using welding equipment. The manager of the respondent, seeing the oil on the water, suspended welding operations and consulted the wharf manager who told him it was safe to continue work – a decision which was justified, because previous knowledge showed that sparks were not likely to set fire to oil floating on water. Work, therefore, proceeded with safety precautions being taken. However, a piece of molten metal fell from the wharf and set on fire a piece of cotton waste which was floating on the oil. This set the oil alight and the respondent's wharf was badly damaged. The case eventually came before the Judicial Committee of the Privy Council on appeal.

Held – the appellant was successful in its appeal, the Judicial Committee holding that foreseeability of the actual harm resulting was the proper tort test. On this principle, the Privy Council *held* that the damage caused by the fire was too remote, though it would have awarded damages for the fouling of the respondent's slipways by oil, if such a claim had been made, since this was foreseeable.

Comment In *Overseas Tankship (UK) Ltd* v *Miller Steamship Property Ltd (The Wagon Mound (No 2))* [1966] 2 All ER 709, the same blaze had caused damage to the respondent's ship (it was the owner of the *Corrimal*). However, the members of the Privy Council had by this time the decision of the House of Lords in *Hughes* v *Lord Advocate* (1963) (see below) before them. It said that the precise nature of the particular injury suffered need not be foreseeable so long as it was one of a kind that was foreseeable, i.e. within the *band* of reasonable foreseeability. Therefore, the respondent recovered damages in negligence and also nuisance. The Privy Council held that in the case of nuisance, as of negligence, it is not enough that the damage was a direct result of the nuisance if the injury was not foreseeable.

326 *Hughes* v *Lord Advocate* [1963] 1 All ER 705

Workmen opened a manhole in the street and later left it unattended having placed a tent above it and warning paraffin lamps around it. The claimant and another boy, who were aged eight and 10 respectively, took one of the lamps and went down the manhole. As they came out, the lamp was knocked into the hole and an explosion took place injuring the claimant. The explosion was caused in a unique fashion because the paraffin had vaporised (which was unusual) and been ignited by the naked flame of the wick. The defendants argued that although some injury by burning was foreseeable, burning by explosion was not.

Held – by the House of Lords – the defendants were liable. 'The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way. . . . This accident was caused by a known source of danger but caused in a way which could not have been foreseen and in my judgment that affords no defence.' (*Per* Lord Reid) 'The accident was but a variant of the foreseeable. It was, to quote the words of Denning, LJ in *Roe* v *Minister of Health* [see Chapter 21], "within the risk created by the negligence". . . . The children's entry into the tent with the ladder, the descent into the hole, the mishandling of the lamp, were all foreseeable. The greater part of the path to injury had thus been trodden, and the mishandled lamp was quite likely at this stage to spill and cause a conflagration. Instead, by some curious chance of combustion, it exploded and no conflagration occurred, it would seem, until after the explosion. There was thus an unexpected manifestation of the apprehended physical dangers. But it would be, I think, too narrow a view to hold that those who created the risk of fire are excused from the liability for the damage by fire because it came by way of explosive combustion. The resulting damage, though severe, was not greater than or different in kind from that which might have been produced had the lamp spilled and caused a more normal conflagration in the hole.' (*Per* Lord Pearce)

Comment (i) A good illustration of the rule in *Hughes* that the *precise* mechanics of the way in which harm occurs need not be foreseen if it is within the risk caused by the negligence appears in *Draper* v *Hodder* [1972] 2 All ER 210. The defendant owned 30 Jack Russell terriers which he kept on his ungated premises. The dogs could run into a nearby house which was owned by the claimant's parents. That house was also ungated. On one occasion the dogs ran into the yard of the nearby house and one or more of them attacked the claimant, a three-year-old boy and bit him. His action for damages succeeded. It was foreseeable immediately that the dogs would bowl over and scratch the child. Nevertheless, the fact that one or more of them bit him was within the risk created by the negligence.

(ii) In spite of the more liberal attitude taken to foresight in *Hughes*, some things are still too remote as consequences. For example, in *Meah* v *McCreamer (No 2)* [1986] 1 All ER 943 the claimant had been injured in a car accident by reason of the defendant's negligence. The claimant alleged that he had suffered a personality change leading to him attacking women. He raped one and indecently assaulted another. The women recovered damages against him and he tried to recover them from the defendant. It was held that the alleged damage was too remote.

(iii) As regards damages for rape, it was held in *Meah* that these should be similar to those awarded in general personal injury cases. However, in *Griffiths* v *Williams, The Times*, 24 November 1995 the Court of Appeal decided that since attitudes to rape had changed, it was now in a different category to ordinary personal injury and higher awards could be made. The claimant's appeal against an award of £50,000 to his victim failed.

(iv) The decision of the House of Lords in *Jolley* v *Sutton LBC* [2000] 1 WLR 1082 should be noted. The case was brought under the Occupiers' Liability Act 1957 (see Chapter 21). The Council allowed a derelict abandoned boat to remain on its land outside a block of flats which it owned. J and another boy jacked the boat up and went underneath it to effect repairs. The boat fell on J and rendered him paraplegic. The Council contended that it was only foreseeable that children would *play* in the boat and not attempt to *repair* it. The House of Lords held that what the boys had done was, after a consideration of *The Wagon Mound* and *Hughes*, within the band of foreseeability so that the Council was liable to J.

