

THIRD EDITION



What About Law?

Studying Law at University

Edited by Catherine Barnard, Janet O'Sullivan
and Graham Virgo

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Many commentators have argued that this is the perfect example of a case in which damages should be based on the defendant's profit, because otherwise the claimant goes under-compensated. But if you stop and think for a moment, it is obvious that the Supreme Court of Louisiana got it wrong—the claimant *has* suffered a loss, because it did not get the level of contractual performance it had bargained and paid for. This problem should be tackled directly: if the problem is failure to compensate properly, the answer is to expand the notion of loss to enable the law to compensate more fully, not concentrate on the defendant's profit instead.

However, the House of Lords in the very controversial case of *Attorney General v Blake* decided that the defendant's gain might occasionally be relevant to calculating damages for breach of contract, although only in very exceptional cases where a compensatory remedy would be inadequate. George Blake was a spy for the British intelligence services, but he was also a double agent working for the Soviet Union. He was convicted of treason and imprisoned, but later escaped from Wormwood Scrubs prison to Moscow. There in 1989 he wrote his autobiography, which contained some old information about his career in British intelligence. The information was no longer confidential by this time: if it had been, the Crown could have recovered Blake's profits in a different type of legal action for breach of confidence, but this was of course not available. Nor was its disclosure damaging to the public interest, but by releasing it Blake was in breach of his *employment contract*, in which he had promised, 'not to divulge any official information gained as a result of [his] employment' (this promise continued in effect beyond the time his employment ended). So the Crown (in the person of the Attorney General) sued for *breach of contract* to get its hands on Blake's profit from publishing the book.

The House of Lords held in 2000, by a 4–1 majority, that because the facts were so exceptional, the Crown *could* recover *all the profits* made from Blake's breach of contract, even though it had not suffered any loss from that breach. The reason given by Lord Nicholls was that the traditional remedies for breach of contract were *inadequate* on the particular facts of the case:

It will only be in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be

prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision that has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which the relief is being sought. A useful general guide, although not exhaustive, is whether the [claimant] had a *legitimate interest* in preventing the defendant's profit-making activity and, hence, in depriving him of his profit. It would be difficult, and unwise, to attempt to be more specific.

He went on to explain what the Crown's *legitimate interest* was:

The context is employment as a member of the security and intelligence services. Secret information is the lifeblood of these services. In the 1950s Blake deliberately committed repeated breaches of his undertaking not to divulge official information gained as a result of his employment. He caused untold and immeasurable damage to the public interest he had committed himself to serve.

Many lawyers (including the writer of this chapter!) have criticised this decision and its reasoning. Although it is obvious why the House of Lords disliked George Blake and wanted to find a way of making him give up his profits, it looks as if this instinct was based on a desire to punish him over again for his previous treachery in the 1950s. But this was an action for Blake's *breach of contract* in publishing his memoirs in 1989, which wasn't actually a particularly serious breach of his former employment contract. So it is not obvious why the Crown's interest *is* legitimate here.

More to the point, the decision does not just affect George Blake, but (because of the doctrine of precedent) makes this sort of profit-stripping remedy (called an 'account of profits') potentially available in other breach of contract cases as well. Lord Hobhouse dissented in *Attorney General v Blake*, warning of the danger of introducing an element of uncertainty into commercial transactions, which would make it hard for lawyers and their clients to predict in advance when such a remedy would be awarded. He said:

I must also sound a further note of warning that if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced into our commercial law the consequences will be very far reaching and disruptive.

In fact, though a number of judges have struggled in cases since, trying to decide whether or not their facts are sufficiently 'exceptional', Lord Hobhouse would be relieved to hear that there is only one other, low-level case in which an equivalent 'account of profits' has been awarded for breach of contract (and pretty much everyone thinks that case is wrong). In every other case in which the claimant sought to bring its claim within *Attorney-General v Blake*, the court has managed to distinguish it. It is starting to look like a piece of 'judicial legislation' just to deal with one difficult set of facts, which is not the way the common law should work. It's no surprise that the Supreme Court in *Morris-Garner v One Step (Support) Ltd* was somewhat lukewarm about *Blake*, pointedly noting that the 'soundness of that decision is not an issue in this appeal'.

Nonetheless, if another *Ruxley*-type case came along in which the builder had saved money and therefore profited from its breach of contract, a sharp barrister would probably still try to argue that the facts fell within the *Attorney General v Blake* exceptional principle. At the time of writing, it's clear this wouldn't succeed, but the law of contractual remedies is so dynamic and controversial that you never know!

