NEGLIGENT INFLICTION OF IMPRISONMENT: ACTIONABLE 'PER SE' OR 'CUM DAMNO'?

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[*This article examines the extent to which negligence is or should be available as a means of protecting personal liberty. Under the historical distinction between actions in trespass and case, trespass is actionable* per se *while proof of actual damage is required under case. Mr Heffey investigates whether the* per se *actionability rule makes an action in trespass superior to an action in negligent infliction of imprisonment; whether the loss of freedom of movement is itself sufficient damage to sustain an action in negligence; and whether the distinction between trespass and case is worth maintaining. In this context, he discusses in detail the directness requirement in trespass, the duty question in negligent certification cases, the damage requirement in negligence and negligence compared with negligent trespass. He concludes that the trespass-case classification should be abandoned. He suggests that if an interest belonging to a plaintiff which the law considers valuable is infringed by the defendant, then it can be said that the plaintiff has suffered damage, and the plaintiff should have an action, whether the defendant caused the damage intentionally or negligently, and whether it was caused directly or indirectly. The only distinction that is then drawn is between intentional and negligent infliction of damage.*]

INTRODUCTION

The case which prompted this article was decided over a century ago: *Smith v. Iffla.*[1] It is exhumed today because of its relevance to an important aspect of the law of torts, the protection of freedom of movement. The tort which traditionally aims at providing this protection is false imprisonment. This tort, a form of trespass to the person, proscribes the direct placement of total restraint upon the plaintiff's liberty of movement. The plaintiff may have suffered damage in such a case, but the traditional view is that he need not prove it in order to establish the tort. Trespass to the person is said to be actionable *per se, i.e.* the violation of a legal right actionable whether damage is proved or not. In this sense it is an example of *iniuria sine damno*. Where the defendant has caused the plaintiff's loss of freedom through indirect means (for example by obtaining a court order), or where the loss of freedom is not total (for example restriction of movement in one direction only) no action in trespass for false imprisonment is available. However, the plaintiff may have what would have been described formerly as an action on the case, for example, malicious prosecution in the former instance, public nuisance in the latter. In such cases damage must be proved. They are examples of *iniuria cum damno*. Less usually associated with the protection of freedom of movement is the tort of negligence. This tort is also

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[1] (1881) 7 V.L.R. 435. The author is grateful to Bernard O'Brien of the University of Melbourne for drawing this case to his attention.

derived from the action on the case. The plaintiff must establish damage caused by a breach of a duty of care owed to him by the defendant. The main purpose of this article is to consider the extent to which negligence is or should be available as a means of protecting personal liberty. Is loss of freedom of movement itself sufficient 'damage' for the purposes of the action on the case? Does the actionability *per se* rule in trespass give that tort any advantage over negligence? Is the trespass-case classification worth retaining?

In *Smith v. Iffla* the plaintiff was detained for two months in a lunatic asylum. He sued the defendant, a medical practitioner, for giving a certificate of insanity under section 11 of the Lunacy Statute[2] without due examination of the plaintiff. Two counts were originally stated in the declaration. First, trespass for causing the plaintiff to be imprisoned in a lunatic asylum. Second, negligent certification of lunacy under the Lunacy Statute. The first cause of action was struck out at the trial. The jury found for the plaintiff on the second count, awarding £520 damages. The Full Supreme Court (Higinbotham, Williams and Holroyd JJ.) refused to interfere with the jury's verdict.

This decision gives rise to a number of questions which will now be discussed.

I. THE 'DIRECTNESS' REQUIREMENT IN TRESPASS

The first question of interest which arises from *Smith v. Iffla* is: why was the trespass (false imprisonment) count struck out at the trial? The reason for this is not revealed in the report. One possible reason is that the defendant had not *directly* caused the plaintiff's detention for three months at the lunatic asylum. The plaintiff alleged that the defendant signed a certificate 'whereby the plaintiff was arrested and imprisoned'.[3] As Street states: 'it is not false imprisonment to cause a person to be temporarily detained in an asylum by making false statements to the authorities . . . or to dig a pitfall into which the plaintiff falls'.[4] In such cases the interference is indirect. But it is a *prima facie* false imprisonment to take a person or direct that he be taken to an asylum, or to keep him there, or to push him into a pitfall.[5] In such cases the interference is direct. A common law or statutory defence may be available. For example, at common law a mentally disturbed and dangerous person may be apprehended. But if he is not in fact

[2] Lunacy Statute 1867 (Vic.).
[3] *Smith v. Iffla* (1881) 7 V.L.R. 435.
[4] *Street on Torts* (6th ed. 1976) 25.
[5] *Anderson v. Burrows* (1830) 172 E.R. 674; *Watson v. Marshall* (1971) 124 C.L.R. 621; *Marshall v. Watson* (1972) 124 C.L.R. 640. The lack of a defence revealed in the latter case was remedied by statute: Mental Health Act 1959 (Vic.), s. 42(3A).