Remoteness of damage: the unusual claimant rule

327 *Smith* v *Leech Braine & Co Ltd* [1962] 2 WLR 148

The claimant was the widow of a person employed by the defendant. Mr Smith's work consisted of lowering articles into a galvanising tank containing molten zinc. On one occasion he was struck on the lip by a piece of molten metal which caused a burn. This resulted in a cancer from which he died three years later. Mr Smith's work had given him a predisposition to cancer and the question arose whether, since *The Wagon Mound*, the so-called 'thin skull rule' had disappeared, so that the claimant had to show that the cancer was foreseeable. The Lord Chief Justice, Lord Parker, finding for the claimant, said in the course of his judgment: 'I am satisfied that the Judicial Committee of the Privy Council did not have what are called "thin skull" cases in mind. It has always been the common law that a tortfeasor must take his victim as he finds him.'

328 *Martindale* v *Duncan* [1973] 1 WLR 674

The claimant's car was damaged in a collision with the defendant's car because of the negligence of the defendant. The claimant delayed repairs to his car pending the approval of the defendant's insurer and also of his own. The defendant's insurer wished to seek the advice of independent engineers and did so. About nine weeks after the accident, the defendant's insurer approved the estimate. A few days later the claimant's insurer did so and the repairs were started one week afterwards. The District Registrar awarded the claimant damages including £220 for loss of use of his vehicle for 10 weeks at the rate of £22 per week for hire of a substitute vehicle to cover the period during which he had delayed repairs pending approval of the estimate by the insurers. The defendant had argued that the repairs were not commenced as early as they could have been since the claimant was not himself able to pay for the repairs but had to wait to see what the position was as regards payment from an insurance company. On appeal by the defendant it was *held* – by the Court of Appeal, dismissing the appeal – that the claimant was not in breach of his duty to mitigate his loss and had acted reasonably in the circumstances.

329 *Morgan* v *T Wallis* [1974] 1 Lloyd's Rep 165

Mr Morgan, a lighterman on the River Thames, sustained back injuries in trying to avoid a wire rope thrown by a stevedore on to a barge where Mr Morgan was working. Liability for his injuries was admitted by the defendants, his employers, because they should have had a better system of working, but the amount of damages was disputed because Mr Morgan unreasonably refused to undergo tests and an operation because he genuinely feared both of these things. The highest estimate by a surgeon of the chances of success of such an operation was 90 per cent. It was *held* – by Browne, J – that the defendants had proved that Mr Morgan's refusal was unreasonable as to the investigations and that the operation would have been successful on a balance of probabilities. Where there was no prior disability, physical, mental or psychological, a defendant did not have to take a claimant as he found him.

Remoteness of damage: intended damage never too remote: *novus actus interveniens*: act of a third party expected

330 *Scott* v *Shepherd* (1773) 2 Wm Bl 892

On the evening of a fair-day at Milborne Port, Shepherd threw a lighted squib on to the market stall of one Yates, who sold gingerbread. Then one Willis, in order to protect the wares of Yates, threw it away and it landed on the stall of one Ryal. He threw it to another part of the market house where it struck the claimant in the face, exploded and put out his eye.

Held – Shepherd was liable for the injuries to Scott because he intended the initial act and there was no break in the chain of causation. Shepherd should have anticipated that Willis and Ryal would act as they did.

Comment The decision in this case is initially difficult to understand because Shepherd did not injure the claimant. It would seem that since battery is also a crime the maxim of the criminal law that a person intends the natural consequences of his acts was applied to produce the 'transferred intent' of the type seen in criminal cases.

Remoteness of damage: *novus actus* not materially causing or contributing to injury

331 ***Barnett* v *Chelsea and Kensington Hospital Management Committee*** [1968] 1 All ER 1068

Mr Barnett drank tea which had, unknown to him, been contaminated with arsenic. He attended at the casualty department of a hospital saying that he had been vomiting for some three hours after drinking the tea. The casualty doctor failed to examine him but sent a message that he should report to his own doctor. Some five hours later Mr Barnett died and on his widow's action for damages, it was *held* that the hospital authority owed a duty of care and that the doctor was negligent in failing to examine and admit Mr Barnett and accordingly there had been a breach of that duty. However, on the facts the deceased's condition was such that he must have died despite any medical attention which the hospital could have given so that causation was not established and the widow's claim failed.

332 ***Robinson* v *The Post Office***, *The Times*, 26 October 1973

The claimant suffered a minor injury for which the defendant, his employer, admitted liability. As a result, the claimant received an anti-tetanus injection which produced a rare complication of encephalitis, with grave consequences. Ashworth, J *held* that the doctor had acted negligently in administering the injection in that he had failed to administer a test dose. However, it appeared that even if such a test had been made the claimant would have shown no reaction to it. Thus, the doctor's negligence had had no causative effect, since even with the proper precautions the encephalitis would not have been prevented. The defendant appealed and it was *held* – by the Court of Appeal – that the judge's conclusions on the question of the medical negligence were correct and that accordingly the defendant could not rely on that negligence as a *novus actus interveniens*. It was, therefore, liable for all the claimant's disabilities, and the contention that these were too remote was to be rejected.

Remoteness of damage: duty to guard against *novus actus*

333 ***Davies* v *Liverpool Corporation*** [1949] 2 All ER 175

The claimant was trying to board a tramcar belonging to the defendant Corporation at a request stopping place. An unauthorised person (a passenger) rang the bell, whereupon the car started, throwing the claimant off the platform and causing her injury. The conductor was on the upper deck collecting fares. Evidence showed that the car had been standing at the request stop for an appreciable time, and that the conductor had been upstairs for the whole of that time, though it was not a particularly busy period. In this action for negligence brought by the claimant, it was *held* that the defendant was liable for the negligent act of the conductor. He should have foreseen that if he was absent from the platform of the car for an appreciable time, some passenger might ring the bell. The act of the passenger did not, therefore, break the chain of causation because it was just that sort of act which the conductor was employed to prevent.

