**NOTES FOR LMan\GDes**
**BLOCK COURSE 2011**

(the notes below are not intended to be exhaustive but cover some of the matters dealt with in my lecture on Thursday the 13th January 2011 nor are they intended specifically to assist with the assignment set by me but they may be some assistance)

We are concerned with two areas of law, namely:

(1) Contract;
(2) The tort of Negligence.

A contractual obligation is an obligation arising out of the parties voluntarily entering into a contract. It only affects the parties to the agreement and no one else. Whereas, a tortuous obligation, is imposed by the law and affects every one falling within the ambit of the tort.

## THE LAW OF CONTRACT

There are three aspects of a contract:

(1) Formation, that is, has a contract come into existence;
(2) Terms of the contract, that is, the nature and extent of the obligations arising under the contract;
(3) Performance & discharge, that is, whether the parties have carried out and completed the obligations that they have entered into. If, there is a breach of the terms of the contract then compensation in the form of damages becomes payable.

## FORMATION OF A CONTRACT

There are three essentials of a contract:

(1) agreement;
(2) consideration;
(3) an intention to create legal relations.

AGREEMENT is reached by the process of offer and acceptance. An offer is a definite promise to be bound provided certain conditions are accepted by the offeree. The promise element of an offer states what the offferor is prepared to do and the conditions state what he wants in return. All the offeree has to do in order to reach an agreement is to assent to the terms of the offer.

For a "statement" to amount to an offer (in addition to the above) it must be complete (that is, contain all the terms of the proposed agreement) and be expressed with sufficient certainty that upon acceptance there is capable of coming into existence a definite agreement which is capable of being enforced.

Whether a particular statement\ circumstances are capable of amounting to an offer in law is a question of fact and degree: see **Carlill v. Carbolic Smoke Ball Co. [1893] 1 QB 256 CA.**

If a statement does not amount to an offer it is called an invitation to treat. Whether or not a statement is an offer or an invitation to treat is a question of fact and degree. In some cases the question is settled by precedent e.g. goods displayed in a shop window at marked prices are an invitation to treat: see **Fisher v. Bell [1961] 1 QB 394 DC;** a tender to carry out building works amounts to an offer: see **Spencer v. Harding (1870) LR 5CP 451.**

Acceptance is simply the act of assenting. Anything less or more will amount to a rejection of the offer or a counter offer.

CONSIDERATION is the "price" paid by one party for the promise or act done by the other party. It is the sign or symbol of bargin.

INTENTION TO CREATE LEGAL RELATIONS for the agreement to amount to a contract, the parties to the agreement must intend to sue or be sued in the event of a breach of the agreement. Commercial but not social agreements are presumed to give rise to such an intention: see Carlill v. Carbolic Smoke Ball Co.

## PRIVITY OF CONTRACT

Only a party to a contract can sue or be sued upon the contract. For the purposes of this rule a party to a contract is someone who has given consideration to the other party suing.

1. The positive effect of this rule is that a third party cannot sue to recover a benefit under a contract made for his benefit.

> **Price v. Easton ( 1833 ) 2 L. J. K B. 51 -** the defendant promised X that if X did certain work for him he would pay a sum of money to the plaintiff. X did the work but the defendant did not pay the money to the plaintiff.
>
> **Held** that the plaintiff could not sue the defendant for he could not "show any consideration for the promise moving from him to the defendant" - per Lord Denman C.J.
>
> **Beswick v. Beswick (1968) A.C. 58 -** Mr. Beswick carried on the business of a coal-merchant and he agreed to sell the business to the defendant, his nephew, provided that the defendant paid him an annuity of £5 a week and after his death that annuity would be paid to Mrs Beswick. After Mr. Beswick's death the defendant refused to make payments to his aunt, who commenced an action to recover damages.

The House of Lords **held** (1) that the plaintiff could not succeed because she was not a party to the contract, (2) that the plaintiff has administration of her husband's estate, was entitled to a decree of specific performance.

Where a party to a contract brings an action to enforce a contract made for the benefit of a third party it may be that he is only entitled to recover nominal damaged: see **Woodar Investment Development Ltd v. Wimpey Construction UK Ltd [1980] 1 W.L.R. 277 H.L. c.f. Jackson v. Horizon Holidays Ltd [1975] 1 W.L.R. 1468 C.A.**

2. The negative side of the rule is that a third party cannot be bound by any provision made in a contract to which he is not a party.

