coffee-shop in such a way that the latter's business was adversely affected. The court awarded £250 to the plaintiff as aggravated damages, over and above a separate sum for general damages.

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67 *Tan Chong & Son Motor Co Sdn Bhd v Borneo Motors (M) Sdn Bhd* [2001] 3 AMR 3789.

68 *Henry Wong v John Lee & Anor* [1980] 2 MLJ 254. Damages in a libel action is made up of actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result or may be thought likely to result, from the wrong which has been done.

69 [1997] 1 CLJ Supp 39.

70 [1972] 225 Estates *Gazette* 2299.

D. Injunction

This is an additional remedy, and may be obtained in addition to general damages where damages alone is not an appropriate or sufficient remedy. An injunction is an order by the court which has the effect of either prohibiting the defendant from repeating or continuing his act, or it may be an order requesting the defendant to do something positive. It is an equitable remedy and so the grant of an injunction lies at the discretion of the court. The plaintiff cannot claim for an injunction as his right. As an injunction is an additional remedy granted at the discretion of the court, it is usually not granted where monetary compensation is adequate; or where the plaintiff only suffers a slight damage; or where the injury to the plaintiff is temporary; or where the plaintiff himself consents or allows his right to be 'encroached upon'; or if the circumstances provided for under s 54 of the Specific Relief Act 1950[71] exist.

Injunctions are normally granted for the torts of nuisance[72] and repeated or continuing trespass to land[73] and in special circumstances to prevent the publication of a defamatory matter.

Public interest is taken into account in the grant of an injunction. This is illustrated in *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd*[74] where the appellant/defendant had trespassed on the respondent/plaintiff's land by erecting a pylon on the land. A mandatory injunction however, would have resulted in the disruption of electricity supply in Peninsula Malaysia. Relying on past authority[75] it was held that in an application for an injunction, whether prohibitory or mandatory against the acts of a public authority, public interest is a relevant consideration. Here the court considered public interest to have outweighed the plaintiff's interest.[76]

1. Types of injunction

There are two types of injunctions, prohibitory and mandatory injunctions which may be granted either before trial or at the end of the trial.

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71 Act 137, see particularly subsections (d), (g), (h), (j).

72 *Hotel Continental Sdn Bhd v Cheong Fatt Tze Mansion Sdn Bhd* [2002] 3 AMR 3405, CA.

73 See for example, *MBf Property Services Sdn Bhd v Madihill Development Sdn Bhd (No 2)* [1998] 4 CLJ 136.

74 [2000] 1 AMR 1187, CA.

75 *Smith v Inner London Education Authroity* [1987] 1 All ER 411, CA.

76 The mandatory and prohibitory orders of the High Court were set aside and substituted with an order for damages.

(a) Prohibitory injunction

This requires the defendant to cease his activities and is normally granted in cases of nuisance and repeated trespass.

(b) Mandatory injunction

This type of injunction requires the defendant to do a positive act, for instance, to demolish a wall that he has built that constitutes an interference to the airspace of the plaintiff,[77] or to remove an object that he has placed on the plaintiff's land.[78]

The House of Lords in the case of *Morris v Redland Bricks Ltd*[79] stated that a mandatory injunction will not be granted unless the plaintiff shows there is a very strong probability that grave damage will be incurred by the plaintiff if the injunction is not granted and that damages will not be a sufficient or adequate remedy if such damage does occur.

In this case, the defendant did some digging work on his land and the plaintiff's land caved in. The court awarded damages to the plaintiff and issued a mandatory injunction to the defendants to restrain them from interfering with the support of the plaintiff's land and to direct them to take all necessary steps to restore support to the plaintiff's land within six months. Restoring support would require the defendant to fill up the plaintiff's land so as to prevent the land from caving in any further. The cost to fill up the plaintiff's land was £35,000 whereas the value of the land was only about £12,000. The defendants appealed against the injunction. The appeal was allowed and the mandatory injunction was withdrawn. The court stated that a mandatory injunction would only be granted when damages are inadequate; or if the defendant acted carelessly and for his own interest. In these circumstances the court will not consider the cost to the defendant to carry out the mandatory injunction. If the defendant has acted reasonably, and subsequently commits a mistake, the court will take into account the costs that the defendant has to incur in order to rectify the situation. In the instant case the defendants had not behaved unreasonably but only wrongly. Further, the grant of a mandatory injunction will be considered only when the defendant is given indication as to what he is supposed to do in the performance of the injunction and not otherwise.[80]

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77 *K Mahunaran v Osmond Chiang Siang Kuan* [1996] 5 MLJ 293.

78 Specific Relief Act 1950, Act 137, s 53.

79 [1970] AC 652.

