seen as bona fide commercial operations. This is starkly shown when one remembers that all of the shareholders in Permakraft (N.Z.) Ltd agreed to the transaction. Therefore, no "insiders" were prejudiced. Indeed, they were substantially benefited. In the case of a relatively small, private company, it does not always make sense to speak of there being a benefit to the company, as distinct from a benefit to its members. The only real potential losers here were the company's creditors.

The future of the "Mason" school of thought will be interesting. If his remarks are seen to have a wider relevance, then it could be said that some inconvenience and uncertainty will follow if directors of a company are always under an abstract duty to "take account of the interests of its shareholders and its creditors", since there will often be insoluble problems of reconciling the conflicting interests of these two groups.

M. W. RUSSELL, LL.B.(HONS)(CANTUAR), LL.B.(CANTAB),
Lecturer in Law, University of Canterbury

LAMB v *LONDON BOROUGH OF CAMDEN: A CASE OF SHIFTING FOUNDATIONS*

What is the proper test of causation when a defendant's breach of duty does not by itself cause damage to a plaintiff but provides the opportunity for a deliberate and harmful intervention by a third-party? According to Lord Sumner in a much-quoted passage from *Weld-Blundell* v *Stephens*:[1]

> "In general . . . even though A is in fault he is not responsible for injury to C, which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause. . . . It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B snaps the chain of causation; he is no mere conduit pipe, through which consequences flow from A to C, no mere moving part in a transmission gear set in motion by A; in a word, he insulates A from C."

The above dictum is, perhaps, too widely stated. The original wrongdoing is at least one of the causes of the damage and certainly there are many decisions in which damage has been attributed to a defendant notwithstanding a deliberate intervening act by a third party. The difficulty comes in seeking to define the principle which allows recovery in such circumstances. The English Court of Appeal has recently considered this issue in some detail in *Lamb* v *London Borough of Camden*[2] but whether the law has thereby been clarified must, unfortunately, be regarded as doubtful.

The facts of *Lamb's* case were as follows. The plaintiff was the owner of a house near Hampstead Heath. In 1972 she went to New York and let

---

[1] [1920] AC 956 at p.986.

[2] [1981] QB 625.

the house to tenants. While she was away the defendant council employed contractors to excavate the street in front of the house and during the course of this work the contractors broke a water main, causing the foundations of the house to be eroded and undermined. The tenants moved out, the plaintiff had her furniture put into store and the house was left empty. On two separate occasions thereafter the house was invaded by squatters despite attempts to keep them out. Before they were finally evicted they had done damage amounting to about £30,000. The plaintiff brought an action against the council claiming damages in nuisance and negligence. The council eventually admitted liability in respect of the damage caused by the subsidence alone but contended the damage caused by the squatters was too remote a consequence of their conduct. The case went before the official referee on this issue, who took as the appropriate test the following passage from the judgment of Lord Reid in *Home Office* v *Dorset Yacht Co Ltd*:[3]

> "These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal."

The official referee thought that squatting was at the material time a *reasonably foreseeable* risk but that it was nonetheless not *likely* to occur in the vicinity of the plaintiff's house. The damage caused by the squatters was, therefore, too remote to be recoverable. The plaintiff appealed to the Court of Appeal which unanimously upheld the decision of the official referee, but for different reasons.

Lord Denning MR thought that the application of Lord Reid's test of what was 'very likely' to happen could render the Home Office liable even for depredations by borstal trainees negligently allowed to escape which were far from the vicinity of their escape. This illustration convinced him that Lord Reid's test was wrong. Further, on the facts of *Stansbie* v *Troman*,[4] where a decorator was held to be under a duty of care to a householder to lock the door, it could not be said that it was *very likely* that a thief would enter. If the decision was to be justified it could only be because theft was *reasonably foreseeable* rather than *likely*. Lord Denning also found the 'very likely' test difficult to reconcile with *The Wagon Mound (No. 1)*[5] and *The Wagon Mound (No. 2)*.[6] Yet simply to ask whether the damage was reasonably foreseeable would not do either. It would extend the range of compensation far too widely. His Lordship gave examples of damage that in his view was reasonably foreseeable yet irrecoverable: a waiter injured by a robber in a restaurant where the manage-

---

[3] [1970] AC 1004 at p.1030.

[4] [1948] 2 KB 48.

[5] [1961] AC 388.