Remoteness of damage: *novus actus* not anticipated by defendant

334 ***Cobb* v *Great Western Railway*** [1894] AC 419

The railway company allowed a railway carriage to become overcrowded, and because of this the claimant was hustled and robbed of £89. He now sued the company in respect of his loss.

Held – this was too remote a consequence of the defendant's negligence. The robbery was a *novus actus interveniens* breaking the chain of causation.

Comment In *Stansbie* v *Troman* [1948] 2 KB 48 the owner of a house was obliged to leave a painter working alone on the premises. The owner told the painter to shut the front door when he left the house, but in fact the painter left the house empty for about two hours in order to obtain some wallpaper and left the door unlocked. It was held that the painter was liable for the loss of jewellery stolen by a third party who entered the house in his absence because this was foreseeable as being just the kind of thing which might happen in the situation. It is difficult to reconcile *Stansbie* with *Cobb* and this leads to

the suggestion that *Cobb* may no longer be good law, though it has never been overruled.

Remoteness of damage: *novus actus* may be that of the claimant

335 ***Sayers* v *Harlow UDC*** [1958] 2 All ER 342

The defendant Council owned and operated a public lavatory. The claimant having paid for admission entered a cubicle. Finding that there was no handle on the inside of the door, and no means of opening the cubicle, the claimant had tried for some 10 to 15 minutes to attract attention. Having failed to do so, and wishing to catch a bus to London in the next few minutes, she tried to see if there was a way of climbing out. She placed one foot on the seat of the lavatory and rested her other foot on the toilet roll and fixture, holding the pipe from the cistern with one hand and resting the other hand on the top of the door. She then realised it would be impossible to climb out, and she proceeded to come down, but as she was doing so, the toilet roll rotated owing to her weight on it and she slipped and injured herself. She sued the defendant for negligence. In the county court the defendant was found negligent, but, as the claimant was in no danger on that account, and as she chose to embark on a dangerous act, she must bear the consequences. It was *held* – by the Court of Appeal – that her act was not a *novus actus interveniens*, and the damage was not too remote a consequence of the defendant's negligence. She was 36 years of age, and in her predicament her act was not unreasonable, though if she had been an old lady it might have been. However, the damages recoverable by the claimant would be reduced by one-quarter in respect of her share of the responsibility for the damage.

336 ***McKew* v *Holland and Hannen and Cubitts (Scotland) Ltd*** [1969] 2 All ER 1621

McKew sustained an injury during the course of his employment for which his employer was liable. The injury caused him occasionally and unexpectedly to lose the use of his left leg. On one occasion he left a flat and started to descend some stairs which had no handrail. His leg gave way and he sustained further injury.

Held – by the House of Lords – his conduct in trying to descend the stairs was unreasonable and thus broke the chain of causation. The subsequent injury was, therefore, too remote and the employer was not liable.

Remoteness of damage: *novus actus* – the intervener must intend the act

337 ***Philco Radio Corporation* v *Spurling*** [1949] 2 All ER 882

Certain packing cases containing inflammable film scrap were delivered in error by the defendants to the claimant's premises. No warning as to their contents was given on the cases. The cases were opened by the claimant's servants, and a foreman recognised the contents as inflammable, and gave instructions that the scrap was to be replaced, and that there was to be no smoking in the vicinity. He telephoned the defendants and arranged to have the cases delivered to their proper destination, 150 yards away. Before the cases had been moved, a typist employed by the claimant negligently set light to the scrap with a cigarette, and it exploded causing damage. The defendants pleaded that the proximate cause of the damage was the typist's act and that the chain of causation was broken.

Held – the defendants were negligent in not ensuring that such dangerous material was properly delivered. The act of the typist did not break the chain of causation; she did not intend to injure her employer, and when she approached the scrap with a cigarette she did so as a joke. Her act was not such a conscious act of violation as to relieve the defendants from liability, and in any case the act formed part of the very risk that was envisaged.

Remoteness of damage: nervous shock

338 ***Dulieu* v *White*** [1901] 2 KB 669

The defendant who was driving a van negligently, ran into a public house. The claimant, who was pregnant, was in the public house and because of the shock became ill and gave birth to a premature and mentally deficient child. It was *held* that she could recover damages.

339 ***Chadwick* v *British Railways Board*** [1967] 1 WLR 912

A serious railway accident was caused by negligence for which the Board was liable. A volunteer rescue worker suffered nervous shock and became psychoneurotic as a result. The claimant, as administratrix of his estate, claimed damages for nervous shock. It was *held* that:

(*a*) damages were recoverable for nervous shock even though the shock was not caused by fear for one's own safety or that of one's children;

(*b*) in the circumstances injury by shock was foreseeable;
(*c*) the defendant ought to have foreseen that volunteers might attempt rescue and accordingly owed a duty of care to those who did.

Comment (i) If the deceased had merely read of this accident to strangers in his newspaper, there would have been no claim for nervous shock if this had resulted.

(ii) It should be noted that in *Chadwick* and the other cases of nervous shock there was an illness following upon the shock. A contrast is provided by the decision of the Court of Appeal in *Nicholls* v *Rushton, The Times*, 19 June 1992, where the claimant had been in a road traffic accident but suffered no physical injury. He experienced a nervous reaction which fell short of a psychological illness. He was not entitled to damages. The Court of Appeal said there were no damages for 'shock and shaking up' without more.