80 See also *Chan Jet Chiat v Allied Granite Marble Industries* [1994] 3 MLJ 495.

2. The grant of an injunction at different times

An injunction may be granted at any one of three different times as follows:

(a) *Quia timet* injunction

This type of injunction is granted before the tort occurs on the condition that the plaintiff can prove that he will suffer substantial damage if the tort in fact occurs. Therefore, conditions for its grant are a certainty that the tort will occur, that it is imminent and that the plaintiff is likely to incur substantial damage. This type of injunction is applicable to torts which are not actionable *per se*.[81]

(b) Perpetual injunction

A perpetual injunction is usually, but not necessarily granted at the end of trial after the hearing of the action.[82] The Specific Relief Act[83] lists down circumstances under which a perpetual injunction may be granted.

(c) Interlocutory injunction

An interlocutory injunction is granted after or during the commission of the act alleged to be a tort and it is issued as a temporary measure before the case is brought to court. Its function is to prevent the alleged tort from continuing.[84] There must be a serious issue to be tried, and the balance of convenience and justice of the case in so ordering the injunction is in the plaintiff's favour.[85] The plaintiff must agree to pay damages if, after the trial, the injunction is retracted.

An interlocutory injunction may be awarded to prevent a person from making any defamatory statements before the matter is tried if the publication of the matter is imminent and the circumstances sufficiently urgent so as to justify the prompt interference of the court.[86] An interlocutory injunction is also commonly awarded in cases of trespass to land and airspace by

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81 See *Lemos v Kennedy Leigh Development Co Ltd* [1961] 105 SJ 178, *cf Hooper v Rogers* [1975] Ch 43; *Associated Newspapers Group plc v Insert Media Ltd* [1988] 2 All ER 420.

82 See Specific Relief Act 1950, Act 137, ss 50, 51(2).

83 Act 137, see s 52(3).

84 *Ibid*, s 51(1).

85 *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 AMR 373, CA.

86 *Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu & Ors* [1977] 1 MLJ 56; *Ibrahim bin Ali & Anor v Utusan Melayu (M) Sdn Bhd & Ors* [1991] 2 CLJ 1318.

encroachment.[87] An interlocutory injunction will only be granted in exceptional and extremely rare circumstances where the grant of damages will not be an adequate remedy and there is a clear necessity for affording immediate protection to the plaintiff's alleged right or interest. Other factors which are taken into account are whether the plaintiff will in fact suffer irreparable injury and most importantly, whether he has made out a strong *prima facie* case showing a strong probability of the existence of the legal right on which he sues and a right to the final relief claimed.

An interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases.[88]

E. Specific restitution of property

The remedy of specific restitution of property would arise in the torts of conversion or detinue,[89] or trespass to land.[90] It must be remembered that the primary remedy for conversion and detinue is an action for damages and therefore an order by the court for the delivery of the goods to the plaintiff is at the discretion of the court. The court will not normally order a specific restitution of property if damages would be an adequate remedy.[91]

F. Extinction of liability

Factors which will extinguish the liability of the defendant will be considered under this heading. Liability of the defendant may be extinguished in several different ways as follows:

1. Waiver

A waiver in the context of the law of torts means the plaintiff 'releasing' his right to claim for damages from the defendant. It is not the tort that is waived, but the right to sue for damages. The plaintiff, instead of claiming for damages, chooses to institute an action for restitution, where he is in essence demanding the defendant to pay him the price of the goods and any profit that the defendant has received as a result of disposing of his property. In this regard, torts which are capable of being waived are those in which the defendant may acquire a pecuniary profit, such as the torts of conversion, trespass to

87 *Karuppannan v Balakrishnen (Chong Lee Chin & Ors)* [1994] 3 AMR 2279.
88 *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271; *Azman bin Mohd Yussof v Vasaga Sdn Bhd* [2001] 2 AMR 2040.
89 Specific Relief Act 1950, Act 137, s 9.
90 *Ibid*, s 7(1), to be read together with subsection (2).
91 *Whitely Ltd v Hilt* [1918] 2 KB 808.

land where things are extracted from the land and sold, and even trespass to goods.

So if *A* takes my antique stool and sells it for RM100 and I then recover through a court action the RM100 from *A* as restitution, I cannot later institute an action for conversion against *A*, even though if I had done that initially, the amount of damages I might have received might have been more than RM100.

Lord Atkin in *United Australia Ltd v Barclays Bank Ltd*[92] stated:

> ... if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose.

Choosing one of two inconsistent rights is not the same as choosing one of two alternative remedies. The former constitutes a waiver, but not the latter. If I claim against you in negligence for damaging my spectacles, and I fail in my action, it does not bar me from suing you in conversion for the same damage.

2. Accord and satisfaction

Liability may also be extinguished through an agreement made between the parties.[93] For instance if I negligently hit you while you were crossing the road, we may have an agreement (accord) whereby you agree not to sue me if I were to pay you RM200 now, or say, within a month from today (satisfaction).

3. Release

Tortious liability may also be extinguished through what is known as a release. The refers to the plaintiff's agreement to either not institute proceedings against the defendant, or where proceedings have commenced, to discharge the defendant against any tortious liability. A release may therefore be given either before or after the commencement of the action.[94] The difference between a release and an accord and satisfaction is that with a release, the declaration by the plaintiff is embodied in a deed and does not require valuable consideration as with accord and satisfaction.

