NO. 1 BESTSELLING REVISION SERIES

TORT LAW

8TH EDITION

EMILY FINCH & STEFAN FAFINSKI

Pearson

LawExpress

LawExpress

TORT LAW

The idea of loss of chance was again considered by the Supreme Court in *Perry* v *Raleys Solicitors* [2019] UKSC 5. The claimant was a miner who suffered from 'white vibration finger' caused by the effects of excessive drilling. He sued the National Coal Board for damages. On the advice of his solicitors he settled his claim for payment of general damages only. However, he subsequently became aware that he could have also claimed for special damages under a scheme set up by the Department of Trade and Industry to deal with the mass of personal injury claims brought by former miners. He calculated he could have received a further £17,000 under the Scheme. He sued his solicitors under the principle of loss of chance (to litigate). The solicitors admitted breach of duty but at first instance, the judge concluded on the facts that the breach had not caused the claimant any loss. The Court of Appeal reversed that decision and the solicitors appealed to the Supreme Court.

The Supreme Court reinstated the decision of the trial judge, reversing the Court of Appeal decision. A lost litigation claim is no different in principle from any other claim for the loss of a chance, and an examination of the underlying facts in order to decide, on the balance of probabilities, whether the claimant has in fact lost anything of value does not constitute an impermissible 'trial within a trial'. The claim failed because, on the basis of facts which were known to him at the time the claimant instructed his solicitors he could not honestly have given them instructions that would have led to his being advised that he was entitled to an additional award of special damages (this principle was also considered in *Watkins* v *Hugh James Ford Simey Solicitors* [2019] UKSC 54 and *Moda International Brands* v *Gateley LLP* [2019] EWHC 1326 (QB)).

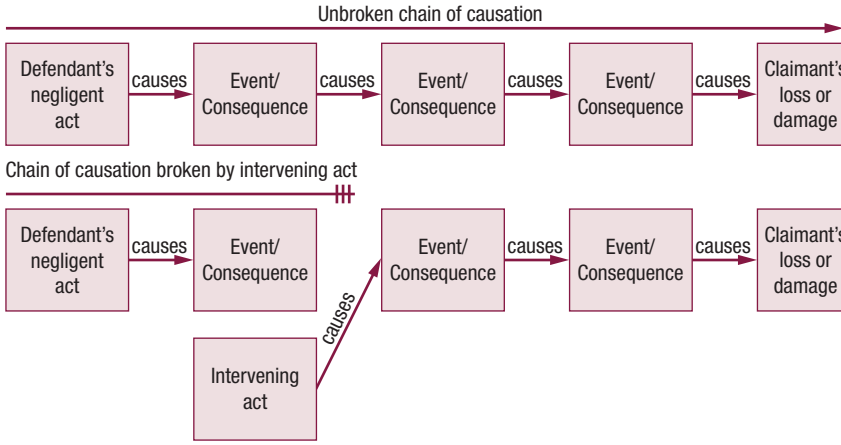
Multiple consecutive causes of damage

Where there are consecutive causes of damage, the application of the 'but for' test is applied to the *original defendant*. In *Performance Cars Ltd* v *Abraham* [1962] 1 QB 33 (CA) the first defendant negligently drove into a Rolls-Royce. The Rolls-Royce was later negligently struck by another car, driven by the second defendant. The first defendant remained liable. The second defendant was not liable for the cost of the respray since the car already needed a respray at the time of the collision with the second defendant.

Novus actus interveniens

This is a Latin phrase which means 'a new act intervenes'. An intervening act may break the chain of causation between the defendant's breach of duty and the loss or damage suffered by the claimant (see Figure 3.2).

Figure 3.2



If the ***novus actus interveniens*** is sufficient to break the chain, then the defendant may not be liable despite being in breach of the duty of care. The intervening act may be:

- a third-party act;
- an act of the claimant; or
- an act of nature.