CONCLUSION

I hope that this chapter has shown that there is much more to contractual remedies than just the boring mathematical bit tacked onto the end of a course on the law of contract. As a topic, it reminds us very sharply that good lawyers must be able to focus on complex arguments and make fine distinctions, whilst at the same time recognising the shared general principles and common problems that can link apparently unconnected situations like ordering books, building swimming pools, buying houses near airports and spying for the enemy.

Cases

Attorney General v Blake [2001] 1 AC 268

City of New Orleans v Fireman's Charitable Association 9 So 486 (1891)

Farley v Skinner [2002] 2 AC 732

Freeman v Niroomand (1996) 52 Con LR 116

Jacob & Youngs v Kent (1921) 129 NE 889

Milner v Carnival plc (trading as Cunard) [2010] 3 All ER 701

Morris-Garner v One Step (Support) Ltd [2018] UKSC 20

Radford v De Froberville [1977] 1 WLR 1262

Ruxley Electronics & Construction Ltd v Forsyth [1996] AC 344

Further reading

O'Sullivan and Hilliard, *The Law of Contract*, 9th edn (Oxford, Oxford University Press, 2020)

D Harris, AI Ogus and J Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 *LQR* 581

S Hedley, "'Very Much the Wrong People": The House of Lords and Publication of Spy Memoirs' [2000] *Web JCLI*

A Burrows 'One Step Forward?' (2018) 134 *LQR* 515

could equally well figure in books on family law, or even medical law. The reason the case appears in books on tort is that the parents were suing the hospital for damages, compensation for the cost of bringing up the baby. It therefore sits in the tort books alongside other cases whose main feature is that the claimants—mainly those injured in industrial or highway accidents—are seeking damages as compensation for the harm they have suffered owing to the misconduct of the defendant or, in our case as in many others, the defendant's employee (a wrongdoer's employer is very often sued as well as, or instead of, the individual wrongdoer, because the law makes employers vicariously liable to pay damages wherever an employee commits a tort in the course of his or her employment; employers commonly have insurance to cover claims of this kind). Sometimes such harm is caused deliberately, but usually it is the result of carelessness, or negligence, as lawyers like to call it.

Just as there are a number of separate crimes (such as murder, theft and rape), similarly there are various separate torts. Of these the tort of negligence is by far the most important in practice, but you may well have heard of some of the other torts, such as defamation and nuisance. To bring a claim in negligence, the claimant must establish certain basic elements. These are first, that the defendant owed him a duty of care (which, as we will see later, is so self-evident in most straightforward cases that it goes without saying, but which occasionally gives rise to problems in unusual situations); secondly, that the defendant breached that duty by behaving unreasonably or carelessly; thirdly, that the defendant's breach of duty caused the claimant to suffer, fourthly, legally recognised harm. Lawyers tend to use the word 'negligence' in two ways: as shorthand for the second element just mentioned, careless conduct on the part of the defendant, and also (more properly) to denote the whole 'tort', the cause of action which is established if the claimant establishes all four elements.

McFarlane is a case of 'negligence' in this sense, and it is of particular interest because the outcome is not quite what one would expect in view of the accepted rules of negligence as a tort. The alleged facts were that the claimants, husband and wife, decided that four children were enough and that the husband should submit to a vasectomy, like some 8,000

other Scotsmen each year. The doctor reported that the operation, which he performed quite properly, had been successful and that normal marital relations could be resumed. Alas, the doctor was wrong in this (having misinterpreted the husband's sperm tests carried out after the operation) and the wife conceived. The pregnancy and birth, though painful as always, were quite normal, and baby Catherine McFarlane was in perfect health. But it costs a lot of money to bring up a child (an average of over £150,000 has been suggested). Who was to bear this cost, the parents whose child it was, or the health service whose fault it was that the child had been born at all?

If the case had arisen in England it would never have reached the House of Lords for, in 1984, the House had declined to review a decision of the Court of Appeal which had held that there was no objection to such a claim. Although that Court of Appeal case concerned a disabled rather than a healthy child, so its decision as to a healthy child was arguably obiter (not binding), and although the court rendered its decision immediately after the barristers had finished their submissions, without taking any time taken to consider its implications, the decision was treated as conclusive thereafter and was followed for 15 years. But Scottish courts are not bound by the English Court of Appeal and, unlike their English counterparts, Scots applicants such as the McFarlanes needed no leave to appeal to the House (the rules are slightly more complicated now for appeals to the Supreme Court). In the event, the House of Lords held unanimously that the McFarlanes' claim must fail.