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92 [1941] AC 1 at 30.
93 *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378.
94 *Apley Estates Co Ltd v De Bernales* [1946] 2 All ER 338.

4. Judgment

Final judgment by a court has two effects. First it terminates the original cause of action, which means that the plaintiff cannot bring a new action against the defendant, either for the same tort or for restitution. Secondly, no other claims may be made by either party against one another as to the correctness of the decision of the court.

5. Limitation

Actions founded on tort must be brought before the expiration of six years from the date on which the cause of action accrues[95] otherwise a defendant may plead limitation as a defence to the action against him.[96] This limitation period may be extended if the plaintiff is under a disability[97] or postponed in cases of fraud or mistake,[98] where time only begins to run when the fraud or mistake is discovered or could with reasonable diligence, be discovered.

The executor of a deceased person's estate may bring an action for damages under s 7(1) and (2) of the Civil Law Act 1956[99] for the benefit of the deceased's spouse, parent or child within three years after the death of the person deceased.[100]

6. Death of a party

It is provided that on the death of any person all causes of action subsisting against or vested in him shall survive against, or for the benefit of his estate.[101] Insofar as the law of torts is concerned, this rule does not apply to a cause of action for defamation. Proceedings (except for defamation) against the estate of the deceased person are maintainable only if they were pending at the date of his death or the proceedings are taken not later than six months after his personal representative has taken out representation.[102] Where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include exemplary damages, any damages for bereavement, damages for loss of expectation of life and any damages for any loss of earnings for any period

95 Limitation Act 1953, Act 254, s 6(1)(a).
96 *Ibid*, s 4.
97 *Ibid*, s 24.
98 *Ibid*, s 29. See also *Karuppan Chellapan v Cheng Lee Chin* [2000] 4 AMR 4375.
99 Act 67.
100 *Ibid*, s 7(5).
101 *Ibid*, s 8(1).
102 *Ibid*, s 8(3).

after that person's death.[103] Further, where the death of that person has been caused by the act or omission which gives rise to the cause of action, the amount of damages recoverable cannot be made in reference to any loss or gain to his estate consequent on his death. Funeral expenses however, may be included in the award of damages.[104]

103 Civil Law Act 1956, Act 67, s 8(2)(a). See *Goh Chai Huat v Lee Mui Ping (f) & 3 Ors* [2000] 4 AMR 4149, CA – claim for loss of future earnings disallowed.

104 *Ibid*, s 8(2)(c) and see also, s 7(3)(ii).

CHAPTER EIGHTEEN

EMERGING TORTS

Six different torts are introduced in this chapter. Not all of these torts are 'new' torts. However they are collectively referred to here, as emerging torts in view of the rise in the number of cases brought to courts on these issues in recent years. The basic principles governing these emerging torts follow.

A. Interference with contract or business

1. Conspiracy

The tort of conspiracy is usually divided into two types: the first type refers to conspiracy as an agreement between two or more persons to carry out an unlawful act or acts, or to carry out a lawful act by unlawful means. This is commonly referred to as conspiracy by unlawful means. The second type of conspiracy arises where a combination of two or more persons agree to wilfully injure a man in his trade, resulting in damage to him.[1] This is commonly referred to as either conspiracy to injure or simple conspiracy, or conspiracy by lawful means.

In *Lonrho Ltd v Fayed*[2] the House of Lords explained the two types of conspiracy: one type employs lawful means but aims at an unlawful end. The other employs unlawful means. In conspiracy by 'lawful means' it is necessary to show that the predominant purpose is to injure the plaintiff.

In the second type of conspiracy it is sufficient that the means used were unlawful. The conspirators are not afforded any defence even if they could show that their primary purpose was to further or protect their own interests. In order to make out a case of conspiracy, the plaintiff must establish the following three essential ingredients of the tort:

(i) an agreement between two or more persons; and

(ii) the agreement was for the purpose of injuring the plaintiff; and

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1 *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [2000] 2 AMR 1278.

2 [1991] 3 All ER 303, HL.

(iii) the acts done in execution of that agreement resulted in damage to the plaintiff.

The essence of conspiracy lies in there being an agreement (or at least an arrangement) between the defendant and other third parties, to cause injury to the plaintiff.[3]

The word 'combination' is generally preferred over 'agreement' to describe a conspiracy. The word 'agreement' does not mean the existence of a signed and sealed document. It is used in the loose sense – referring to a combination, or a common understanding and intention, or a conjoint effort; to injure the plaintiff. The requirement for combination between two or more persons is satisfied even where the parties are married to one another.[4]

In any case the existence of an agreement/combination must be proved. The court must thereafter consider the predominant purpose for which the act or acts are carried out.[5]

The sole and predominant purpose (that is, to injure the plaintiff) must be pleaded, if the plaintiff alleges conspiracy by lawful means or conspiracy to injure.[6] There is no need to specifically plead 'sole and/or predominant purpose' if the allegation is conspiracy by unlawful means. (Such as passing off, conversion, breach of fiduciary duties, breach of confidentiality).