[6] [1967] 1 AC 617.

ment had taken inadequate security precautions;[7] loss suffered by a householder whose house was burgled by a criminal negligently allowed by prison staff to escape; nervous shock on being told of a motor accident involving close relatives.[8] His Lordship concluded, returning to a familiar theme,[9] that ultimately it was a question of policy as to which consequences of a wrongful act may be the subject of compensation. The relevant questions of policy here were: Whose job was it to do something to keep out the squatters? And if they got in, to evict them? Clearly, said Lord Denning, it was that of the appellant, Mrs Lamb. More broadly, his Lordship thought the insurance position was also a relevant factor.[10] The risk of damage here should be borne by Mrs Lamb's insurers. If she was not insured, that was her misfortune.

Oliver LJ made no overt appeal to any question of policy but rather sought to express his judgment in orthodox terms. He thought that all Lord Reid in the *Dorset Yacht* case was seeking to do was to draw a distinction between 'foreseeability as a possibility' and 'reasonable foreseeability'. The finding by the official referee that the damage was foreseeable but unlikely constituted in effect a finding that the damage claimed was not such as could *reasonably* be foreseen. On this basis his Lordship was satisfied that the appeal should be dismissed. He nonetheless concurred with Lord Denning in regarding the straight test of foreseeability, at least in cases where the acts of independent third parties were concerned, as one which could, unless subjected to some further limitation, produce results which would extend the ambit of liability 'beyond all reason'. This further limitation might, apparently, be found in the degree of likelihood of third party intervention. The standard of probability required before the law would attribute the free act of a responsible third party to the tortfeasor would vary according to the circumstances: virtual inevitability might be appropriate in some cases. However, his Lordship left further consideration of the problem for a case in which it directly arose.

The third member of the court, Watkins LJ, did not think that the test of reasonable foreseeability of damage laid down in *The Wagon Mound* cases should be festooned with additional words, such as 'possibility', 'likely' or 'quite likely', supposedly for the purpose of amplification or qualification. However, mere application of *The Wagon Mound* principle alone could not in all circumstances conclude the question of remoteness because in some cases 'the very features of an event or act for which damages are claimed themselves suggest that the event or act is not on any practical view of it remotely connected with the original act of negligence'. His Lordship said that the court should look at such matters as the nature of the event or act, the time it occurred, the place where it occurred, the identity and intentions of the perpetrator, the responsibility, if any, for

---

[7] Disagreeing with the decision of the Supreme Court of New South Wales in *Chomentowski* v *Red Garter Restaurant Pty Ltd* (1970) 92 WN (NSW) 1070 (affirmed (1971) 45 ALJR 713 (note), HC of Aust.)

[8] Lord Denning gave as authority the decision of the Court of Appeal in *McLoughlin* v *O'Brian* [1981] QB 599 which decision has since been reversed by the House of Lords ([1982] 2 WLR 982). The point nonetheless remains a valid one.

[9] See *Dutton* v *Bognor Regis Urban District Council* [1972] 1 QB 373.

[10] Relying here on *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827.

taking measures to avoid the occurrence, and matters of public policy. A 'robust and sensible' approach would produce an 'instinctive feeling' that the event or act being weighed in the balance was too remote to sound in damages for the plaintiff. This feeling led his Lordship to the conclusion that the squatters' damage was here too remote, although nonetheless reasonably foreseeable.

It is, perhaps, fair to say that the judgments in *Lamb's* case are not especially helpful in providing guidelines for future courts dealing with similar cases. The policy of Lord Denning MR and, possibly, of Watkins LJ has the merit of flexibility but demerit of uncertainty, while the distinction drawn by Oliver LJ between foreseeability and reasonable foreseeability may often border on invisibility. Yet a concept of some value here which the court neglected to use is found in the doctrine of risk. The notion of risk entails an examination of the *purpose* of the rule which has been infringed. If the rule is aimed at preventing the kind of damage that has occurred, that is a strong indication that the damage may then be recoverable. This approach seems to work satisfactorily when applied to those cases where a defendant has been held liable for harm caused by the deliberate conduct of a stranger, although the relevant judgments have not usually been expressed in such terms. Thus the risk posed by a decorator negligently leaving a house unlocked while out collecting materials is that a burglar may enter the house and steal some of the contents.[11] The risk provides the *reason* for describing the conduct as negligent. Likewise, negligent installation or repair of a burglar alarm system gives rise to a risk of loss in a subsequent burglary.[12] The risk in an employer sending an unprotected employee to collect the company payroll when an attack by thieves had occurred previously is that such an attack might happen again.[13] Where a landlord lets premises to a tenant and neglects his adjoining vacant premises known to be haunted by tramps, he should foresee the risk of burglary by persons chiselling through the wall of the vacant premises.[14] A failure by a social worker to warn the head of a community home of the fire-raising propensities of a 12 year old boy committed there from the juvenile court gives rise to a risk that the boy will not be adequately supervised and will not be prevented from setting fire to a nearby building.[15]

On the other hand, the risk to which an accident victim is exposed on being left lying in the road is of further injury from other vehicles,[16] not of being robbed while lying unconscious. The purpose of the rule that one should drive carefully is to safeguard others from injury, not to protect them from robbery. Similarly, if a motorist negligently damages another's car, he is not liable if a passerby steals the wheels while the car is left by

---

[11] *Stansbie* v *Troman* [1948] 2 KB 48.

