McGEOWN v SECRETARY OF STATE FOR NORTHERN IRELAND[1]

Criminal injury to property—Causation—Car stolen by three or more persons—Later abandoned and vandalised in area where vandalism virtually inevitable—Whether acts of vandalism broke chain of causation—Criminal Damage (Compensation) (Northern Ireland) Order 1977 (S.I. No. 1248, N.I. 15) art 5(1).

The applicant's car was stolen by three or four persons from the garage of his dwelling house and was later found in the Turf Lodge estate in west Belfast. When the applicant went to attempt to retrieve it, he found the car was utterly wrecked and the wheels and all removable parts of the engine and interior fittings had been taken. It was established that a very high proportion of stolen cars ended up in the Turf Lodge estate and that nearly all cars abandoned there were badly vandalised and the removable parts were stolen. The applicant sought compensation for the damage and for the parts under Article 5(1) (a) of the Criminal Damage (Compensation) (Northern Ireland) Order, 1977. There was no evidence to show who had done the damage, whether it was the thieves or other persons, and if the latter, how many were involved.

The applicant contended that the damage to the motor car resulted directly from the theft and was awarded £750 being the pre-theft value of the car less its salvage value.

The respondent appealed against the award, arguing that in all probability the car had been wrecked by third parties and that their action broke the chain of causation between the theft and the damage.

Held, allowing the appeal in part that:— (i) On viewing the facts in the light of the several tests of causation, the applicant was entitled to succeed whichever test was used, since:—

(a) the vandalising of the car was a direct consequence of its theft;

(b) the degree of likelihood that it would be vandalised amounted to near inevitability;

(c) if the court were to apply the criteria propounded by Watkins L.J. in *Lamb* v. *Camden London Borough Council* [1981] Q.B. 625, it would hold that the damage was attributable to the theft as having been caused by it

(d) if causation is to be looked at as a matter of common sense, the thieves' act of taking the car and abandoning it in Turf Lodge was the effective cause of its being wrecked by vandals;

(e) there were acceptable policy reasons for allowing a car owner whose car had been destroyed in such circumstances to claim for the damage. This would not necessarily open the flood-gates to every owner whose vehicle is stolen and abandoned and subsequently damaged, to claim for its loss, because it would be necessary for him to establish that it was stolen by three or more persons or by a person or persons acting on behalf of or in connection with an unlawful association.

[1]In the Queen's Bench Division before Carswell J: 17 September, 9 October 1987.

(ii) The evidence was that the pre-theft value of the car was £800. The salvage value of the wrecked car returned to the applicant was £50. Disregarding the effect of the theft of the parts, ie, assuming that those parts were still on the car, but it had sustained the other damage done to it, the salvage value would have been £150. The appeal would be allowed and a decree of £650 substituted for the award made in the Court below of £750.

The following cases were referred to in the judgment of Carswell J.:

Doyle v. *Olby (Ironmongers) Limited* [1969] 2 Q.B. 158; [1969] 2 W.L.R. 273; [1969] 2 All E.R. 119 C.A.
Home Office v. *Dorset Yacht Co Ltd.* [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294 H.L.
HM Postmaster-General v. *Londonderry R.D.C.* [1957] N.I. 77 C.A.
King v. *Liverpool City Council* [1986] 1 W.L.R. 890; [1986] 3 All E.R. 544 C.A.
Lamb v. *Camden London Borough Council* [1981] Q.B. 625; [1981] 2 W.L.R. 1038; [1981] 2 All E.R. 408 C.A.
Morrison S. S. Co. v. *Greystoke Castle* [1947] A.C. 265; [1946] 2 All E.R. 696 H.L.
O'Hanlon v. *Armagh City Council* [1973] N.I. 171 C.A.
Overseas Tankship (UK) Limited v. *Morts Dock Engineering Co. Ltd.* [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404 P.C.
Overseas Tankship (UK) Limited v. *Miller Steamship Co. Pty* [1967] 1 A.C. 617; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709 P.C.
Paterson Zochonis & Co. Limited v. *Merfarken Packaging Limited* [1986] 3 All E.R. 522 C.A.
P. Perl (Exporters) Limited v. *Camden London Borough Council* [1984] Q.B. 342; [1983] 3 W.L.R. 769; [1983] 3 All E.R. 161 C.A.
In re Polemis and Furness Withy & Co. [1921] 3 K.B. 560 K.B.D.
Smith v. *Littlewoods Organisation Limited* [1987] A.C. 241; [1987] 2 W.L.R. 480; [1987] 1 All E.R. 710 H.L. (Sc.)
Victoria Laundry (Windsor) Limited v. *Newman Industries Limited* [1949] 2 K.B. 528; [1949] 1 All E.R. 997 C.A.
Wells v. *Secretary of State for Northern Ireland* [1981] N.I. 233 Q.B.D.