(iii) *Chadwick* v *British Railways Board* (1967) was held to be correctly decided but distinguished in *White* v *Chief Constable of South Yorkshire* [1999] 1 All ER 1. The case involved claims by police officers for nervous shock following their involvement as rescuers in the Hillsborough football stadium disaster. There was, said the House of Lords, no liability to the officers. A rescuer, it said, is not placed in any special position as regards liability for nervous shock merely by reason of the fact that he was a rescuer unless, as in *Chadwick*, he had exposed himself to danger or reasonably believed that he was doing so. In *Chadwick* the claimant was exposed to danger by trying to rescue passengers in a train which might have caught fire or toppled over on him and so on. The police officers at Hillsborough were not in danger as such. The danger was past. It follows that a person who suffers nervous shock or psychiatric injury caused by witnessing or participating in the aftermath of an accident that has caused death or injury to others cannot recover damages unless he was himself in danger or fear of it.

340 *Hinz* v *Berry* [1970] 1 All ER 1074

Mrs Hinz witnessed a car accident in which her husband was killed and her children injured. The accident was caused by the negligent driving of the defendant. As a result of seeing the accident Mrs Hinz, who had been a vigorous and lively woman, became morbid and depressed for years afterwards.

Held – by the Court of Appeal – she was entitled to damages of £4,000 for nervous shock. She was a woman of robust character who would probably have stood up to the strain if she had not *seen* the accident.

Somehow or other the court has to draw a line between sorrow and grief for which damages are not recoverable, and nervous shock and psychiatric illness for which damages are recoverable. The way to do this is to estimate how much the claimant would have suffered if, for instance, her husband had been killed in an accident when she was 50 miles away, and compare it with what she is now, having suffered all the shock due to being present at the accident. The evidence shows that she suffered much more by being present. (*Per* Lord Denning, MR)

341 *Hambrook* v *Stokes* [1925] 1 KB 141

The defendant left his lorry unattended on a sloping street and, because of his negligence in failing to brake the vehicle properly, it began to run away. The claimant's wife had just left her children further down the street though they were in fact round a bend and not within her view. However, she saw the lorry moving and suffered shock, which resulted in her death, because she feared for the safety of her children. Her husband brought this action for loss of her services and was *held* entitled to recover damages provided that the shock was brought about by his wife's own experience and not by the accounts of bystanders.

342 *McLoughlin* v *O'Brian* [1982] 2 All ER 278

The claimant's husband and three children were involved in a road accident caused by the negligence of the defendant. One child was killed and the husband and the other two children were badly injured. At the time of the accident the claimant was at home two miles away and was told of the accident by a neighbour and taken to hospital where she saw the injured members of her family and the extent of their injuries and shock, and heard that her daughter had been killed. As a result of hearing and seeing the results of the accident, the claimant suffered severe and persisting nervous shock and brought this action against the defendant for negligence. It was *held* by the Court of Appeal that the claim failed. Even though the claimant's nervous shock was a reasonably foreseeable consequence of the defendant's negligence, in accordance with precedent and social policy the duty of care owed by a driver of a motor vehicle was limited to persons and owners of property on the road or near it who might be directly affected by the driver's negligent driving and accordingly the defendant did not owe a duty of care to the claimant because she had not been in the physical proximity of the accident when it occurred.

The House of Lords reversed the Court of Appeal and upheld the claimant's claim, even though she was two miles from the accident. The argument that

this would open the floodgates to many claims by people who had not actually seen the accident, which was a former restriction on claims of this sort, did not deter their Lordships. They all agreed that the claimant's nervous shock was a foreseeable event producing an identifiable mental illness. However, that part of the decision in *Hinz* v *Berry* (above) which says that nervous shock does not cover sorrow or grief was upheld.

Comment (i) If the floodgates ever did open, they were closed by the Court of Appeal in *Alcock* v *Chief Constable of South Yorkshire, The Times*, 6 May 1991. The case was brought following the disaster at Hillsborough football ground at Sheffield where it was alleged that the police let too many people get into the ground causing those in front of them to be crushed against railings and barricades. It was held that only the parents and spouses of the victims could recover damages for nervous shock and then only if they had actually seen the accident by being at the ground or identified bodies afterwards. Parents and spouses who had only seen the disaster by viewing it on a simultaneous TV broadcast could not get damages. The decision was affirmed by the House of Lords. (See *Alcock* v *Chief Constable of South Yorkshire, The Times*, 29 November 1991.) The decisions in *Frost* v *Chief Constable of South Yorkshire Police* (1996) and *White* v *Chief Constable of South Yorkshire* (1999) have already been noted as *not* putting police rescuers who were not related to the Hillsborough victims in a special category as rescuers and, therefore, unable to recover damages for nervous shock.

(ii) However, it was held in *Attia* v *British Gas plc* [1987] 3 All ER 456 that damages for nervous shock could be recovered where it was caused by damage to property. It need not result from the death or injury of a person. The claimant's shock in this case arose when, on returning home, she saw the whole of her house on fire as a result of the defendant's negligence.

(iii) There have been further developments as follows. It was held in *Vernon* v *Bosley, The Times*, 4 April 1996 by the Court of Appeal that a father (V) who witnessed the aftermath of an accident caused by B's negligent driving in which V's two children died could recover for nervous shock and obtain further damages for grief and bereavement of a normal kind. V was clearly suffering from mental illness as a result of what he had seen and it was not necessary, if indeed it was possible, to say that one part of his mental state was due to what he had seen and some other part was due to normal grief and bereavement.