[12] *Williams* v *Wormald Vigilant Ltd*, High Court, Wellington, August 16 1982; *McNeil* v *Village Locksmith Ltd* (1982) 129 DLR (3d) 543; cp *J. Nunes Diamond Ltd* v *Dominion Electric Protection Co.* (1972) 26 DLR (3d) 699.

[13] *Charlton* v *Forrest Printing Ink Co.* "The Times", 19 October 1978.

[14] *P. Perl (Exporters) Ltd* v *Camden London Borough* "The Times", 1 April 1982.

[15] *Vicar of Writtle* v *Essex County Council* (1979) 77 LGR 657.

[16] *Chapman* v *Hearse* (1961) 106 CLR 112.

the roadside.[17] The risk posed by a failure to control and supervise a borstal inmate is that he may cause damage in seeking to escape,[18] not that he might run someone over at some later time when well away from the vicinity of the borstal.[19] Perhaps it is fair to say that the risk posed by negligently puncturing a water main is of damage caused by the escaping water rather than of squatters entering and damaging a vacated house.

Ascertainment of the risks contemplated by a particular rule of conduct must to some extent be a matter of impression upon which opinions may differ. It is thought, nonetheless, that the above examples serve to illustrate the utility of the doctrine of risk in the present context. The doctrine is, however, of less value in solving remoteness problems where the third party intervention is negligent as opposed to deliberate. This is because where deliberate conduct is concerned the risk of intervention may constitute the only reason for regarding conduct as tortious whereas in the case of negligent conduct the risk may be only one out of a number of possibilities and it may be a minor one at that. Thus the ultimate damage may in some circumstances be of a kind within the reasonably contemplated risk yet irrecoverable on a broad view of the relevant events. An example is *Knightley* v *Johns*,[20] a further decision of the English Court of Appeal delivered nine days after *Lamb's* case[21] but by a differently constituted bench.[22]

Mr Johns, the first defendant, was involved in a serious accident near the exit of a one-way road tunnel. The tunnel had a sharp bend in it so the accident could not be seen by drivers entering the tunnel. A police inspector who arrived at the scene of the accident realised that he had forgotten to close the tunnel to oncoming traffic. In breach of the police force's standing orders for road accidents in the tunnel he ordered two police officers on motor cycles, one of whom was the plaintiff, to drive back through the tunnel against the flow of the traffic in order to close it. The plaintiff was hit by an oncoming motorist near the entrance to the tunnel while complying with this direction. The plaintiff claimed damages from, *inter alios*, the first defendant, the police inspector and the chief constable as being vicariously liable for the inspector's negligence. The first defendant conceded that he had been negligent but contended that the negligence of the other defendants and/or of the plaintiff caused or contributed to the accident. The trial judge found the first defendant wholly liable for the plaintiff's injuries. At the appeal it was found that the plaintiff had not himself been negligent whereas the inspector was negligent in not closing the tunnel[23] and in telling the plaintiff to carry out the dangerous manoeuvre of driving the wrong way down the tunnel. In the light of these findings the Court of Appeal concluded that the inspector's negligence had been the real cause of the plaintiff's injuries and was a new

---

[17] An example given by Oliver LJ in *Lamb's* case, *supra* at p.642. See also *Duce* v *Rourke* (1951) 1 WWR (NS) 305.

[18] *Home Office* v *Dorset Yacht Co Ltd* [1970] AC 1004.

[19] *Marti* v *Smith and the Home office* (1981) 131 NLJ 1028.

[20] [1982] 1 WLR 349.

[21] Although not reported until the following year.

[22] Stephenson, Dunn LJJ and Sir David Cairns.

[23] Sir David Cairns dissented on this point.

cause which disturbed and interrupted the sequence of events between the first defendant's accident and the plaintiff's accident. The inspector's negligence thus made the plaintiff's injuries too remote from the first defendant's wrongdoing to be a consequence of it.