Therefore it is a necessary ingredient of the tort of conspiracy to injure that the predominant purpose must be to injure the plaintiff. If such intention is not clear, the tort is not established.[7] Being aware of the inevitable damage to the plaintiff as a consequence of the defendant's action, is insufficient in the tort of conspiracy to injure. It must be shown that the predominant purpose is to deliberately inflict damage on the plaintiff. In an action for conspiracy to injure, once the predominant purpose is established, it is irrelevant that the defendant also has a subsidiary purpose of furthering his own interests. The converse is equally true – that where the predominant purpose is the advancement of the defendant's trade interests and injuring the plaintiff is the subsidiary purpose, no case of conspiracy can be made out. In ascertaining

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3 See *Seagate Technology Pte Ltd v Goh Han Kim* [1995] 1 SLR 17, CA Singapore.
4 *Midland Bank Trust Co Ltd v Green (No 3)* [1981] 3 All ER 744.
5 *Simmah Timber Industries v David Low See Keat* [1999] 5 MLJ 421; *Seah Siang Mong v Ong Ban Chai* [1998] 1 CLJ Supp 295; *Seagate Technology (S) Pte Ltd v Heng Eng Li* [1994] 1 SLR 534.
6 *Electro Cad Australia Pty Ltd v Mejati RCS Sdn Bhd* [1998] 3 MLJ 422; [1998] 3 AMR 2555; *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman* [1996] 3 AMR 3001.
7 *Iskandar Gayo v Datuk Joseph Pairin Kitingan & Ors* [1997] 2 AMR 1264.

the predominant purpose the court may consider the short and long term objectives of the defendant.

There is no need to establish that the intention to injure was the defendant's predominant motive if the defendant's act was by itself unlawful.[8] The mere intention to injure is sufficient.

In order for the plaintiff to succeed in a cause of action for conspiracy to do unlawful acts or use unlawful means, the acts alleged must be actionable in a civil action.

Actual damage is an essential ingredient in the tort of conspiracy. Damage means actual pecuniary loss.

An award for damages for injury to reputation or to feelings is therefore, not permissible in a claim for the tort of conspiracy.[9] Where damage has not occurred, the claim will fail.[10]

A defendant who is able to prove that the purpose behind his action is to further his own interests will not be liable for conspiracy.

2. Inducing breach of contract

In *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd*[11] the court summarised the tort of inducement of breach of contract as follows:

> The tort is committed when a third person deliberately interferes in the execution of a valid contract which has been concluded between two or more other parties.

Five conditions must be fulfilled in order to establish this tort:

(i) there must be a 'direct' interference, or an 'indirect' interference together with the use of unlawful means; and

(ii) the plaintiff must show that the defendant had knowledge of the relevant contract; and

(iii) the defendant had the intention to interfere with the contract; and

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8 *Esso Singapore Pte Ltd v Ang Chuah Nguan* [1998] 2 SLR 199.

9 *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] 2 AMR 2111, CA; following *Ward v Lewis* [1955] 1 All ER 55; *Lonrho Ltd v Fayed (No 5)* [1993] 1 WLR 1489, CA.

10 *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1995] 2 AMR 1138.

11 [1984] 2 MLJ 105, FC; following *Greig v Insole* [1978] 3 All ER 449 at 484-485.

(iv) in an action other than for a *quia timet* injunction, the plaintiff must show that he has suffered special damage which is over and above nominal damage;

In any *quia timet* action, the plaintiff must show the likelihood of damage to him resulting if the act of interference takes place; and

(v) so far as it is necessary the plaintiff must successfully rebut any defence based on justification, which the defendant may put forward.

Once the five conditions are fulfilled and the intention to interfere with the contract is proven, it is irrelevant that the defendant may have acted in good faith and without malice. It is equally irrelevant if the defendant has acted under a mistaken understanding as to his legal rights.[12]

The tort of inducement of breach of contract is therefore established where the plaintiff is able to prove firstly, that the procurer acted with the requisite knowledge of the existence of the contract; and secondly, the procurer intended to interfere with the performance of the contract.[13] Intention is to be determined objectively.

A direct dealing by the defendant with the plaintiff's subtenants for instance, need not necessarily mean that there has been an inducement by the defendant of the subtenants, to breach their contract with the plaintiff. The facts of each case must be scrutinized in order to determine whether there has been an interference amounting to an inducement to breach the contract.[14]

The plaintiff must show that there is a contract in existence between himself and a third party, and that the defendant by his act interfered with this contract or induced the third party to breach this contract. Where the existence and the terms of the contract are not proven, it would be impossible to try to establish that the defendant's act amounted to an inducement to the third party to breach his supposed contract with the plaintiff.[15]

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12 *Kelang Pembena Kereta-Kereta Sdn Bhd v Mok Tai Dwan* [2000] 2 AMR 1337, CA. See also *South Wales Miner's Federation v Glamorgan Coal Co Ltd* [1905] AC 239 at 246 per Lord McNaghten, HL.