APPEAL by the Secretary of State for Northern Ireland against an award of £750 made to James McGeown in relation to a claim for compensation under the Criminal Damage (Compensation) (Northern Ireland) Order 1977. The facts appear sufficiently in the judgment of Carswell J.

J. C. Gillespie for the appellant.
T. G. McKillop for the respondent.

Cur. adv. vult.

CARSWELL J. In the early hours of 16 March 1984 the applicant's car was stolen from the garage of his dwelling house at 510 Ardowen, Craigavon. One of his neighbours recognised the car as it was being driven away at high speed without lights, and saw that there were three or four persons in it. Next morning the Army reported to the police that the car was parked in a road in the Turf Lodge estate in west Belfast. When the applicant went to attempt to retrieve it he found that it was utterly wrecked. All the wheels had

been stolen, removable parts of the engine and interior fittings had been taken, all the glass was broken, and every part of the bodywork had been badly damaged, apparently by a person or persons who had kicked the panels and jumped up and down on the roof, bonnet and boot. The car was damaged beyond economic repair, and was worth only a small sum for salvage.

There was no evidence who had done the damage, whether it was the thieves or other persons, and if the latter how many were involved. It was in my view impossible to infer that the damage was done by three or more persons. It was, however, established that a very high proportion of stolen cars end up in that part of west Belfast which falls within the R.U.C. 'B' Division, and that nearly all cars abandoned there are badly vandalised and the removable parts are stolen. I accept that if a car is stolen and left in the Turf Lodge area there is a very high probability, amounting very close to inevitability, that it will sustain serious damage within a very short time.

The claim is brought under Article 5(1) of the Criminal Damage (Compensation) (Northern Ireland) Order 1977, which provides as follows:

> "(1) Where damage has been unlawfully, maliciously or wantonly caused to any property—
>
> (a) by any three or more persons unlawfully, riotously or tumultuously assembled together; or
>
> (b) as a result of an act committed maliciously by a person acting on behalf of or in connection with an unlawful association;
>
> the Secretary of State shall, subject to the provisions of this Order, pay compensation to any person having an estate or interest in that property who suffers loss from that damage."

As a matter of construction of this provision, one might have questioned whether Article 5(1)(a) requires a more direct link with three or more malefactors than Article 5(1)(b) does with the person acting on behalf of or in connection with an unlawful association. It could perhaps be argued that the distinction is more than a matter of drafting convenience, and that a claim will lie under Article 5(l)(a) only where the damage is physically caused by three or more persons present and taking part in the vandalism. In *Wells* v. *Secretary of State* [1981] N.I. 233, however, the Lord Chief Justice held that both parts of the paragraph should be construed in a similar manner. He said at page 235 that:

> "it would seem illogical, if paragraph 5(1)(a) will bear an interpretation yielding a result similar to that achieved under 5(1)(b), to choose an interpretation of paragraph 5(l)(a) which would yield inconsistent results in the two cases."

It accordingly has to be ascertained how far the chain of causation may extend, and whether the court can admit a claim in a case such as the present one, where the unlawful acts of three or more thieves make the likelihood of damage being caused to the car extremely high.

It should be noted that in *Wells'* case the issue was the admissibility of a claim for damage caused in the Republic of Ireland when three youths crashed a car which they had hijacked in Northern Ireland. Counsel for the

Secretary of State conceded that if the car had crashed in Northern Ireland in identical circumstances compensation would have been payable, so that the only issue in contention was whether the fact that the damage occurred outside Northern Ireland provided a defence to the claim. The Lord Chief Justice nevertheless expressed the conclusion on the construction of Article 5(1) which I have quoted, and went on to say:

> "I would stress the point that I am not here concerned with cases in which a fresh voluntary act causing the damage is done outside Northern Ireland by the original wrongdoer or the applicant or a third party. It seems to me that applications for compensation in such cases will fail or succeed according to whether or not the fresh act breaks the chain of causation between itself and the original wrongdoing in Northern Ireland."

Leaving out the foreign element, one has to ask a similar question in the present case. The apparent simplicity of the concept, however, conceals a number of considerable difficulties.