**Scrutton Ltd v. Midland Silicones Ltd (1962) A.C. 446 -** a drum containing chemicals was shipped from New York and consigned to the order of the plaintiffs. The bill of lading contained a clause limiting the liability of the ship's owners, as carriers, to $500. The defendants were stevedores who had contracted with the shippers to unload the ship in London and to have the benefit of the limiting clause in the bill of lading. Owing to the defendants negligence the drum of chemicals was damaged to the extent of £593. The plaintiffs sued the defendants in negligence and the defendants pleaded the limiting clause in the bill of lading.
The House of Lords **held** that the plaintiffs were entitled to recover the full amount of their loss since they were not subject to the limiting clause in a contract to which they were not a party.

## ACTION FOR NEGLIGENCE

There are three essentials of an action in negligence:
(1) duty of care;
(2) breach;
(3) damage

### 1. DUTY OF CARE

(a) **Foreseeability** - person owes a duty of care to avoid acts or omissions which he can reasonably foresee will be likely to injure his neighbour, that is, persons who he ought reasonably to have in contemplation when directing his mind to the acts of omissions which are called into question.

**Donogue v. Stevenson (1932) A.C. 562 -** the plaintiff drunk some ginger beer which had been bought for her by a friend. The beer was in an opaque bottle and, when the last of it was poured out, it was found to contain the decomposed remains of a snail. The plaintiff brought an action against the manufacturer of the ginger beer.
The House of Lords **held** that the manufacturer was liable.

Lord Atkin said:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyers' question, who is my neighbour? received a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour, who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."

(b) **Just and reasonable** - foreseeability is a condition precedent to a duty of care arising. However, the fact that injury or damage is foreseeable does not automatically give rise to a duty of care. In addition it must be "just and reasonable" that a duty of care should arise: see **Home Office v. Dorset Yacht Co Ltd (1970); Norwich City Council v. Harvey**. Traditionally, there are three areas where the courts have been reluctant to impose a duty to take care:

(i) omissions
(ii) nervous shock
(iii) pecuniary loss.

(c) **Remotness**- in addition the damage must not be too remote.

**To whom therefore does an architect\ landscape architect owe a duty of care?**

(i) **To their client** - the fact that there exists a contract between the architect and his client does not preclude a concurrent duty of care in tort.

(ii) **To Third parties** -

"Quite clearly English law has now developed to the point where contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work" per Richmond P. in **Bowen v. Paramount Builders (Hamilton) Ltd (1977), NZLR 394.**

eg to the contractor and his employees

**Driver v. William Willet (Contractors) Limited [1969] 1 All ER 665 -** engineers were employed by a contractor as consulting safety and inspecting engineers. The plaintiff labourer employed by the contractor was injured by the collapse of a scaffold board from a hoist.

**Held** the engineers owed the laborer a duty of care and were in breach of that duty by failing to advise the contractors that the hoist be enclosed by wire mesh.

eg to a mere stranger

**Voli v. Inizlewood Shim Council (1963) A.L.R. 657 -** the plaintiff was injured by the collapse of a stage in a public hall designed by the defendant architect.
Held the defendant was liable to the plaintiff.

"....neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is case upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered. If, for example, it was a design for a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it' per Windeyer, J.

(NB. Both the above cases involved personal injuries. For pure pecuniary loss see later notes).

## 2. STANDARD OF CARE

The standard of care required at common law is that of a reasonable man.

> "Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got that special skill, the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established that it is sufficient if he exercises the skill of an ordinary competent man exercising that particular art". per **McNair J. in Bolam v. Friern Hospital Management Committee (1957) 1 W.L.R. 582.**

Thus in the Voli Case Windeyer, J said:

"An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring the task he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. The liability can be said to arise either from a breach of the contract or in tort".

Whether or not an architect has in fact been negligent depends upon the facts of the particular case and the surrounding circumstances (including the various contractual obligations undertaken by the parties of the building project).

Except in the case of a glaring error it will be necessary for the plaintiff to call professional evidence to the effect that the defendant failed to exercise the required care and skill: per Sach, H J in **Warboys v. Acme Investments Ltd (1969).**

The failure of an architect to comply with codes of practice is prima facie evidence of faulty design: per Beattie, J in **Bevan Investments Ltd v. Blackhall and Struthers (No 2) (1977) 2NZLR45**

## 3. DAMAGE

(a) **Factual causation** - the plaintiff must show, as a matter fact, that the damage was the result of the defendant's negligence. An act or omission may be said to be a cause of an event if that event would not have happened "but for" that act or omission.