13 See *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405, CA Singapore.

14 *Mok Tai Dwan v Kelang Pembena Kereta-Kereta Sdn Bhd* [1996] 1 MLJ 586; affirmed in *Kelang Pembena Kereta-Kereta Sdn Bhd v Mok Tai Dwan* [2000] 2 AMR 1337, CA.

15 As what transpired in *In-Comix Food Industries Sdn Bhd v A Clouet & Co (KL) Sdn Bhd* [1997] 2 AMR 1554.

3. Passing-off[16]

The law of passing-off is essentially concerned with the protection of goodwill associated with a business. Goodwill is normally created by trading, and very slight trading activities have been held to suffice.[17]

In *Electro Cad Australia Pty Ltd v Mejati RCS Sdn Bhd*[18] the plaintiff pursuant to an agreement, was authorised to manufacture and develop an anti-theft car safety device, called Stopcard. The plaintiff launched Stopcard on November 27, 1995. Three days later on November 30, 1995, the defendants launched a similar device, called Stopcar.

Relying on an earlier authority[19] the court held that in a passing-off action the plaintiff must prove the following elements:

(i) that the plaintiff has sufficient goodwill, reputation and presence in the trade name in question, in the local jurisdiction; and

(ii) the actions of the defendant are likely to cause, or has actually caused, deception or confusion; and

iii) the plaintiff has suffered, or is likely to suffer damage or injury to his business or goodwill as a result of the defendant's misrepresentation.

The court found that the goodwill of the business, through the would-be distribution of the product Stopcard, belonged to the plaintiff, generated by their extensive advertising campaign. The use of the trademark Stopcar by the defendant would result in the public being led to believe that the two products were connected. The defendant's conduct was done with the intention of appropriating the plaintiff's goodwill and to pass off the defendant's product as that of the plaintiff's. Passing-off was therefore established.

4. Breach of confidence

Breach of confidence is a new and emerging tort, and the successful plaintiff will be awarded damages as compensation.

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16 See Teo Bong Kwang, *Trade Mark Law and Practice in Malaysia*, 2001, Butterworths Asia, Chapter 16.

17 *Electro Cad Australia Pty Ltd v Mejati RCS Sdn Bhd* [1998] 3 AMR 2555 at 2584 *per* Kamalanathan Ratnam J.

18 [1998] 3 AMR 2555.

19 *Compagnie Generale des Eaux v Compagnie General Des Eaux Sdn Bhd* [1996] 3 AMR 4015.

Kamalanathan Ratnam JC stated:

> ... the categories of tortious liability remain open, the ingenuity and resourcefulness of the human mind can and ought to lead to fresh categories of tort being established.[20]

A plaintiff who claims for breach of confidence can do so in one of two ways: firstly he can rely on the contractual agreement between himself and the defendant, that there is a duty of confidence on the part of the defendant. This duty could have been either expressly or impliedly imposed. Where the court finds that there exists a confidential relationship between two parties, the court can infer an implied contract arising out of that confidential relationship. This is usually the case in employer-employee situations. Secondly, he can invoke the equitable jurisdiction of the court to protect the obligation of confidence that the defendant owes him.[21]

Examples of relationships in which there is an implied duty of confidence are as between a banker and customer,[22] a clerk or other employee and his employer[23] and doctor and patient.

In an action for breach of confidence where there is no contractual relationship between the plaintiff and defendant, the plaintiff must prove the following[24]:

(i) the information must have the necessary quality of confidence about it;

(ii) the information must have been imparted in circumstances importing an obligation of confidence[25];

(iii) there must be unauthorised use of the information to the detriment of the party who originally communicated it.

In *Schmidt Scientific Sdn Bhd v Ong Han Suan*[26] the plaintiff had initially signed an exclusive distributorship agreement with *T*, an overseas supplier,

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20 *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632 at 653.
21 *X Pte Ltd v CDE* [1992] 2 SLR 996.
22 *Tan Eng Seong v Malayan Banking Bhd* [1997] 2 CLJ Supp 552.
23 *Merry Weather v Moore* [1892] 2 Ch 518.
24 *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632; *Electro Cad Australia Pty Ltd v Mejati RCS Sdn Bhd* [1998] 3 AMR 2555; *Stephens v Avery* [1988] 2 All ER 477; *X Pte Ltd v CDE* [1992] 2 SLR 996.
25 A personal relationship is not considered as information which has been communicated on the basis of confidentiality – *X Pte v CDE* [1992] 2 SLR 996.
26 [1997] 5 MLJ 632.

for the sale of certain specialised imported equipment. This agreement was subsequently made non-exclusive when another company *X*, was appointed as a distributor in 1994. *X* was a company incorporated by four defendants who were all former employees of the plaintiff. They formed the company almost immediately upon leaving the plaintiff's employment. Before *T* appointed *X* as distributor, *X* had approached existing customers of the plaintiff and quoted a much lower price than what the plaintiff had already quoted for the sale of the same products. Two of the three customers proceeded to purchase the items from the plaintiff but at a lower price from the plaintiff's earlier quotation. The third customer proceeded to buy the item from *X*. The plaintiff claimed for damages for the profits lost. *P* also prayed for an injunction to restrain *X* (including its servants or agents) from disclosing any confidential information or trade secrets of the plaintiff, and from dealing with *P*'s suppliers or customers.