(iv) The above ruling was not applied in *Greatorex* v *Greatorex, The Times*, 6 June 2000. In that case the claimant was a fire officer who went to the scene of a car accident in which the defendant, his son, was trapped following an accident *caused by the son's negligent driving while under the influence of alcohol*. The father suffered severe post-traumatic stress disorder, though his son was later released from the car and recovered. The High Court ruled that the claimant failed. There was no duty of care owed by the *victim of a self-inflicted injury* to a secondary party in these circumstances. In effect, the son's insurer was not liable because the son was not.

(v) In *Robertson* v *Forth Road Bridge Joint Board*, 1996 SLT 263 it was held that two friends of a worker whom they saw blown off the Forth Bridge to his death could not recover for nervous shock. They were not within the *Alcock* categories of secondary victims.

(vi) More importantly, perhaps, the House of Lords has decided that where the claimant is *not a witness but the primary victim*, if the accident is foreseeable, so is that element of damage from it which can be put down to nervous shock; see *Page* v *Smith* [1995] 2 WLR 644 where the claimant was involved in an accident with a car driven negligently by the defendant. Page suffered no physical injury but the accident worsened his previous nervous state. As the House of Lords said, if it was reasonably foreseeable that the claimant might suffer personal injury as a result of the defendant's negligence, it was not necessary to ask a separate question as to whether the defendant should have foreseen injury by shock. The House of Lords ruling in no way changes the rules relating to *witnesses who are secondary victims*.

(vii) The control mechanisms set out in *Alcock* continue to be applied in these cases. Thus in *Keen* v *Tayside Contracts* 2003 SLT 500 Mr Keen was a roadworker. He was instructed by his employers to set up a road diversion at the scene of a road accident. While doing this he became aware that there were four crushed and burned bodies in a car. He developed post-traumatic stress disorder and claimed damages against the employer for exposing him to the accident scenario and failing to provide debriefing to enable him to come to terms with what he had seen. His case failed largely because he had no close ties of love and affection with the victims, which is one of the *Alcock* control mechanisms.

Remoteness of damage: nervous shock – there must be a duty of care

343 *Hay (or Bourhill)* v *Young* [1943] AC 92

The claimant, a pregnant Edinburgh fishwife, alighted from a tramcar. While she was removing her fish-basket from the tram, Young, a motor cyclist, driving carelessly but unseen by her, passed the tram and collided with a motor car some 15 yards away. Young was killed. The claimant heard the collision, and after Young's body had been removed, she approached the scene of the accident and saw a pool of blood on the road. She suffered a nervous shock and later gave

birth to a stillborn child. The House of Lords *held* that her action against Young's personal representative failed, because Young owed no duty of care to persons whom he could not reasonably anticipate would suffer injury as a result of his conduct on the highway.

344 *Owens* v *Liverpool Corporation* [1939] 2 KB 394

A funeral procession was making its way to the cemetery when a negligently driven tram owned by the defendant collided with the hearse and overturned the coffin. Several mourners who were following in a carriage suffered shock and it was *held* by the Court of Appeal that they were entitled to damages.

Remoteness of damage: successive accidents and supervening events

345 *Jobling* v *Associated Dairies* [1980] 3 All ER 769

The claimant, an employee in a butcher's shop, suffered a partially disabling accident at work in 1973. In 1976 before the trial in regard to that accident came on, the claimant was found to be suffering from a totally disabling but unconnected condition. At the trial in 1979 the judge took no account of the supervening disability. On appeal on amount of damages it was *held* – allowing the appeal – that where a claimant was subsequently injured by a non-tortious act, the tortfeaser's damages were to be reduced by the extent of the claimant's further injuries and consequent loss. *Baker* v *Willoughby* (1969) (below) should not be extended further.

346 *Baker* v *Willoughby* [1969] 3 All ER 1528

In September 1964, the claimant was involved in an accident on the highway caused by the negligent driving of the defendant, but attributable as to one-quarter to the claimant's contributory negligence. The claimant received serious injuries to his left leg, but after long hospital treatment he took up employment with a scrap metal merchant. On 29 November 1967, while in the course of his employment, the claimant was the innocent victim of an armed robbery receiving gunshot wounds necessitating the immediate amputation of his left leg, which was already defective because of the previous accident. The question of the amount of damages for the claimant's injuries in the road accident of September 1964 came before the court for assessment in February 1968.

Held – by the Court of Appeal – no consequence of the accident of September 1964 survived the amputation of the claimant's left leg and the defendant was liable only for loss suffered by the claimant up to 29 November 1967. Damages are compensation for loss arising from a tortious act and cease when by reason of recovery, supervening disease, or further injury there is no continuing loss attributable to that act.

The House of Lords, [1969] 3 All ER 1528, reversed the Court of Appeal decision holding that damages are not merely compensation for physical injury but for the loss which the injured person suffers. This loss was not diminished by the supervening event and the second injury was irrelevant. 'The supervening event has not made the appellant less lame nor less disabled nor less deprived of amenities. It has not shortened the period over which he will be suffering. It has made him more lame, more disabled, more deprived of amenities. He should not have less damages through being worse off than he might have expected . . .' (*Per* Lord Pearson, LJ)

Comment *Holtby* v *Brigham & Cowan (Hull) Ltd* (2000) (see p 525) may perhaps be distinguished. In that case the existing injury was merely *aggravated* by the continuing employment – it was not a *different* injury.