**McWilliams v. Sir William Arrol & Co Ltd (1962) 1 W.L.R. 295-** the plaintiff steel erector fell 70ft from a steel tower in the building of which he was assisting and was injured. The defendant had failed to provide the plaintiff with a safety belt which if worn would have prevented the accident. The plaintiff was an experienced steel erector and the evidence showed that it was highly probable that he would not have worn the belt if one had been provided.

The House of Lords **held** that although in breach of their duty to the plaintiff the defendant was not liable since their breach was not the cause of the damaged suffered.

(b) **Legal causation** - person is only liable for such damage if it is the foreseeable consequence of his negligent conduct: the **Wagon Mount (No 1) (1961)**. It is sufficient that the resultant damage is of the same "kind" as that which could be reasonably foreseen: **Hughes v. Lord Advocate (1962) A.C. 837 H.L.** If the damage which occurs is damage of the type of kind which ought to have been foreseen, then it is immaterial that the extent or amount of the damage was not foreseen: **Smith v. Leech Brain & Co Ltd. (1962) 2 Q.B. 405.**

(c) **Novus actus interveniens** - an intervening act of a third party will only break the chain of causation if the intervention is not foreseeable.

**Taylor v. Rover Co Ltd (1966) 1 W.L.R. 1491 -** the plaintiff was employed by the first defendants on an assembly line while using a hammer to hit a chisel a piece broke off and injured the plaintiff. A similar accident had happened previously but the first defendants had not

withdrawn the tool from their employees. The chisel had been negligently manufactured by the second defendants.
**Held** that the second defendants were not liable since the first defendants act in continuing to let the chisel be used broke the chain of causation.

## 4. DEFENCES TO NEGLIGENCE

There are two defences to an action for negligence:

(a) **Contributory negligence** -

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person ... the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimants share in the responsibility for the damage". Section I of the Law Reform (Contributory Negligence) Act 1945.

A plaintiff may be guilty of contributory negligence, although he in no way contributed to the accident itself, if his act or omission contributed to the nature or extent of his injuries, eg failure to wear a seat belt as in **Froom v. Butcher (1976) Q.B. 286 C.A.**

(b) **Volenti no fit injuria** (voluntary assumption of risk)-
it is a complete defence to an action for negligence for the defendant to prove that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it. The plaintiff is said to be volenti, that is, he is taken to have consented to the injury and cannot recover damages.

## VICARIOUS LIABILITY.

This occurs where one person is held liable for the torts of another person. The general rule is
that a person is only liable for his own acts.

e.g. a father is not liable merely because his son has thrown a stone through his neighbour's window (the father would only be liable where he had authorised the act or had negligently supervised his son).

1 . **Employees** - an employer is vicariously liable for the torts of his servants in the course of their employment. This includes not only acts provided that they are so connected with authorised acts that they may be regarded as modes, though improper modes, though improper modes, of doing those authorised acts.

**Rose v. Plenty [19761 1 W.L.R. 141 -** a milkman was employed by his employers, a dairy company, to go round on a milk float delivering milk to the

employers customers, collecting empty bottles and obtaining payment for the milk. The employers exhibited notices at the milk depot which expressly prohibited the milkman from employing children in the performance of his duties and from giving lifts on the milk float. Contrary to those prohibitions, the milkman invited the plaintiff, a boy aged 13, to assist hi-in with the milk round in return for payment. The plaintiff rode on the milk float and helped to deliver milk and return empty bottles to the float, whilst riding on the milk float, the plaintiff was injured when the milkman drove the float negligently.
The Court of Appeal **held** that the employers were vicariously liable for the milkman's negligence.
(NB: The fact that the employer is vicariously liable does not relieve the negligent employee of liability: **Lister v. Romford lee and Cold Storage Ltd [ 19571 A.C. 555 H.L.**

2. **Independent Contractors** - the general rule is that a person is not liable for the torts of his independent contractors (NB a person is under, a duty of care in selecting his independent contractors).

**Salsbury v. Woodland [19701 1 Q.B. 324 -** the defendant, the occupier of property-adjoining the highway, employed X, an experience and apparently competent tree feller, to fell a large tree in his front garden. Because of X's negligence as the tree fell it fouled telephone wires causing them to fall across the highway. A car collided with the wire and in getting out of the way the car, the plaintiff was injured.
The Court of Appeal held that the defendant was not liable for the negligence of this independent contractor. Such liability arose only (a) where the work to be carried out was inherently dangerous, ie work which creates a risk even when performed with all reasonable care, or (b) where the work is carried out on the highway.