The court held that the plaintiff had satisfied all elements of the tort, namely that the information sought to be protected was of a confidential nature; it was communicated in circumstances importing an obligation of confidence and there had been unauthorised use of that information to the detriment of *P* in terms of business and reputation. The injunction was granted on the principle that a defendant who comes into possession of confidential information, knowing it to be such, is under a duty not to take unfair advantage of it or to use it to the prejudice of the person who gave the information to him, without his consent.

Again in *Electro Cad Australia Pty Ltd v Mejati RCS Sdn Bhd*,[27] the facts of which are similar to *Schmidt*; the defendants, one of whom was a former employee of the plaintiff and two others who had access to the plaintiff's business dealings; were found to have disclosed confidential information relating to the plaintiff's trade, resulting in both the plaintiff and defendant's respective companies launching a similar anti-theft device for cars within three days of each other. The court held that all elements of a cause of action for breach of confidence were fulfilled.

A duty of confidence arises whenever the defendant either knew or ought to have known that the other person could reasonably expect his privacy, *via* the information, to be protected.[28]

Information relating to a person's sexual conduct may be the subject matter of a legally enforceable duty of confidentiality.[29]

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27 [1998] 3 AMR 2555.
28 *A v B* [2002] 2 All ER 545, CA.
29 *X Pte Ltd v CDE* [1992] 2 SLR 996.

However, a court of equity will not enforce a duty of confidence relating to matters which have a grossly immoral tendency. In *Stephens v Avery*[30] the plaintiff had told the defendant in confidence, that she was having a lesbian sexual relationship with *T*. The defendant disclosed this to the newspapers, in connection with press coverage over the trial of *T's* husband who was alleged to have killed *T*. *P* sued *D*. *D* applied to strike out the statement of claim on the ground that it was frivolous and disclosed no cause of action. The court dismissed *D's* application. It was held that a judge should not apply his personal moral views in deciding the legal rights of the parties before him. As difficult as it is to identify what sexual conduct is considered as grossly immoral and therefore is not subject to the duty of confidence, the court can only refuse to enforce rights where there is a generally accepted moral code on that issue.

In short, lesbianism does not amount to 'grossly immoral' conduct so as to take it outside the protection of the tort of breach of confidence. (Would this decision be followed in Malaysia should similar facts be presented before a Malaysian court?)

Within the realm of medical law, there is no breach of confidence where the information disclosed does not identify the person to whom it relates.[31]

There is no duty of confidence where the disclosure was made in obedience of the law.[32]

B. Misuse of procedure

Malicious prosecution and abuse of process

In *Vijendran Ponniah v MBf Country Homes & Resorts Sdn Bhd*[33] the plaintiff was an advocate and solicitor. In August 1986 he sent two separate bills to the first defendant (one to the first defendant and one to the first defendant's holding company) totalling over RM46,000 for agreements that he had prepared for the defendant. These two bills were not denied or disputed. Neither were these two bills settled. The plaintiff at the same time, was a holder of a credit card from the first defendant. In a letter dated March 1988 the first defendant wrote to the plaintiff demanding payment for about RM7,500, the amount owed on the credit card. The plaintiff wrote back to

30 [1988] 2 All ER 477.
31 *R v Dept of Health, ex p Source Informatics Ltd* [2000] 1 All ER 786, CA.
32 *AG of Hong Kong v Zauyah Wan Chik & Ors and another appeal* [1995] 2 AMR 1955, CA.
33 [2002] 1 AMR 740.

the first defendant in April 1988, first denying that he owed the said RM7,500, and secondly demanding payment on his bills which far exceeded RM7,500. Again the defendant did not dispute the claim, neither did they reply to his letter. The plaintiff forwarded the bill for the third time in May 1988. Again he received no reply. The first defendant however, without serving the summons (dated April 23, 1988) on the plaintiff, obtained judgment in default of appearance (on June 28, 1988) against the plaintiff. Four years after having obtained the default judgment, the first defendant commenced bankruptcy proceedings against the plaintiff. The creditor's petition against the plaintiff was published in a newspaper and posted on the notice board of the Kuala Lumpur High Court. The plaintiff applied to set aside the service of summons. On a preliminary issue that as the summons was never served on the plaintiff, the service of summons was set aside by the magistrate. The creditor's petition was also struck out. The plaintiff thus claimed for damages for civil malicious prosecution and for abuse of process, arising out of the bankruptcy proceedings.