mentally disturbed a reasonable belief that he is will apparently not suffice to uphold the defence.[6]

Harnett v. Bond[7] is sometimes referred to as an example of the application of the directness principle.[8] The plaintiff, Harnett, was detained under a reception order in a private asylum called Malling Place. The asylum was managed by Dr Adam. In 1912 the plaintiff was liberated for a period of twenty-eight days on trial under a leave of absence order, but with a proviso authorising the manager to take back the patient if his mental condition required it. The plaintiff, who was later found by a jury to have been sane at the time, presented himself at the office of the Commissioner in Lunacy and saw Dr Bond, one of the Commissioners. Dr Bond telephoned Dr Adam to the effect that the plaintiff was not in a fit state to be at large. Dr Adam sent a car with two attendants to take the plainiff back to Malling Place. Pending the arrival of the car, the plaintiff was detained for two or three hours by Dr Bond. After examination by Dr Adam the plaintiff was detained at the asylum, and at other institutions for lunatics for over eight years. In 1921 the plaintiff finally escaped and sued Dr Adam and Dr Bond jointly and severally for false imprisonment. The trial judge, on the basis of findings by the jury, gave judgment against Dr Bond for £5000 and against both the defendants for £20000. The House of Lords upheld the view of the Court of Appeal that Dr Adam was absolved from liability by virtue of statutory authority, and that there should be a new trial of the action against Dr Bond. The trial judge had directed the jury that they might in assessing damages, take into consideration the whole period of the plaintiff's detention if they thought it was the direct consequence of the original detention. In respect of Dr Bond, the House of Lords considered that while the original detention of two or three hours at his office was wrongful, it was not the direct cause of his subsequent detention. This was caused by new intervening acts of managers of institutions in which the plaintiff was subsequently detained. Accordingly, Dr Bond's responsibility did not extend beyond Dr Adam's reassumption of control over the plaintiff.

This case is best understood as concerned not with the 'directness' element in trespass, but with remoteness of damage in trespass.[9] The original

[6] *Fletcher v. Fletcher* (1859) 120 E.R. 967. See further: Lanham D., 'Arresting the Insane' [1974] *Criminal Law Review* 515. In most Australian states no liability attaches to a person who acts in good faith and without negligence pursuant to the Mental Health Act. See O'Sullivan J., *Mental Health and the Law* (1981) 145-6; *Re Hawke; H. v. H.* (1923) 40 W.N. (N.S.W.) 58; *Ex parte Kessell; Levinson v. Kessell* (1932) 32 S.R. N.S.W. 274. There is no such provision in the Mental Health Act 1959 (Vic.); but s. 103 gives immunity for anything done in reliance on any recommendation apparently given in accordance with the Act.

[7] [1925] A.C. 669. The plaintiff in this case also went to the House of Lords in *Harnett v. Fisher* [1927] A.C. 573. He was described recently as 'one of the most unlucky Englishmen to be involved in the mental health field in this century': O'Sullivan, *op. cit.* 174.

[8] Weir T., *A Casebook on Tort* (4th ed. 1979) 284; Luntz H., Hambly D. and Hayes R., *Torts: Cases and Commentary* (1980) 807.

[9] See *Watson v. Marshall* (1971) 124 C.L.R. 621, 631.

imprisonment of the plaintiff by Dr Bond was undoubtedly direct. The question was as to the extent of Dr Bond's liability for the consequences of that imprisonment. As Viscount Cave said:

> . . . Dr. Bond had no right to cause the appellant to be detained at the office pending the arrival of Dr. Adam's car, and is liable for damages for that illegal detention. But those damages must, on the authorities, be confined to such as were the direct consequence of the wrong committed.[10]

The point is that in trespass there is a threshold requirement of directness (which was not in issue in *Harnett v. Bond*), and a remotness test of directness (which was in issue in *Harnett v. Bond*). It just so happened that the alleged consequence of the original detention was a further detention.[11] In *Smith v. Iffla* the plaintiff complained about two months detention in a lunatic asylum. It was presumably not the defendant but the manager of the asylum who detained him there. In *Harnett v. Bond* the only reason Dr Adam, the manager, was not liable in false imprisonment for the period during which the plaintiff was detained at Malling Place was statutory authorisation. Whether the test of remoteness governing voluntary intervening acts by third parties is or should be different in trespass and negligence will be considered later in this article.