THE MOST FAMOUS TORT CASE

Seventy years earlier, in 1932, Scotland had produced the most famous case in the tort of negligence—the 'snail-in-the-ginger-beer-bottle' case of *Donoghue v Stevenson*. Mrs Donoghue alleged that she had been poisoned by a foreign body, to wit a very dead snail, lurking in a bottle of Stevenson's ginger beer bought for her by a friend in a café. The Scottish court held that, even if she could show that Stevenson had been careless, her claim must fail since he owed her no duty in law to take care of

her: she had not actually bought the product. The House of Lords, by a majority, held that the manufacturer did indeed owe her a duty to take such care.

Why is this case regarded as so important? After all, by 1932 there were plenty of situations in which a defendant would be liable if he caused harm negligently, but they were regarded as isolated, unconnected instances that just happened to have similar characteristics, not linked at a conceptual level to form one general tort of negligence. At the time most lawyers thought that *Donoghue v Stevenson* merely added one more such isolated pocket of liability and was no more than a small step forward for 'consumer protection', of little or no significance outside that area. But the case is as famous and important as it is today because its reasoning went beyond that narrow view, when Lord Atkin, with some aid from the Sermon on the Mount, delivered himself of a general statement regarding the situations in which one person would be held to owe another a duty to be careful not to injure them. There need not be a contract between the parties, it was enough if there were 'neighbourhood' between them, and one's neighbour was not just the person next door, though such persons are very close, but anyone close enough that injury to them was reasonably foreseeable if one mismanaged whatever one was doing.

As the case indicates, liability in the tort of negligence depends, among other things, on the defendant's having been under a 'duty of care'. Whether or not such a duty exists is a matter of law, the subject of legal argument that can be decided in principle without hearing any of the evidence. This is in sharp contrast to the question of whether or not the duty has been breached, ie whether the defendant had actually been negligent by falling below the proper standard of conduct, which is a matter of fact to be proved by witnesses. This distinction was more obviously significant before 1965, when juries were still used to decide negligence cases, because questions of law remained for the judge to decide and thus it was open to the judge to hold that there was no duty of care on the facts as pleaded, however careless the defendant might have been, so that the case failed before getting as far as a jury. Nowadays negligence cases are invariably decided by a judge alone, but the distinction between questions of law and questions of fact remains a very important one in practice.

THE 'DUTY' QUESTION

Mrs Donoghue had, we suppose, suffered injury to her person, and the same was true of Mrs McFarlane, what with the pregnancy and confinement. Where the injury is physical in nature, the 'duty' question is not often discussed, at any rate where, as in both *Donoghue* and *McFarlane*, the defendant's conduct actually created the danger that led to the injury, as opposed to merely failing to prevent it: Stevenson actually despatched the noxious bottle into the world and the doctor in *McFarlane* said that sex was now safe (from babies anyway). So there was not much discussion of the mother's claim for the pain of pregnancy and parturition. Indeed, in cases of highway or industrial accidents the existence of the duty is never questioned—it is too obvious that road-users owe each other a duty to drive carefully, and that an employer is under a special duty to look out for the safety of his employees—but the question does arise in novel cases, especially if the judges want to exonerate the negligent defendant from liability for the foreseeable harm he has caused, for then 'no duty in law' is almost the only device they can deploy.

THE KIND OF HARM

Tort lawyers often say, somewhat illogically, that the existence of the duty, or its scope or ambit, depends on the nature of the harm that resulted from breach of the duty. In *McFarlane* there were two types of harm: the wife had suffered not only physical harm, harm to her body, as a result of the unwanted pregnancy but also financial harm, in having to pay for the baby's upkeep, while the husband had suffered only harm of the latter kind. The real issue was the cost of bringing up the child. This was problematic because our law of tort has always been less ready to award compensation for a loss which is merely financial than for damage which is physical in nature, harm to person or property. In other words, the claim 'you wounded me' has always been held stronger than 'you cost me'. Of course, where the tort has caused the claimant to suffer personal injury or property damage, its economic aspects—lost wages,

cost of cure, repairs and so on—are every bit as compensable as pain and suffering and loss of amenity, but it is different if the only harm is financial, not consequent on physical damage to person or property: this is commonly called pure financial loss, and it is less readily compensated in tort. Some judges regarded the financial loss in *McFarlane* not as ‘pure’ but rather as consequential on the personal injury to the wife, and therefore compensable on normal principles, but a majority of their Lordships treated the harm to the mother as regards the pregnancy and birth as quite distinct from harm in the sense of the cost to both parents of bringing up the baby.