The court[34] held that in a claim for civil malicious prosecution, the plaintiff has to satisfy the court that the defendant did not have the right to institute the proceedings in the first place. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, they terminated in his favour and that he had suffered damage. The damages claimed is for damage to the person, to property or to reputation. On the whole it must be shown that the defendant had wrongfully set the law in motion, that he had abused the process of the court. The rationale behind the foundation of the action is to discourage the perversion of the machinery of justice for an improper purpose.

The court held that the general rule is that it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even if malice is provable. The exceptions to this general rule are in relation to proceedings for bankruptcy, liquidation, arrest and execution against property instituted maliciously and without reasonable and probable cause. In all these excepted cases, the principles applicable are the same as in actions for malicious prosecution for the institution of criminal proceedings.[35]

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34 Following *Mohamed Amin v Jogendra Kumar Bannerjee & Ors* AIR 1947 SC 108 at 112, PC, *per* Sir John Beaumont.

35 A petition for insolvency tends to injure the credit and reputation of the person proceeded against in the society in which they move. This is especially and more so if he is actually adjudged insolvent and his property is seized by the receiver and adjudication annulled on appeal. The person so proceeded against is entitled to sue in tort for damages if the application for insolvency is malicious and without reasonable and probable cause – *Vijendran Ponniah v MBf Country Homes & Resorts Sdn Bhd* [2002] 1 AMR 740 at 747; following *Bahori Lal v Sri Ram* AIR 1946 All 139.

Where it is plain that there is a want of a reasonable or probable cause or excuse, it is reasonable to conclude that the defendant could not honestly have believed in the charge he made, and this is evidence of malice. Evidence of malice can also be construed from utter recklessness or failure to make proper and adequate enquiries, or not making any effort to test one's information or grounds of suspicion, for veracity.[36]

On the facts the court found that the defendant was malicious.

To succeed in a claim for damages for the tort of collateral abuse of process, a claimant need not prove that the party claimed against had maliciously invoked the process of court, or that the proceedings had terminated in the claimant's favour. He only needs to prove that the process complained of had been initiated for a purpose other than to obtain a genuine redress, and that the claimant had suffered some damage or injury in consequence thereof. The essence of an abuse of process action is that the proceedings complained of were instituted for a purpose other than that for which they were properly designed, or to achieve for the person instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process. The focus is on the dominant purpose of the person charged with abuse of process in instituting them. It is not necessary for the plaintiff to show what that purpose is or to identify the collateral object. Abuse of process is established if the defendant has been shown to have acted unlawfully, negligently, unconscionably in contumelious disregard for the plaintiff's right.

A claim for malicious prosecution can only be made after the conclusion of the earlier proceedings (terminating in the plaintiff's favour) and not before the earlier proceedings is resolved.[37] It is essential that the plaintiff proves that the proceeding complained of terminated in his favour.[38]

Malice means 'an improper and wrongful motive', which may be established by showing evidence of personal enmity or ill will.[39]

Malice cannot be inferred merely from the absence of reasonable and probable cause. It must be proven on the facts of each case.[40] Suppression of

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36 For instance, the validity of the earlier judgment on bankruptcy proceedings must be checked and verified by solicitors before embarking on execution proceedings. An omission would indicate lack of care which would be sufficient to constitute malice in a claim for malicious prosecution.

37 *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman* [1996] 3 AMR 3001.

38 *Taib bin Awang v Mohamad bin Abdullah* [1983] 2 MLJ 413.

39 *Shaw Ming Jeong Frank v Banque Indosuez* [1994] 2 SLR 51.

40 *Chao Yan San v Yuen Ten Soo* [2000] 3 AMR 3057.

material facts by a defendant, which led to the arrest of the plaintiff is evidence of malice.[41]

'Want of reasonable and probable cause' refers to want of genuine belief, based on reasonable grounds, that there are good grounds in law for the earlier proceedings against the plaintiff.[42]

This belief must be one which would be entertained by a reasonable and discreet mind. For instance, a belief founded on the information of a credible witness would be sufficient reasonable and probable cause for the prosecution of the plaintiff in the first place. Not so, apparently, if the witness has been previously convicted of theft.[43]

Reasonable and probable cause does not only mean that such cause has to objectively[44] exist – it must be subjectively held as well.[45] An honest belief in the plaintiff's guilt is sufficient,[46] and serves to negative any malice on the defendant's part.