Third-party act

For a third-party act:

- The original defendant will be liable where the intervening act does not cause the loss. The original defendant will be responsible for 'injury and damage which are the natural and probable results of the [initial] wrongful act (*Knightley* v *Johns* [1982] 1 WLR 349 (CA)).
- The original defendant will be liable where the intervening act is one that should have been foreseen (*Lamb* v *Camden London Borough Council* [1981] QB 625, (CA)).

The question of whether an intervening event will break the chain of causation is one for the courts to decide in all the circumstances, as you will see when comparing *Baker* v *Willoughby* [1970] AC 467 (HL) with *Jobling* v *Associated Dairies Ltd* [1982] AC 794 (HL). In *Baker* v *Willoughby* the claimant was knocked down by a car due to the negligent driving of the defendant. He suffered a permanent stiff leg as a result. After the accident, but before the trial, he was shot in the injured leg during a robbery at work. As a result, his leg was amputated. In *Jobling* v *Associated Dairies* the claimant was injured at work due to his employer's negligence. He slipped and injured his back and lost 50 per cent of his earning capacity as a result. Three years later, he developed spondylotic myelopathy, a spinal disease. This had not been brought about

by the accident. He was consequently unable to work. In *Baker* the court held that the gunman's act was not a *novus actus interveniens* and the defendant remained liable. The claimant's loss of earnings was a result of the original injury. The later robbery and consequent amputation did not change this, even though the eventual damage was different and more severe.

In *Jobling*, however, the disease of the spine *was* held to be a *novus actus interveniens* which did break the chain of causation.

Act of the claimant

In this case, the *novus actus interveniens* will mean that the claimant is responsible for his own damage.

McKew v *Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 (HL)

Facts

As a result of the defendants' negligence, the claimant suffered a leg injury. This left his leg seriously weakened. He later fell when attempting to descend a steep flight of steps with no handrail, suffering further serious injuries. He did not seek assistance in climbing the stairs.

Legal principle

The claimant's act in attempting to descend a steep staircase without a handrail in the normal manner and without adult assistance when his leg had previously given way on occasions was unreasonable. The court held that his act was a *novus actus interveniens* which had broken the chain of causation. As a result, the defendants were not liable in damages for his second injury.

Analysis

In order for the act of a claimant to be a *novus actus interveniens,* it must be entirely unreasonable in all the circumstances. This was considered in *Corr* v *IBC Vehicles* [2008] 2 WLR 499 (HL).

In *Corr*, the deceased had suffered a serious accident at work, which his employer admitted had been caused by its breach of duty. As a result of the accident, he had become depressed. His depression worsened until, six years after the accident, he died by suicide by jumping from the top of a multi-storey car park. His wife claimed damages for the physical and psychological injuries that he had suffered. The employers were held liable and his deliberate act in taking his own life was not a *novus actus interveniens.* The House of Lords pointed out that the rationale of the principle that a *novus actus interveniens* broke the chain of causation was fairness: it was not fair to hold a tortfeasor liable for damage caused by some independent, supervening cause for which he was not responsible.

However, in this case, the deceased had not taken a voluntary, informed decision as an adult of sound mind. The suicide was the response of a man suffering from a severely depressive illness which arose as a consequence of his employer's tort that had impaired his capacity to make reasoned and informed judgements about his future. Therefore, it was not unfair to hold IBC responsible for the consequences of its breach of duty.

Act of nature

Intervening acts of nature will not generally break the chain of causation. However, the defendant will not normally be liable where the intervening act of nature is unforeseeable and separate from the initial negligent act or omission. For instance, in *Carslogie Steamship Co Ltd* v *Royal Norwegian Government* [1952] AC 292 (HL), the claimant's ship was damaged following a collision. After temporary repairs, the ship then set off on a voyage to a port in the United States where permanent repairs could be carried out. During her voyage across the Atlantic the ship sustained further heavy weather damage during a storm. The defendants were not liable for the damage caused by the storm. The court held that the storm could have happened on any voyage and therefore the storm damage was not a consequence of the collision. It was unforeseeable and quite separate.

Remoteness

The final element required in establishing negligence is the extent of the damage suffered by the claimant which should be attributable to the defendant. In other words, for how much of the claimant's loss should the defendant be responsible? Remoteness is sometimes referred to as 'legal causation' or 'causation in law'.