DAMAGE AND LOSS

This distinction between physical damage and pure economic loss makes some commentators uneasy—after all, they are both kinds of harm—but it seems perfectly justifiable, even in a society which seems to put money above all else. Consider, for example, the word ‘dangerous’. It is applied only in situations where the potential harm is of a physical variety, where there is a risk of injury to person or property, and since the counterpart of ‘danger’ is safety, it is not too surprising if the law puts safety first. To put it another way, health is more important than wealth: we don’t have a National Wealth Service—indeed, we have the very opposite, in the form of Her Majesty’s Revenue and Customs.

RECOVERY FOR PURE FINANCIAL HARM

For 30 years after *Donoghue v Stevenson* it was assumed that there was no prospect of claiming in the tort of negligence for pure financial loss due to mere carelessness, as opposed to deliberate lies (deceit) or failure to do what one had been paid to do (breach of contract). Then, in 1963, the House of Lords held that such a claim might lie. In *Hedley Byrne v Heller and Partners* the claimant lost money as a result of a misleading credit-reference given, gratuitously, by the defendant bank on one of the claimant’s customers. What the bank did—certifying that the customer

was in a good financial position when it was anything but—was careless and negligent, but it was not dangerous, since the only loss that could and did result from the claimant’s relying on the reference and giving credit to the customer was purely financial.

As in *McFarlane*, as we shall see, the House of Lords in the banking case was agreed as to the result—that there could be liability in negligence for causing merely financial harm—but their Lordships differed in the reasons they gave and consequently as to the circumstances in which liability would attach. The five different speeches emphasise different points. Could the defendant foresee that the recipient of the information would rely on it? Was it on a business rather than a social occasion? Was the defendant an expert on the matter in issue? Was the relationship between the parties ‘equivalent to contract’? Did the defendant ‘assume responsibility’ for the statement in question?

As the law developed, it became less important whether the defendant had spoken or acted, and more important that there be a ‘special relationship’ between the parties, characterised by an ‘undertaking’ or ‘assumption of responsibility’ on the part of the defendant. The fact that different reasons were given for the decision made it easier for later courts to expand its scope, to the point that in 1995 a solicitor who failed to draw up a will as instructed by his client was held liable in *White v Jones* to the client’s daughters who would have inherited had the will been drawn up as it should have been. The disappointed daughters won, despite the facts that the solicitor neither spoke nor acted, and seemed to be in no very special relationship with them, and that, even supposing that he could be said to have assumed responsibility for drawing up the will, they surely did not rely on his doing so, foreseeable though the harm to them was. In other words, although he undoubtedly assumed responsibility to his client, the father, it is quite another thing to say that he assumed responsibility, in any meaningful sense, to the daughters.

White v Jones is an exceptionally expansive decision, because the court felt exceptionally sympathetic to the claimant daughters, and the reasoning in *Hedley Byrne* could be moulded to allow this expansion. In commercial rather than familial settings, however, the courts have insisted on a meaningful assumption of responsibility by the defendant to the particular claimant. So more recently the Supreme Court refused

to allow a claim by the Playboy Club against a bank that gave a grossly negligent credit reference about a potential gambler, causing the club to lose a large amount of money, because the club used another company, Burlington, to request the reference (to keep the gambler's habits confidential), which meant that Burlington was the only entity to whom the bank assumed responsibility, as per *Hedley Byrne*, not the club. One can easily see how very different decisions may 'follow' from a previous decision, especially one in which several different reasons are given for the same outcome.