347 *Performance Cars Ltd* v *Abraham* [1961] 3 All ER 413

The claimant owned a motor car which was damaged in a collision with a car driven by the defendant. The damage to the claimant's car was such that it would necessitate respraying the whole of the lower body. Two weeks before the accident the claimant's car had been involved in another collision which had also made respraying of the lower body of the car necessary. The claimant obtained judgment against the driver responsible for the first collision, but that judgment was not satisfied and the car had not been resprayed at the time when the second collision took place. The court was asked to decide whether the claimant was entitled to recover as damages from the defendant the cost of respraying the lower body of its car.

Held – by the Court of Appeal – the claimant was not entitled to recover the cost of respraying from the defendant because that damage was not the result of his wrongful act.

Limitation of actions: fraudulent or negligent concealment of claim

348 *Beaman* v *ARTS* [1949] 1 All ER 465

In November 1935, Mrs Beaman, before leaving for Istanbul, deposited with the defendant company several packages to be sent to her as soon as she gave

notice requesting it. In May 1936, the defendant at her request dispatched one of the packages, but afterwards regulations made by the Turkish authorities prevented dispatch of the other packages and Mrs Beaman asked the defendant to keep them in store pending further instructions. Three years later the defendant, not having received instructions, wrote and asked the claimant to insure the contents of the packages. She did not do so but replied saying that she was hoping to return to England. However, the outbreak of war while she was still in Turkey prevented this.

On the entry of Italy into the war in 1940 the defendant, being a company controlled by Italian nationals, had its business taken over by the Custodian of Enemy Property. Wishing to wind up the business as soon as possible, the manager of ARTS Ltd examined the packages, reported that they were of no value, and gave them to the Salvation Army. No steps were taken to obtain the claimant's consent. The claimant returned to England in 1946 and commenced proceedings more than six years after the packages were disposed of, claiming damages for conversion. The defendant set up the defence that the action was barred by the Limitation Act. The claimant relied on what is now s 32 of the Limitation Act 1980, which provides that where '(*a*) the action is based on fraud of the defendant . . . or (*b*) the right of action is concealed by the fraud of any such person . . . the period of limitation shall not begin to run until the [claimant] has discovered the fraud . . .'.

Held:

(*a*) The action for conversion was not 'based on fraud', so that what is now s 32(1)(a) had no application.

(*b*) The conduct of the defendant constituted a reckless 'concealment by fraud' of the right of action within what is now s 32(1)(b). Therefore, the claimant's action was not barred.

Comment (i) It appears that it is not necessary to prove a degree of moral turpitude to establish fraud for the purposes of s 32. Thus, in *Kitchen* v *Royal Air Force Association* [1958] 1 WLR 563, solicitors negligently concealed a payment of money on behalf of the claimant and this conduct was held to amount to 'fraud' for the purposes of what is now s 32, even though the court accepted that the solicitors were not dishonest.

(ii) Reference should also be made at this point to *Sheldon* v *HM Outhwaite* [1995] 2 All ER 558 where the House of Lords decided that the normal period of six years governing the start of legal claims can be extended where information relevant to the possible claim is deliberately concealed *after* the period of six years has started to run.

SPECIFIC TORTS

Trespass to the person: words may prevent an assault

349 ***Turbervell* v *Savage*** (1669) 2 Keb 545

In this old case a man laid his hand menacingly on his sword, but at the same time said, 'If it were not assize time I would not take such language from you.'

Held – this was not an assault because it was assize time, and there was no reason to fear violence.

Trespass to the person: battery may arise from a failure to act

350 ***Fagan* v *Metropolitan Police Commissioner*** [1968] 3 All ER 442

Fagan was driving his car when he was told by a constable to draw into the kerb. He stopped his car with one wheel on the constable's foot and was slow in restarting the engine and moving the vehicle off. He was convicted of assault on the constable and Quarter Sessions dismissed his appeal. He then appealed to the Queen's Bench Divisional Court where it was *held* – dismissing his appeal – that whether or not the mounting of the wheel on the constable's foot had been intentional, the defendant had deliberately allowed it to remain there when asked to move it, and that constituted an assault. The decision seems to extend the law because there was no act but merely an omission. Furthermore, there was no intentional application of force but only a failure to withdraw it. A more appropriate charge might have been false imprisonment because the constable could not presumably have moved while the wheel remained on his foot.

Comment This was a criminal prosecution for assault, an expression which is commonly used to mean battery also. In strict civil law terms, the trespass to the policeman was a battery.

Trespass to the person: is not actionable in itself: the claimant must prove intention or negligence

351 ***Fowler* v *Lanning*** [1959] 1 All ER 290

By a writ (now claim form) the claimant claimed damages for trespass to the person. In his statement of claim (now statement of case) he alleged that on 19 November 1957, at Vineyard Farm, Corfe Castle, in the County of Dorset, the defendant shot the claimant. By reason of the premises, the claimant sustained personal injury and suffered loss and damage;

particulars of the claimant's injuries were then set out. The defendant denied the allegations of fact and objected that the statement of claim disclosed no cause of action, because the claimant had not alleged that the shooting was either intentional or negligent.

Held – in an action for trespass to the person, onus of proof of the defendant's intention or negligence lay on the claimant and the claimant must allege that the shooting was intentional or that the defendant was negligent, stating the facts alleged to constitute the negligence. The claimant's statement of claim, therefore, disclosed no cause of action.

Comment If the interference is *unintentional* it was held in *Letang* v *Cooper* [1964] 2 All ER 929 that an action must be brought in negligence.