The question of causation has given rise to much judicial and academic discussion, and one need only refer to the leading monograph by Professors Hart and Honoré to see the extent of the problems which exist. In Greer and Mitchell on *Compensation for Criminal Damage to Property*, pages 61–65, the authors point to the inconsistency between the decided cases in Northern Ireland and the Republic, and put forward the proposition that tort cases should not be unduly relied on to determine the scope of damage "caused by" or "as a result of" criminal acts, quoting the well known authorities which say that the choice of the real or efficient cause must be a matter of common sense. The latter robust statements (gently deprecated in Hart and Honoré, *Causation in the Law* (2nd ed., page 26) do not offer much by way of guidance to a court attempting to decide a specific case, and I think that before one has to fall back upon them it may be helpful to consider the principles applying to remoteness of damage in the law of tort, bearing in mind the equation between criminal damage compensation and damages in tort made by the Lord Chief Justice in *O'Hanlon* v. *Armagh County Council* [1973] N.I. 171, 173.

It cannot be said that the state of the law on remoteness of damage reflects any great degree of credit upon the ability of the law to cope with the concept of causation. The principles have been stated and restated so many times, and with such variation of language and use of different metaphors, that it is possible to find authority for virtually any proposition and very difficult to find a consistent set of principles coherently laid down. It is not my intention in this judgment to attempt to lay down such a set of principles, nor perhaps would it be wise for a judge deciding this type of appeal to attempt to do so, but some examination of the authorities may give me a degree of assistance.

The classic test for remoteness of damage laid down in *In re Polemis and Furness Withy & Co.* [1921] 3 K.B. 560 of liability for all direct consequences was rejected by the Privy Council in *Overseas Tankship (UK) Ltd.* v. *Morts Dock and Engineering Co. Ltd.* [1961] A.C. 388 (commonly known and hereinafter referred to as *The Wagon Mound*), a decision which has been consistently followed at all levels. The Privy Council took the view that the

test of direct consequences could lead to an unfairly wide ambit of liability, and in a case of negligence adopted the test of foreseeability to govern remoteness as well as liability, to operate as a limitation upon that width. Foreseeable consequences always fell within the scope of direct consequences (see *Morrison SS Co.* v. *Greystoke Castle* [1947] A.C. 265, 295, per Lord Porter) but in negligence cases the defendant will not be liable for damage which can be regarded as a direct consequence of his action unless it was also foreseeable.

It is less clear which test is applicable to torts other than negligence. In *The Wagon Mound (No.2)* [1967] 1 A.C. 617 the Privy Council held that in actions for nuisance it is necessary to prove that the injury was foreseeable as well as being a direct result of the nuisance. Lord Reid pointed out at pages 639–40 of his opinion that in some classes of nuisance foreseeability is a necessary element in determining liability, but not in others. He held that all classes of nuisance should be treated alike and that the similarities between nuisance and other forms of tort to which *The Wagon Mound* applies outweigh any difference. *In Doyle* v. *Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158, however, an action for deceit, the Court of Appeal held that the defendant is liable for all actual damage directly flowing from the fraudulent inducement, contrasting the ambit of liability with the rule in contract cases limiting it to the damage reasonably supposed to have been in the contemplation of the parties. In that case *The Wagon Mound* was not cited in the judgments, but it is clear that Lord Denning intended to reject the test of foreseeability (which is the criterion in a contract case—see *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528, 539, per Asquith L.J.) when he said at page 167:

> "The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement . . . All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen."

When one considers torts of strict liability, and more particularly torts in general which are based upon deliberate wrongdoing, then foreseeability would appear to have less relevance to remoteness of damage and the test of direct consequences may continue to hold sway in this field, notwithstanding Viscount Simonds' criticism expressed in *The Wagon Mound* at page 423 that it "leads to nowhere but the never-ending and insoluble problems of causation."

The application of the principles governing remoteness becomes more difficult again when there is a *novus actus interveniens,* and the most difficult of this class of cases is constituted by that which arises where a third party commits an act which is a wilful wrong towards the plaintiff. That class has in the past few years received detailed consideration on a number of occasions in the English and Scottish courts. I propose to examine some of the cases briefly to see if assistance can be gained from them, but it is necessary to bear in mind that they all relate to actions for negligence.

