

**EXTRACT FROM**

**"THE LAW OF DAMAGES"  
(Contract and Tort/Delict)**

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## Chapter 4

### LIABILITY FOR CONSEQUENTIAL ACTS AND EVENTS<sup>1</sup>

#### a. Introduction

- 4.1 The issue.** An act or event is a consequence of a breach if it would not have been a factor at all ‘but for’ the breach.<sup>2</sup> Whether the original wrongdoer should be liable for such consequences is the issue which is being considered here.<sup>3</sup> The issues of law are very closely related, if not identical, to those raised on a question of ‘foreseeability’ of type/kind of damage (chapter 5).
- 4.2 Chain of events/causation/liability.** If a consequential act or event is found to be attributable to the breach the ‘chain of causation’ is not broken and the wrongdoer will be liable for the cumulative loss (figure 4.1). In the case of consequential ‘acts’/failure to act (4.4) a finding of ‘joint fault’ may be appropriate if there was negligence on the part of the party performing the consequential act.<sup>4</sup>

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<sup>1</sup> Often referred to as ‘intervening acts and events.’

<sup>2</sup> Illustrated, for example, by *Monarch Steamship Co Limited v Karlshamns Oljefabriker (A/B)* (4.19).

<sup>3</sup> The issue is in other words whether the ‘chain of causation’ has been broken.

<sup>4</sup> Examples include *Sayers v Harlow Urban District Council* (4.8/figure 4.3); *The Calliope* (4.9/figure 4.4). In *The Wagon Mound (No1)* there was potential joint liability (contributory negligence) on the part of the owners of the wharf (4.22-23). *Burrows v March Gas & Coke Co* (4.18) is a case involving a third party in which a finding of joint fault could potentially

**Fig 4.1: Consequential act or event is attributable to the breach**



(Wrongdoer is liable for the cumulative damage if the 'chain of causation' has not been broken).

**4.3 Breaking the chain/new cause.** If, on the other hand, the subsequent factor is not attributable to the breach then the chain of causation is said to have been broken and the wrongdoer will only be liable for any initial damage caused by the breach and not in respect of any further damage attributable to the consequential act or event (figure 4.2). In such circumstances the consequential act or event may be referred to as a 'new and independent cause'<sup>5</sup> of damage. The effect could be as in figure 2.3, that is separate causes of distinct damage.

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have been made.

Note that an element of 'negligence' may be excusable (4.4).

<sup>5</sup> Sometimes referred to as a 'novus actus interveniens.'

**Fig 4.2: Consequential act or event is not attributable to the breach**



(The ‘chain of causation’ is said to have been broken and the wrongdoer is relieved of liability for any further damage)

### **b. Liability for Consequential Acts**

**4.4 Test.** In the case of a consequential act<sup>6</sup>/failure to act<sup>7</sup> the wrongdoer will be liable if the injured party acted reasonably (by what he did or by what he failed to do) in the circumstances in which he was placed as a result of the breach.<sup>8</sup> The burden of

<sup>6</sup> These include, for example, acceleration measures taken by a contractor in an attempt to mitigate delay caused by employer’s default or actions by the master of a ship in an attempt to save her following a collision at sea. Acts of third parties generally fall into the category of consequential ‘events’ (chapter 4 part d).

<sup>7</sup> The test is the same where the allegation is one of ‘failure to act.’ A failure to act may consist of a breach of an implied common law/contractual duty such as in the case of *Lambert and another v Lewis and others* [1982] AC 225, [1981] 2 WLR 713; [1981] 1 All ER 1185, HL. Alternatively it may consist of a breach of the ‘duty to mitigate’ loss, a special type of duty situation, considered in part c of this chapter. The distinction between an ordinary implied duty and the duty to mitigate is considered at 4.13.

<sup>8</sup> In order to reconcile this with the principles applicable on a question of ‘foreseeability,’ it could be said that only reasonable acts of the claimant will be held to be within the reasonable contemplation of/reasonably

proof is on the wrongdoer to show that the claimant's actions were unreasonable in the circumstances.<sup>9</sup>

**4.5** The *Metagama*<sup>10</sup> concerned an action arising out of a collision between 2 vessels on the river Clyde. It was alleged that the master of the claimant's vessel had been negligent in that he had failed to keep the engines running after 'beaching.' This failure had resulted in total loss when the ship slipped into the river Clyde.<sup>11</sup> On the facts, the master of the ship was not negligent and there was no break in the chain of causation (initiated by the collision)/no new and independent cause. The relevant principle of law was stated in the following terms by Viscount Haldane (at p254):

“...what those in charge of the injured ship do to save it may be mistaken, but if they do whatever they do reasonably, although unsuccessfully, their mistaken judgment may be a natural consequence for which the offending ship is responsible, just as much as any

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foreseeable by the wrongdoer.

<sup>9</sup> *Roper v Johnson* (1873) LR 8 CP 167; The onus was described as being a 'heavy' one by Lord Shaw in *The Metagama* (4.5) at p259. See also Lord Blanesburgh at p265.

Note, however that in *Selvanayagam v University of the West Indies* [1983] 1 All ER 824, PC at 827 it was held that the claimant must prove that in all the circumstances his failure to take the steps in question was reasonable. **Update:** In *Geest plc v Lansiquot* [2002] UKPC 48 it was affirmed that the burden is on the wrongdoer (*Selvanayagam* incorrectly decided)

<sup>10</sup> (1927) 29 Ll LR 253 (HL), also referred to as *Canadian Pacific Ry Co v Kelvin Shipping Co Ld.* (1927) 138 L.T. 369.