Trespass to the person: false imprisonment

352 *Bird* v *Jones* (1845) 7 QB 742

A bridge company enclosed part of the public footway on Hammersmith Bridge, put seats on it for the use of spectators at a regatta on the river, and charged admission. The claimant insisted on passing along this part of the footpath, and climbed over the fence without paying the charge. The defendant, who was the clerk of the Bridge Company, stationed two policemen to prevent, and they did prevent, the claimant from proceeding forwards along the footway in the direction he wished to go. The claimant was at the same time told that he might go back into the carriage way and proceed to the other side of the bridge if he wished. He declined to do so and remained in the enclosure for about half an hour.

Held – there was no false imprisonment, for the claimant was free to go off another way.

353 *Herd* v *Weardale Steel, Coal and Coke Co Ltd* [1915] AC 67

The claimant was an employee of the defendant company and at 9.30 am on 30 May 1911, he descended the defendant's mine. In the ordinary way he would have been entitled to be raised at the end of his shift at 4 pm. The claimant and two other men were given certain work to do which they believed to be unsafe, and they refused to do it. At about 11 am they, and 29 men acting in sympathy with them, asked the foreman to allow them to ascend the shaft. The foreman, acting on instructions from the management, refused this request. At about 1 pm the cage came down carrying men, and emptied at the bottom of the shaft. The 29 men were refused permission to enter, but some got in and refused to leave the cage, which was left stationary for some 20 minutes. At 1.30 pm permission was given for the men to leave and the claimant was brought to the top. He now sued for false imprisonment.

Held – there was no false imprisonment. There was a collective agreement regarding the use of the cage, and the claimant's right to be taken to the surface did not arise under the agreement until 4 pm. The defendant was perfectly willing to let the claimant ascend, but was not required, in the absence of any emergency, to provide him with the means of doing so except in accordance with the agreement.

354 *Meering* v *Grahame White Aviation Co Ltd* (1919) 122 LT 44

The claimant, being suspected of stealing a keg of varnish from the defendant, his employer, was asked by two works policemen to accompany them to the works office to answer questions. The claimant, not realising that he was suspected, assented to the suggestion and even suggested a short cut. He remained in the office for some time during which the works policemen stayed outside the room without his knowledge. The claimant later sued for false imprisonment and the question arose as to whether the claimant must know that the defendant is restraining his freedom.

Held – the claimant was imprisoned and his knowledge was irrelevant, though knowledge of imprisonment might increase the damages.

Trespass to the person: unlawful arrest

355 *Christie* v *Leachinsky* [1947] AC 573

The appellants, without the necessary warrant, arrested the respondent for unlawful possession of a number of bales of cloth. They had reasonable grounds for thinking that the bales were stolen but did not disclose this until later.

Held – by the House of Lords – the arrest was unlawful.

356 *Wheatley* v *Lodge* [1971] 1 All ER 173

The defendant's car collided with a parked vehicle. A constable saw him about an hour later and smelling alcohol on his breath, cautioned him and said that he was arrested for driving under the influence of drink contrary to what is now the Road Traffic Act 1988. The defendant was deaf and could not lip read, though the constable did not know this. Nevertheless, the defendant got into a police car, which the constable pointed to, and was taken to the police station

where he indicated his deafness. From then on the charge and all relevant matters were made clear to him by written and printed matter. On the question of the lawfulness of his arrest, it was *held* by the Queen's Bench Divisional Court that the original arrest was valid. A police officer arresting a deaf person had to do what a reasonable person would do in the circumstances and the magistrates were clearly of the opinion that the constable had done so.

Comment (i) Presumably, on the basis of this decision, if a person is arresting someone who cannot speak English, he is not obliged to find an interpreter.

(ii) The Police and Criminal Evidence Act 1984 confirms the common-law rule that where an arrest is made by seizure of a person, words indicating that the person is under arrest should accompany the seizure (s 28(1)). However, the common-law rule is modified by requiring that where an arrest is made by a policeman, the person arrested must be informed that he is under arrest, even though that fact is obvious. The common law also requires that the person arrested be told the reason(s) for the arrest, and s 28(3) confirms this rule but modifies it where there is an arrest by a constable, requiring that in such a case information regarding the ground for the arrest be furnished, regardless of whether it is obvious (s 28(4)). The section confirms the common-law rule that there is no requirement to tell a person that he is under arrest or of the ground for arrest if it is not reasonably practicable to do so, as where he has escaped from arrest before the information can be given (s 28(5)). The grounds for the arrest may be given subsequently, e.g. at the police station as in *Lewis* v *Chief Constable of the South Wales Constabulary* [1991] 1 All ER 206.

Trespass to land

357 *Southport Corporation* v *Esso Petroleum Co* [1954] 2 QB 182

The Esso company's tanker became stranded in the estuary of the River Ribble. The master of the tanker discharged oil in order to refloat the ship. The action of the wind and tide took the oil on to the Corporation's foreshore and caused damage. The Corporation sued in trespass and negligence. Devlin, J, at first instance, thought that trespass would lie, but on appeal to the Court of Appeal, Denning, LJ contended that there could be no trespass because the injury was not direct, but was caused by the tides and prevailing winds; in trespass, the injury must be direct and not consequential. In the House of Lords, [1956] AC 218, Lord Tucker agreed with Denning, LJ, though in the House of Lords trespass was not pursued. The appeal was based on negligence and the defendant was *held* not liable.

Comment This case illustrates the difficulties of trying to recover at common law for oil pollution damage in negligence or trespass. The action for nuisance has similar difficulties. *Rylands* v *Fletcher* does not apply because, among other things, the oil does not escape from the land but from the sea and the sea is the equivalent of a public highway. Oil pollution is now dealt with by the Merchant Shipping (Oil Pollution) Act 1971, which provides a more straightforward method of making claims.