The most recent, and most authoritative, decision is that of the House of Lords in *Smith* v. *Littlewoods Organisation Ltd.* [1987] 1 All E.R. 710. It is quite apparent from the opinions of Lord Mackay and Lord Goff that in an action for negligence the problem posed in determining liability for the

wilfully wrongful acts of third parties should be approached by the avenue of defining the duty of care rather than that of remoteness of damage. Lord Mackay at page 723d approved of the result in *Lamb* v. *Camden London Borough Council* [1981] Q.B. 625, to which I shall refer further in a moment, and in particular of the reason for it expressed by Oliver L.J. at page 643 in terms of reasonable foresight. The later cases of *P. Perl (Exporters) Ltd.* v. *Camden London Borough Council* [1984] Q.B. 342 and *King* v. *Liverpool City Council* [1986] 3 All E.R. 544 were both decided by the Court of Appeal by reference to the extent of the duty of care, as were the Scottish cases referred to by Lord Mackay and Lord Goff. In *Paterson Zochonis & Co. Ltd.* v. *Merfarken Packaging Ltd.* [1986] 3 All E.R. 522 (decided in 1982) Robert Goff L.J. pointed out that the common criterion of foreseeability creates some overlap between the various constituent parts of the tort of negligence. The issue might therefore be looked at as one of remoteness or duty of care, but the weight of authority is in favour of regarding it as a question of duty of care.

It may nevertheless be useful to examine the views expressed in terms of remoteness of damage by the members of the Court of Appeal in *Lamb* v. *Camden London Borough Council* [1981] Q.B. 625. The diversity of opinion between the members of the court demonstrates the difficulty of extracting usable principles from the authorities, even though they were unanimous in their ultimate conclusion. The defendant council broke a water main in the course of replacing a sewer near to the plaintiff's house, which was let to a tenant. The escaping water undermined the foundations, causing subsidence and the tenant moved out. The house lay empty for some time, and was occupied successively by two lots of squatters, who resisted attempts to evict them and caused very substantial damage. The court held that the damage caused by the squatters was too remote and could not form part of the damages payable by the defendants.

The defendant's counsel relied upon a passage from Lord Reid's opinion in *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] A.C. 1004 as justification for the proposition that something more than reasonable foreseeability of the damage is required in such cases. The passage, which Oliver L.J. pointed out was obiter, is at page 1030 of his opinion:

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

It was argued on the strength of this passage that reasonable foreseeability is but one ingredient in a composite test of remoteness, which involves a further ingredient, described as "nexus". That nexus is broken by

the act of an independent third person unless the act is not merely foreseen but is either "likely" or "very likely". Watkins L.J. expressed the view that the test of foreseeability could not in all circumstances conclude consideration of the question of remoteness. In some cases one had to consider the features of the event or act to determine whether upon a practical view it was connected with the original act of negligence. He rejected Lord Reid's test that "the action must at least have been something very likely to happen" as being insufficiently stringent. Lord Denning M.R. also rejected Lord Reid's test as being inconsistent with *The Wagon Mound*, but regarded a test based solely upon foreseeability as extending the range of compensation far too widely. In the end he preferred to decide the issue as a matter of policy.

Oliver L.J. considered that the defendant's proposition restored "the fallacy of *In re Polemis*" to the law of remoteness of damage, and declined to accept that that was Lord Reid's meaning. In his view Lord Reid did not intend to depart from the criterion of reasonable foresight, but the degree of likelihood required before the law could or should attribute the free act of a responsible third person to the tortfeasor must be very high. He concluded by saying:

> "It may be that some more stringent standard is required. There may, for instance, be circumstances in which the court would require a degree of likelihood amounting almost to inevitability before it fixes a defendant with responsibility for the act of a third party over whom he has and can have no control."

The difficulty about using the concept of remoteness of damage to decide cases involving the wrongful act of a third party in the way in which the Court of Appeal did so in *Lamb* v. *Camden London Borough Council* is that the court was using remoteness to limit the heads of damage which foreseeability would admit, whereas in *The Wagon Mound* foreseeability was itself brought into play as a limiting factor. As I have indicated, the House of Lords has approved the approach by way of the duty of care to the resolution of such cases where the cause of action is negligence, by which means any limits to be adopted for policy reasons can be expressly defined. Where the cause of action is one such as trespass to goods, such an approach is obviously not appropriate, and the issue can only be considered as one of remoteness of damage. The authorities since *Lamb* v. *Camden London Borough Council* do not give one much assistance with this issue. It would appear to follow, however, from the views which have been expressed in them that if foreseeability is the test to be applied, foreseeability of damage in the ordinary sense will not necessarily suffice to attribute the damage to the defendant. Either some additional factor, of policy or otherwise, is required, or reasonable foreseeability should be so interpreted that the deliberately wrongful acts of third parties should not too readily be attributed to the defendant. On the other hand, it seems to me likely that the test for determining remoteness of damage where the commission of a tort has already been established should not be based upon foreseeability. In principle it ought not to be as strict as that for defining the existence of a duty of care. Lord Goff said in two passages in his opinion in *Smith* v. *Littlewoods Organisation Ltd.* (pages 734f and 735g) that there is no general duty at common law to prevent persons from harming others by their deliberate