<sup>11</sup> This is effectively an allegation of failure to mitigate: per Lord Blanesburgh (at p264), Viscount Haldane (at p254) and Viscount Dunedin at p256.

physical occurrence.”<sup>12</sup>

**4.6** In *McKew v Holland Hannen and Cubitts (Scotland) Ltd*<sup>13</sup> the claimant suffered injury to his leg at work as a result of his employer’s negligence. Some time thereafter his leg gave way when he was about to descend a staircase. In an attempt to save himself (which would not have been an unreasonable act on his part) he jumped onto the lower landing and sustained a further severe injury to his ankle. The chain of causation was said to have been broken before his leg had given way and before he was forced to jump, however, since it was unreasonable for the him, when his leg had given way on other occasions since the accident, to attempt to descend a steep staircase which had no handrail without seeking adult assistance. The employer was not therefore liable for the further injury.<sup>14</sup>

**4.7 Chain not broken but finding of joint fault.** As an alternative to a finding that either one party or the other should be wholly responsible for the damage in question, a finding of joint fault could be considered. This may be appropriate if the claimant’s actions in consequence of the breach were negligent (in the circumstances)<sup>15</sup> but not so negligent as to lead to a conclusion

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<sup>12</sup> This was referred to as an important statement of principle by Lord Wright in *The Oropesa* [1943] P. 32 at p40.

<sup>13</sup> 1969 SC 14; [1969] 3 All ER 1621, HL

<sup>14</sup> This is a case in which a finding of joint fault (involving ‘contributory negligence’) could potentially have been made (4.7).

<sup>15</sup> It may be that a finding of contributory negligence would be less likely than it would be in the case of ‘non-consequential’ acts. ‘Allowance’ is made for the fact that the claimant is in a position of difficulty as a result of the breach.

that the chain of causation had been broken.

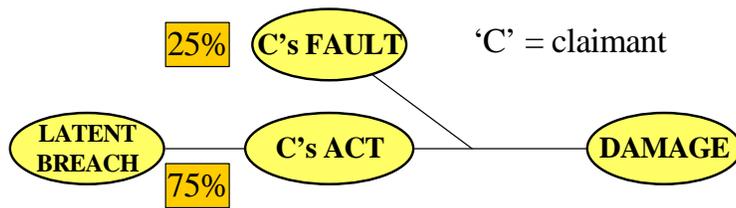
- 4.8** The case of *Sayers v Harlow Urban District Council*<sup>16</sup> (figure 4.3) concerned an action for breach of duty (negligence) pursuant to an implied contract and/or tort/delict. The claimant, having paid to use the amenity, found herself locked inside a public toilet as there was no handle on the inside of the door. This was a 'latent' breach by the council (figures 2.8 and 2.9). The claimant attempted to climb out by standing on the toilet and then placing one foot on the toilet roll and fixture. On discovering that she would be unable to climb out she attempted to descend at which point the toilet roll rotated causing her to fall and injure herself. To attempt to climb out was reasonable in the circumstances and that was therefore a consequence in respect of which the council were liable (the chain of causation had not been broken). Damages were reduced by 25%, however, since the claimant was found to have been careless in the process of returning to the ground by allowing her balance to depend on the toilet roll.

**Update:** the point is also illustrated by *The Volute* [1922] 1 AC 129; *Grosse Ile Bridge Company v American Steamship Company* 2002 FED App 0307P (6th Cir) [UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT]

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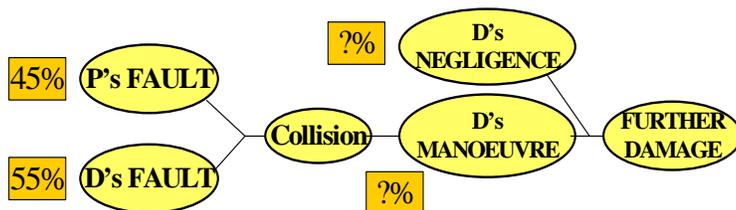
<sup>16</sup> [1958] 1 WLR 623; [1958] 2 All ER 342, CA

**Fig 4.3: Sayers v Harlow UDC**



**4.9** In *The Calliope*<sup>17</sup> (figure 4.4) the initial collision was caused by the fault of both ships (45% plaintiff and 55% defendant). This was followed some time later by further damage due to the defendant’s negligent, ‘consequential’ manoeuvre on the river.

**Fig 4.4: The Calliope**



As to whether a further ‘sub-apportionment’ of liability was appropriate, Brandon J stated that:<sup>18</sup>

“...it is open to the court, as a matter of law, in a case like the present, to find that the alleged consequential

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<sup>17</sup> *Carlsholm (Owners) v Calliope (Owners), The Calliope* [1970] P 172; [1970] 2 WLR 991; [1970] 1 All ER 624.

<sup>18</sup> [1970] P 172 at 184F.

damage was caused partly by the original casualty, and partly by the claimant's own intervening negligence, and to make a further sub-apportionment of liability accordingly."

He also said that "...it is only right to add that I express it with some diffidence" and in any event that:

"...cases where it would be right to find that such damage was caused both by such intervening negligence and by the original negligence which resulted in the casualty may well be comparatively rare. They will certainly be much less frequent than cases of joint fault based on successive acts of negligence both of which precede the original casualty."<sup>19</sup>

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<sup>19</sup> A similar situation arose in the case of *Government of Ceylon v Chandris* (6.21-23).