The burden is on the plaintiff to prove both want of reasonable probable cause *and* malice. Malice alone is not sufficient. This is because express malice on its own need not necessarily imply or give rise to want of probable cause. Where however, the facts do show reasonable and probable cause for instituting proceedings, the question of malice or any other dishonest motive is irrelevant.[47]

In an action for malicious prosecution damage must be proved. Any one of these three types of damage is sufficient to support the plaintiff's action: damage to reputation (or fame), damage to his person or damage to his property.[48] The action will fail if the plaintiff is unable to prove one or other of these three types of damage.[49]

Lord Denning MR in *Goldsmith v Sperrings*[50] explained the tort of abuse of process as follows:

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41 *Saiboo Gunny v Suleiman* [1982] SLR NS 64, SC Straits Settlements.
42 *Shaw Ming Jeong Frank v Banque Indosuez* [1994] 2 SLR 51.
43 *Nelligan v Wemyss* [1833] 1 Ky 629, CA Straits Settlements.
44 *Vytee Padiachee v Narana Naiken* [1888] 1 SLJ 75, SC Straits Settlements.
45 *Saul Hamid b Pakir Mohamad v Inspector Abdul Fatah b Abd Rahman* [1999] 6 MLJ 800.
46 *Rawther v Abdul Kareem* [1966] 2 MLJ 201, FC. See also *Challenger Technologies v Dennison Transoceanic Corp* [1997] 3 SLR 582.
47 *Boon Hoe Chia v S Qureshi* [1948] MLJ 89, CA Singapore.
48 *Hj Ahmad v Sadah* [1954] 20 MLJ 101.
49 *Chao Yan San v Yuen Ten Soo* [2000] 3 AMR 3057.
50 [1977] 1 WLR 478 at 489, CA.

> An abuse of process arises when the legal process is diverted from its true course – that it leads to extortion or oppression. In other words, exerting pressure so as to achieve an improper end.

The case which founded this tort is *Grainger v Hill*[51] in which the court held that the wrong was committed as the whole legal process was initiated for an ulterior purpose, and thus to effect an object outside the scope of the process.

In *Grainger v Hill* it was held that the tort of abuse of process differs from malicious prosecution. The claimant who sues for abuse of process need not show that the earlier proceeding had terminated in his favour, and that there was want of a reasonable and probable cause for the institution of that proceeding.

The Court of Appeal in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Ungku Mohamed*[52] laid down the elements of this tort as being:

(i) the process complained of by the claimant must have been initiated;

(ii) the purpose for initiating that process must be other than to obtain genuine redress which the process offers. The dominant purpose for which the process was invoked must be shown to be collateral, that is, aimed at producing a result not intended by the invocation of the process;

(iii) the plaintiff must have suffered some damage or injury in consequence.

C. Liability for false statements

Deceit

The tort of deceit arises when there has been a fraudulent representation resulting in damage to another. The claimant must prove fraud on the part of the defendant.

Elements of the tort[53] are:

(i) a false representation;

(ii) made knowingly or recklessly;

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51 [1838] 132 ER 769.
52 [1998] 2 AMR 1666, CA.
53 See *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405, CA Singapore.

(iii) with the intention that it would be acted upon; and

(iv) it is in fact acted upon with the consequence that damage is incurred by that other party.

The motive of the defendant or person making the fraudulent representation is immaterial. The remedy for deceit is damages, and the primary object, as in the case for other torts, is to put the injured party into as good a position financially as he would have been in if the tort had not been committed.[54]

In *Bank Bumiputra Malaysia Bhd v Yeoh Ho Huat*[55] the defendant valuer in his valuation report, valued a piece of land at over RM64,000. In reliance on this report, the plaintiff bank approved an application for a RM20,000 loan for *A*, the owner of the said land. The land was duly charged to the plaintiff as security for the loan. *A* defaulted in his payments. The land was finally sold for about RM7,000. In an action against the defendant for fraudulent valuation, the court held that an action of deceit would lie at the instance of any person who had acted on the fraudulent report of a valuer. This was even more so where the defendant had no honest belief in the truth of his report, or in any case not caring whether the report was true or false. Although there was no contractual relationship between the parties, the defendant ought to have known that his report would be relied upon by the plaintiff, and so a duty of care arose. The requirement of damage was also satisfied as in reliance on the valuation report the plaintiff had advanced the loan and consequently suffered damage when the land was sold at its true value of RM7;000 as against the value stated in the report at RM64,000.

In a situation where the plaintiff takes action against a briber and the agent bribed, he may only recover, either the amount of bribe as money had and received by the agent bribed, or the amount of the actual loss sustained in consequence of his entering into the transaction. He cannot recover both. *T Mahesan v Malaysian Government Officers' Co-operative Housing Society*[56] is an example. Mahesan was the director and secretary of the Society. The Society wanted to purchase a piece of land. One Manickam bought the land for RM456,000. Manickam then resold the land to the Society for RM944,000, realising a gross profit of RM488,000. He gave Mahesan RM122,000, a quarter of his profit.

In an action by the Society, the court held that the Society had to elect, either to claim from Mahesan the amount bribed or from Manickam the net profit he had made.

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54 *Datuk Jagindar Singh v Tara Rajaratnam* [1986] 1 MLJ 105, PC.
55 [1979] 1 MLJ 30.
56 [1978] 1 MLJ 149, PC.

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