wrongdoing, however foreseeable such harm may be, if the defendant does not take steps to prevent it. Where the issue is one of the remoteness of the damage which was sustained by the plaintiff in consequence of the defendant's admittedly tortious act, however, I think that there should not be quite such a general restriction upon inclusion of harm caused by third parties' wrongdoing.

I have not found it possible to deduce any general or universal rule from the tort cases for application to cases of criminal injury, but the various tests adopted may assist in determining the issue of causation. I therefore return to posing the question whether the chain of causation initiated by the thieves was broken by the acts of the vandals who wilfully set about wrecking the car. Reliance upon metaphors of this kind is notoriously dangerous when dealing with legal concepts, and that leads one to be tempted to accept the proposition that it is a question either of common sense in the particular case or of judicial policy. If one seeks assistance from the rules governing remoteness in tort, one cannot say much more than that reasonable foreseeability alone of a head of loss—if it is applicable at all—may not be sufficient to make the loss allowable unless the concept is interpreted in a restrictive manner. The issue which I have to decide is whether the damage to the car was caused by the unlawful act of the persons who stole it, and all the approaches which I have discussed rank only as methods by which one may decide whether effects can be attributed to a cause.

I shall attempt to draw together the threads of this judgment by viewing the facts in the light of the several tests which have been applied in the cases which I have cited. I shall take them seriatim, and attempt to apply each, although the tests used in the negligence cases now appear to be less appropriate. The purport of the evidence was that if thieves take a car and abandon it in Turf Lodge, it follows almost as night follows day that it will be vandalised. I would apply the several tests as follows:

(a) The vandalising of the car was in my opinion a direct consequence of its theft.

(b) The degree of likelihood that it would be vandalised amounts in my judgment to near inevitability.

(c) If I were to apply the criteria propounded by Watkins L.J. in *Lamb* v. *Camden London Borough Council*, I should hold that the damage is attributable to the theft as having been caused by it.

(d) If one should attempt to look at the matter as one of common sense, I regard it as sensible to say that the thieves' act of taking the car and abandoning it in Turf Lodge was the effective cause of it being wrecked by vandals.

(e) I see no policy reason why one should not so hold, and I can see acceptable reasons why a car owner whose car has been taken and destroyed in such circumstances should be able to claim for the damage to his property. I need hardly say that so to hold does not open the floodgates for every owner whose vehicle is stolen and abandoned and subsequently damaged to claim for his loss, because it is necessary for him to establish that it was stolen by three or more persons or by a person or persons acting on behalf of or in connection with an unlawful association.

Some of the tests or approaches may be too stringent for causation in a case of criminal damage, but whichever one adopts I consider that the necessary criteria are fulfilled in this case. I therefore hold that the damage to the car was caused by three or more persons, and that the applicant has a valid claim for it.

It was argued, on the authority of *HM Postmaster-General* v. *Londonderry RDC* [1957] N.I. 77, that the applicant's claim extended to the theft of the many items removed from the car. It would be possible to say, in consequence of the finding I have already made, that the theft of the parts was caused by the persons who stole and abandoned the car. In order to succeed, however, on this part of the claim the applicant would in my view have to establish that the theft of the parts was consequential upon the wrongful damage to the car (see the judgment of Black L.J. at page 88 of the report of *HM Postmaster-General* v. *Londonderry RDC*). So stated, the issue is clearly determined against the applicant.

The evidence was that the pre-theft value of the car was £800. The salvage value of the wrecked car returned to the applicant was £50. If one were to disregard the effect of the theft of the parts, i.e. assume that those parts were still on the car, but it had sustained the other damage done to it, the salvage value would have been £150. I therefore hold that the applicant's claim amounts to the sum of £650, and I allow the appeal and substitute a decree for £650 for the award made below of £750.

Appeal allowed

Solicitor for the appellant: *F. G. Brown.*
Solicitor for the respondent: *H. McPartland.*

P.S.G.