358 *Kelson* v *Imperial Tobacco Co* [1957] 2 All ER 343

The claimant was the lessee of a one-storey tobacconist's shop and brought this action against the defendant, seeking an injunction requiring it to remove from the wall above the shop a large advertising sign for cigarettes showing the words 'Players Please'. The sign projected into the airspace above the claimant's shop by a distance of some eight inches. The claimant alleged that the defendant, by fixing the sign in that position, had trespassed on his airspace.

Held – the invasion of an airspace by a sign of this nature constituted a trespass and, although the claimant's injury was small, it was an appropriate case in which to grant an injunction for the removal of the sign.

Comment The claimant seemed prepared for the sign to remain until he became involved in a dispute with the defendant regarding the quota of cigarettes supplied to him. It was after the dispute that he brought this action, but the court found that the claimant's case was not affected by his acts.

359 *Woollerton and Wilson* v *Richard Costain (Midlands) Ltd* (1969) 119 NLJ 1093

In this case the court granted to the owners of a factory and warehouse in Leicester an injunction restraining the defendants from trespassing on and invading airspace over their premises by means of a swinging crane. The injunction was suspended for 12 months to enable the defendants to finish their work, the defendants having offered to pay for the right to continue to trespass and to provide insurance cover for neighbouring properties. It was also *held* that it was no answer to a claim for an injunction for trespass that the trespass did no harm to the claimants.

Comment There has not been full support from the judiciary on the issue of postponing the injunction. In *John Trenbart Ltd* v *National Westminster Bank Ltd* (1979) 123 SJ 38, Walton, J would not postpone the operation of an injunction in similar circumstances and refused to follow *Woollerton* saying it was wrongly decided.

360 ***Bernstein* v *Skyviews & General*** [1977] 2 All ER 902

The claimant sued for damages for trespass against Skyviews, which had taken an aerial photograph of his home from about 630 feet, crossing his land in order to do so. It was *held* – by Griffiths, J – that an owner of land at common law had rights above his land to such height as was necessary for the ordinary use and enjoyment of the land and the structures upon it. The plane was, therefore, too high to be trespassing. In any case, s 40(1) of the Civil Aviation Act 1949 (see now Civil Aviation Act 1982, s 76) provides a defence to such a claim where the height was reasonable. However, the judge did say that constant surveillance from the air with photographing might well be actionable nuisance.

Trespass to land: effect of revocation of licences

361 ***Winter Garden Theatre (London) Ltd* v *Millennium Productions Ltd*** [1948] AC 173

The respondents were permitted by a contractual licence to use the Winter Garden Theatre, Drury Lane, which belonged to the appellants, for the purpose of producing plays, concerts or ballets in return for a weekly payment of £300. There was no express term in the licence providing that the appellants could revoke it. However, the appellants did revoke it, giving the respondents one month in which to quit the premises, but stating that they were prepared to give fresh notice for a later date if the respondents required further time in which to make other arrangements. The respondents contended that the licence could not be revoked so long as the weekly payments were continued. The appellants claimed that it was revocable on giving reasonable notice.

Held – on a proper construction of the contract, the licence was not intended to be perpetual, but nevertheless could only be determined by reasonable notice. What was reasonable notice depended on the commitments of the licensees and the circumstances of the parties. In this case the notice given by the appellants was reasonable and valid to determine the licence.

Comment This case also has a bearing on the ejection of hooligans from soccer and other sports grounds. They may have paid and have a contractual right to enter, but as Viscount Simon said in this case: 'The ticket entitles the purchaser to enter and, if he behaves himself, to remain on the premises until the end of the event which he has paid to witness.' This clearly implies that those who do not behave in a reasonable way cease to be licensees and become trespassers and can be evicted.

362 ***Hounslow London Borough Council* v *Twickenham Garden Developments*** [1970] 3 WLR 538

A building owner granted a licence under a building contract to a builder to enter on his land and do work there. The procedure for terminating the building contract involved an architect giving notice that the work was not being carried out properly. Such a notice was given but the building contractor refused to leave the land and carried on his work. The owner claimed an injunction and damages for trespass.

Held – by Megarry, J – in view of the fact that it was not certain whether the architect's notice had been given as a result of following proper procedures, the contract had not necessarily been terminated and the builder was not, unless and until that was done, a trespasser. The owner's action failed.

Trespass to land: self-help

363 ***Hemmings* v *Stoke Poges Golf Club*** [1920] 1 KB 720

The claimant was employed by the defendants and occupied a cottage belonging to them. Later he left the defendants' service and was called upon to give up possession. On refusal, he and his property were ejected with no more force than was necessary.

Held – the defendants were not liable for assault or trespass.

Comment (i) Since this case concerns the eviction of an employee/occupier, it would seem to be overruled on its facts by s 8(2) of the Protection from Eviction Act 1977. Hemmings could now claim damages for breach of that Act. However, the principle behind the decision on the *Hemmings* facts is still relevant in that the occupier of property could eject a person not covered by the 1977 Act, e.g. a squatter, from his property by the use of reasonable force.

(ii) It will, of course, *not* be regarded as reasonable to fire a shotgun at a trespasser to effect his removal and such a trespasser may be awarded damages (see *Revill* v *Newberry, The Times*, 3 November 1995).

Wrongful interference with goods: what is possession?

364 ***The Tubantia*** [1924] P 78

The claimant, who was a marine salvor, was trying to salvage the cargo of the *SS Tubantia* which had been sunk in the North Sea. He had discovered the wreck and marked it with a marker buoy, and his divers were already working in the hold, when the