The test of remoteness

***Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560 (CA)**

Facts

The charterers of a ship filled the hold with a cargo including a number of containers of petrol. These filled the hold with petrol vapour which ignited when a heavy plank was dropped into the hold by a stevedore whilst the ship was unloading, destroying the ship.

Legal principle

The defendants were liable for *all* damage which resulted from the breach of duty, regardless of whether that damage was foreseeable by the defendant. As Scrutton LJ stated:

> . . . if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act.

Analysis
The test in *Re Polemis* does not limit liability for the direct consequences of a negligent act, however severe or unforeseeable those consequences may be. It has been criticised for its unfairness in that respect.

Similar circumstances arose in *Overseas Tankship (UK) Ltd* v *Morts Dock and Engineering Co Ltd (The Wagon Mound) (No 1)* [1961] 1 All ER 404 (PC).

Overseas Tankship (UK) Ltd v *Morts Dock and Engineering Co Ltd (The Wagon Mound) (No 1)* [1961] AC 388 (PC)

Facts
The defendants negligently leaked a quantity of bunkering oil into Sydney Harbour from a tanker. This oil drifted into the claimant's wharf where it mixed with assorted detritus including cotton wadding. Welding was taking place in the wharf. The claimants sought (and received) assurances that it was safe for them to continue welding. However, sparks from the welding ignited the oily wadding which caused fire to spread to two ships, damaging them. The wharf was also fouled.

Legal principle
At first instance, the trial judge applied the principles from *Re Polemis,* finding that the defendants were liable for the fire damage, since the fouling to the wharf was a foreseeable consequence of the leakage. On appeal, the Privy Council reversed the decision, holding that the correct test for remoteness is reasonable foreseeability of the kind or type of damage in fact suffered by the claimant.

Analysis
The tests in *Re Polemis* and *The Wagon Mound (No 1)* cannot be reconciled. The decision in *Re Polemis* was taken by the Court of Appeal and has never been overruled, since *The Wagon Mound (No 1)* was heard by the Privy Council. As such, both cases remain good law. However, *The Wagon Mound (No 1)* is now accepted by the courts (including the Court of Appeal) as the relevant test to follow in questions of remoteness.

The basic principle that loss must be foreseeable is qualified by the scope of the duty of care. If the particular kind of damage suffered by the claimant falls outside the scope of the defendant's duty, then it will not be considered to be within the

reasonable contemplation of the defendant (even if it was generally foreseeable) (*BPE Solicitors and another* v *Hughes-Holland* [2017] UKSC 21).

Remoteness in psychiatric injury cases

The degree of foreseeability required depends on whether or not the claimant is a primary or secondary victim (see Chapter 1).

Primary victims	Secondary victims
Defendant must or should have foreseen some physical injury to claimant	Psychiatric injury must be foreseeable in a person of reasonable fortitude in the circumstances
Even if no physical injury occurs, but psychiatric injury does, defendant is still liable	

The 'egg-shell skull' rule

If the type of injury is foreseeable, but the severity of the injury is not, due to some pre-existing special condition on the part of the claimant, then the defendant remains liable for *all* the losses.

Smith v *Leech Brain & Co Ltd* [1962] 2 QB 405 (CA)

Facts
The claimant was splashed by molten metal as a result of his employer's negligence and suffered a burn to his lip. This burn triggered cancer, from which the claimant died. The claimant's lip was pre-malignant at the time of the incident.

Legal principle
Some form of harm from the burn was foreseeable although the particular type of harm in the particular circumstances was not. However, despite the fact that death from cancer was not a foreseeable consequence of the burn, the employers remained liable in negligence for the full extent of the damage.

Analysis
In essence, the 'egg-shell skull' rule means that defendants must take their victims as they find them. Note that it also applies in cases of psychiatric damage. Therefore, defendants must also take their victims as they find them in respect to psychiatric injury, even if the victims suffer greater injury than a person of reasonable fortitude (*Brice* v *Brown* [1984] 1 All ER 997 (QBD)).