APPLICATION IN *McFARLANE*

Now, in *McFarlane* it was plain that there was a 'special relationship' between the parents and the doctor, that he was a specialist who 'assumed responsibility' to them and that he knew they would be relying on what he told them. It is true that they didn't pay for the treatment, so there was no contract, but after *Hedley Byrne* that was unimportant. It had been held for centuries that doctors owe their patients a duty of care, and though the cases have generally involved harm to the patient's person rather than his pocket, Lord Devlin in *Hedley Byrne* said that that made no difference. Since the birth of the child was the 'very thing' that the defendant was retained to prevent, it was not easy to say that it fell outside the scope of his duty of care; and since it is notorious that children are expensive, the loss could not possibly be described as too 'remote'. Furthermore, several of the judges said that it was immaterial whether the claim rested on *Donoghue* or on *Hedley Byrne*. As Lord Bingham put it in a later case, 'An orthodox application of familiar and conventional principles of the law of tort would, I think, have pointed to imposing liability in *McFarlane*. So how was this avoided?

FAIR, JUST AND REASONABLE

The majority in the House of Lords in *McFarlane* invoked an element which their predecessors in 1990 had added to Lord Atkin's statement

of the requirements for finding a duty of care. The 1990 case—*Caparo v Dickman*—was again one of pure economic loss: a shareholder interested in taking over a company was suing the auditor whose carelessly favourable statement about its profitability in its annual accounts, a publicly available document, induced him to pay too much for further shares. In rejecting his claim, their Lordships said that in addition to 'foreseeability of the harm' and 'proximity between the parties' (= neighbourhood), in order to recognise a duty of care in a novel situation not previously litigated, it must be found that it would be 'fair, just and reasonable' to impose a duty (= make the defendant liable).

The first two of these elements were plainly satisfied on the facts of *McFarlane*. The doctor could hardly have been closer to the husband in performing the operation, which he knew would, if its outcome were carelessly misreported, affect the wife (in contrast to the lack of 'proximity' in *Caparo* itself). The harm was evidently foreseeable—indeed, what happened was the very thing the doctor was retained to prevent—but the majority of their Lordships held that it was not 'fair, just and reasonable' to impose liability on the careless doctor for the cost of the child's upbringing.

THE REASONS GIVEN IN *McFARLANE*

The reasons given by their Lordships were rather varied. Some members of the House of Lords were content to rely on the formula that it was not 'fair, just and reasonable' to impose on the medical services liability for the cost of bringing up a healthy, though unwanted, child, or that to make the doctor liable to pay for the maintenance of a healthy child for eighteen years was disproportionate to his fault. Less time was spent on justifying the decision than on dismissing arguments which had been raised against it. These included the argument that the (provable) harm of having to pay for the child's upbringing should be offset by the (intangible) joy of parenthood. This was regarded as impracticable and unprincipled: after all, a person disabled from working by a negligent driver does not have his claim for lost earnings reduced just because he can now relax and watch daytime television.

THE SPEECH OF LORD STEYN

Lord Steyn did not care much for the reasons given by his colleagues:

To explain decisions denying a remedy for the cost of bringing up an unwanted child by saying that there is no loss, no foreseeable loss, no causative link or no ground [for] reasonable restitution is to resort to unrealistic and formalistic propositions which mask the real reasons for the decisions. And judges ought to strive to give the real reasons for their decision.

He held that when there were thousands of people in the kingdom who desperately wanted a family and paid good money in the vain hope of achieving it, it would be contrary to the principle of distributive justice to give damages to the parents of a healthy child they did not want (but kept). Furthermore, he said:

Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.

Lord Millett said much the same. He said that claimants 'are not allowed by a process of subjective devaluation, to make a detriment out of a benefit' and that 'it is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth'.

DISTRIBUTIVE JUSTICE

Lord Steyn referred to 'distributive justice', a rather unattractive term often attributed to Aristotle's distinction between what is fair between claimant and defendant on the one hand and what is fair between different classes of claimant or potential claimant on the other. Thus Lord Steyn suggested that when deciding on a claim made by parents who didn't want a child one should bear in mind the many other people who do want a child and can't have one. He might also have mentioned another constituency, namely sick children who would be deprived of proper treatment if the limited resources of the health service were deployed to pay for the upbringing of children in perfect health.