The damage suffered by the plaintiff here was broadly within the risk created by the original negligent driving. As the trial judge put it, the motorist ought to foresee that if he is negligent and creates an emergency, other people are likely to be put at risk and police, fire and ambulance officers are likely to take risks either to rescue him or protect other members of the public. Stephenson LJ thought that the judge was asking himself the right question and applying the right law yet his Lordship nonetheless came to a different conclusion. The question he asked was whether the damage that occurred was natural and probable and therefore reasonably foreseeable in the sense of foreseeability of something of the same sort being likely to happen as against it being a mere possibility which would never occur to the mind of a reasonable man or, if it did, would be neglected as too remote to require precautions or to impose responsibility. In answering this question, according to Stephenson LJ[24]—

> "[I]t is helpful but not decisive to consider which of these events were deliberate choices to do positive acts and which were mere omissions or failures to act; which acts and omissions were innocent mistakes or miscalculations and which were negligent having regard to the pressures and the gravity of the emergency and the need to act quickly. Negligent conduct is more likely to break the chain of causation than conduct which is not; positive acts will more easily constitute new causes than inaction. Mistakes and mischances are to be expected when human beings, however well trained, have to cope with a crisis; what exactly they will be cannot be predicted, but if those which occur are natural the wrongdoer cannot, I think, escape responsibility for them and their consequences simply by calling them improbable or unforeseeable. He must accept the risk of some unexpected mischances."

As to which mischances, the 'common sense of plain men' not the logic of philosophers, should be called in aid. His Lordship thought that too much happened here, too much went wrong, the chapter of accidents and mistakes was too long and varied to impose on the first defendant liability for what happened to the plaintiff in discharging his duty as a police officer.

It may be noted that notwithstanding the expressed reliance on the notion of foreseeability, founded, it seems, squarely on *The Wagon Mound (No. 2)*,[25] Stephenson LJ again resorted to an extraneous limiting factor, here described as 'common sense'. This, no doubt, is not very different from the 'policy' of Lord Denning MR or the 'practical view' of Watkins LJ. Where the courts will in future draw the line in dealing with a matter which depends pre-eminently on the special facts of each particular case necessarily remains uncertain. One helpful way of looking at the question is, perhaps, to consider the justice in the attribution of responsibility. In *Lamb*, Lord Denning MR concluded that it was the job of the plaintiff to keep the squatters out.[26] In *Knightley*, Stephenson LJ thought that in

---

[24] [1982] 1 WLR at pp.366-367.

[25] [1967] 1 AC 617.

[26] [1981] QB at p.637.

trying to be fair to the inspector the judge had been unfair to Mr Johns.[27] Clearly, however, there is no magic formula upon which the courts can always rely with both certainty and confidence.

STEPHEN TODD, LL.M.
Senior Lecturer, University of Canterbury

[27] [1982] 1 WLR at p.368.

THE HONOURABLE D. F. QUIGLEY'S RESIGNATION STRICTLY POLITICAL — NOT CONSTITUTIONAL

June 1982 will be remembered for the Quigley affair. Precipitated by Mr D. F. Quigley's address to the Young Nationals on June 7,[1] the Prime Minister responded with the ultimatum that the Minister either publicly apologise to his Cabinet colleagues or resign. Mr Quigley resigned. The Prime Minister: "[H]is speech went 'well beyond' the limits of collective responsibility in which cabinet ministers worked. . . [I]t went beyond that which was acceptable from a Cabinet Minister unless accompanied by his resignation."[2] "Bear in mind that we are not talking about a backbencher." Said the Prime Minister: "[T]here is a real difference between what a backbencher could say and what a Minister could say."[3]

It is this appeal to the constitution avowedly vindicating the Prime Minister's reaction that distinguishes this political controversy from the many to have occurred since the closing of the thirty-seventh Parliament. The reference in the Prime Minister's statements is to the proclaimed constitutional convention that Minister's are 'collectively responsible' for all that passes in Cabinet — shed of euphemism, meaning that a Minister who disagrees with a Cabinet decision must either resist making known his dissent or resign. This at least is the theory Mr Muldoon averred: in the event of public disunity a Minister's resignation is constitutionally imperative rather than merely commendable, honourable or even in the Government's best interests to enforce.[4] Thus depending upon the particular construction one might wish to give Mr Quigley's offending speech ("did it or did it not breach the doctrine of collective ministerial responsibility?") it was simply a matter of the constitution claiming an able but dissentient Minister.

But is not this notion of collective responsibility obligating a Minister's resignation novel? Fortunately, the political scientists were able to assist:

[1] ". . . designed to stimulate discussion. . .it is most important that a group such as this has the opportunity to debate the issues of the day. . .and to appreciate the role the government plays in the decision-making process". *Christchurch Press* 15 June 1982, reproducing the full text of the Minister's speech.

[2] *Christchurch Press*, 15 June 1982.

[3] *Ibid.*

[4] See generally, S. A. de Smith, *Constitutional and Administrative Law* (2nd ed., 1973), at 168-177.