PSYCHIATRIC HARM

The term 'distributive justice' had surfaced in the House of Lords a few years previously in one of the cases arising out of the Hillsborough disaster in Sheffield when 96 football fans were crushed to death when the police negligently allowed too many of them to enter the stadium. Many claims were brought by relatives of the deceased victims, who had been shocked by what they witnessed, with their own eyes or on television, but almost all their claims were dismissed. The harm here was psychiatric, not physical: to the mind, not the body. Harm of this kind might well seem at the other extreme from pure economic loss, but it, too, is subject to restrictive rules: in particular, the claimant, unless himself physically endangered, must have been physically close to the shocking event and emotionally close to the person primarily affected. But there was some authority that the second restriction did not apply to those who went to the rescue of those actually injured, and clear authority that employers owe their employees a special duty not to cause them injury, so there was a problem when claims were brought by members of the police force, shocked by having to deal with the dead and dying, since they were rescuers suing their employer, the negligent police authority. Could the courts really bring themselves to award damages to the police when they had refused to compensate relatives of the deceased victims, members of the public whom the police are supposed to protect? To award damages might be fair as between the policemen and their employers, but it wouldn't seem right as between policemen and the relatives. Likewise, in the *McFarlane* case, it didn't seem right to award damages to parents of a child they didn't want (though now dearly loved) when so many parents wanted children they couldn't have, however much they paid.

EFFECT ON THIRD PARTIES

That the courts do and should consider the effect of their decisions on third parties is shown by another important tort case. In *Tomlinson* a young man ignored signs prohibiting swimming in a reservoir in a public park and was badly injured in the water. The Court of Appeal held the

local authority occupier liable because, knowing that the prohibitions were ineffective, it had failed to erect a physical barrier which it had resolved to erect and which would have prevented all access to the water. A unanimous House of Lords, in unusually vigorous judgments, reversed the Court of Appeal's decision: to block access in this way was not fair to innocent holiday-makers who wished to sit beside the water, and the local authority had, in deciding to effect a physical barrier, overreacted to the fear of being held liable to injured trespassers.

TORT AS DETERRENCE

To be held liable is unpleasant, even if one has insurance against such liability (as is required of employers and motorists, among many others), so the risk of being held liable may act as a deterrent. Indeed, it follows from the doctrine of precedent that decisions which impose liability are apt to affect third parties: court decisions may affect the behaviour of the public, or a relevant section of it, just as much as statutory prohibitions. Given that tort liability is commonly imposed for conduct which is dangerous, it may well be conducive to safety if third parties, especially public bodies and firms conscious of risk management, respond to the decision. So tort law certainly has some deterrent effect. But there are better devices, in particular those enforced by the criminal law. The general regime known as 'health and safety' is enforced by criminal legislation. Such a statute or regulation can state precisely what must be done on pain of penalty (eg that a guardrail must be provided where persons work more than two metres above the ground) and an injured victim might be able to tack a claim for tort damages onto breach of such a criminal rule. But in the absence of a statute all a judge can say—and that after the event—is that the employer or occupier must take reasonable care of the safety of his employees or visitors.

DETERRENCE AND COMPENSATION

If the primary, though by no means the sole, function of tort law is to award compensation for harm due to culpable conduct, there are dangers

in overemphasising its deterrent aspects: since compensation looks to the harm suffered by the claimant and deterrence looks to the conduct of the defendant, compensation and deterrence do not quite go hand in hand. Accordingly, to focus on deterrence may lead one to downplay the importance of the harm in relation to the conduct: one might be tempted to impose liability on those who have acted negligently so as to deter others from doing likewise, even if the harm in the case is not obviously attributable to their negligence. After all, the defendant's carelessness might well have caused harm even if it did not obviously do so in the particular case, and might, unless repressed now, do so the next time. Does some such idea lie behind the fact that the common law seems to treat damage to property very much like injury to the person, although people are surely more important than their property and should have greater protection? After all, anything which can damage a thing could have injured a person. Again, one might think that unless we hold people liable for breaching their duty of care, even if it is not clear that the breach caused any harm, people similarly situated might be able to ignore their duty with impunity. This is anathema to orthodox negligence reasoning, but maybe it is a subconscious concern in some cases.

TWO EXAMPLES

Two cases on causation in the law of tort from the start of the twenty-first century are indicative. In *Chester v Afshar* a doctor failed to inform his patient, as he was duty-bound to do, of the risk of paralysis inherent in the proposed operation, which tragically materialised even though the operation was performed impeccably. Had she been informed, the patient would still have had the operation, though not then and there because she would have wanted to go away first to consider and research the possible risk, and that risk would have been the same on whatever day she eventually had the surgery. The minority in the House of Lords would have absolved the doctor on the ground that his breach of duty did not increase the risk of harm, but the majority gave judgment for the patient, even though they said that this was inconsistent with the conventional principles of causation, because otherwise doctors could ignore