II. THE DUTY QUESTION IN NEGLIGENT CERTIFICATION CASES

The second question of interest which arises from *Smith v. Iffla* is: why did the action in negligence succeed? As noted earlier, the action was for the negligent signing of a certificate of lunacy. The defendant argued that the verdict of the jury in favour of the plaintiff was against the evidence. The statute provided that before a person could be committed to a lunatic asylum at the instance of private persons, he must be examined by two medical practitioners who must each of them separately personally examine the person against whom the certificate is sought.[12] The defendant medical practitioner said the interview with the plaintiff lasted twenty minutes; the plaintiff said it lasted only four or five minutes and consisted of three questions of a rather singular kind. The Supreme Court refused to interfere with the finding of the jury that the defendant had not exercised due and proper care in giving the certificate which resulted in the imprisonment of a man who was found to be sane. Higinbotham J. said:

> The gist of the charge against the defendant is negligence, it was for the judge to ask the jury whether the defendant did exercise due and reasonable care.[13]

[10] [1925] A.C. 669, 681-2. See also in the Court of Appeal [1924] 2 K.B. 517, 565, *per* Scrutton L.J.

[11] *Child v. Lewis* [1924] 40 T.L.R. 870 is an example of wrongful detention causing consequential economic loss.

[12] Lunacy Statute 1867 (Vic.), s. 11.

[13] (1881) 7 V.L.R. 435, 439.

[14] Earlier authority in support are *Hall v. Semple* (1862) 176 E.R. 151 and *Roberts v. Hadden* (1873) 4 Australian Jurist Reports 167 and 181.

[15] (1881) 7 V.L.R. 435, 438.

The case is interesting in that it decides, or rather assumes, that a duty of care is owed by a medical practitioner in certifying.[14] Referring to the statutory requirements of personal examination, Higinbotham J. pointed out that the purpose of the provision was to protect persons who may not be fit subjects for a mental institution from being sent there by improperly motivated persons.

> It is a most important act that a medical practitioner is required to do, and should be done with all care and caution, and all the inquiry which, under the circumstances, he can reasonably make at the time.[15]

The question whether when a medical practitioner certifies as to a person's mental soundness he owes a duty to such person has been considered in England on several occasions. In *De Freville v. Dill*[16] the plaintiff alleged that the defendant, a medical practitioner, was negligent in giving his certificate under section 16 of the Lunacy Act 1890, and that as a result of his negligence, she was taken, although sane, to a hospital and detained there for two days before she was discharged. After reviewing the authorities,[17] McCardie J. held that the defendant owed a duty of care to the plaintiff. He was not happy with this conclusion. He said, 'I feel I must bow to the weight of opinion'.[18] The policy considerations relevant to determining whether to impose a duty in the certification situation will be considered later in this article.

III. THE DAMAGE REQUIREMENT IN NEGLIGENCE

The third question of interest which arises from *Smith v. Iffla* is: was it necessary for the plaintiff to prove damage? From the report it does not appear that any damage as such was alleged by the plaintiff. £520 damages were awarded for two months' wrongful detention in a lunatic asylum. One basis on which the defendant argued for a new trial was that the damages were excessive. The Full Court unanimously rejected this argument. Higinbotham J. thought the amount was 'a severe penalty for an act done in good faith, without any malicious intention, and the result of haste'.[19] But it was a question for the jury, and the jury had made no mistake. Williams J. said that he did not know how it could be said that '£500 is too much for a man being locked up in a lunatic asylum for two months, by the negligent act of another man'.[20]

(i) A distinction between trespass and case

One of the traditional distinctions between trespass and case is that

[16] [1927] All E.R. 205.
[17] *Hall v. Semple* (1862) 176 E.R. 151; *Everett v. Griffiths* [1920] 3 K.B. 163, [1921] 1 A.C. 631 (House of Lords); *Harnett v. Fisher* [1927] 1 K.B. 402, [1927] A.C. 573 (House of Lords). See 'Certification of Insanity and the Duty of Care', (1937) 11 *Australian Law Journal* 215.
[18] [1927] All E.R. 205, 210.
[19] (1881) 7 V.L.R. 435, 440.
[20] *Ibid.* 442.

trespass is actionable *per se* (*i.e.*, without proof of damage), whereas as a general rule damage is the gist of case. For a tort to be considered actionable *per se* special justification is needed. In respect of trespass to land, for example, actionability *per se* facilitated the determining of disputed rights in land, prevented the acquisition of prescriptive rights, and deterred breaches of the peace. In 1824 Littledale J. said:

> It is true, that in trespass for a wrongful entry into the land of another, a damage is presumed to have been sustained, though no pecuniary damage be actually proved. So in the case of an action for the obstruction of a right of common, or a right of way, any obstruction of that right, is a sufficient cause of action.[21]

Moreover, an intrusion on land is an invasion of privacy, whether damage is committed or not. As there is no tort which protects privacy as such in Australia, it is important that trespass to land be actionable *per se*. Lord Scarman has referred to 'the fundamental right of privacy in one's own home, which has for centuries been recognised by the common law'.[22]

In respect of trespass to the person actionability *per se* facilitated the protection of a person's dignity, mental tranquillity, and freedom. Thus there are well known statements to the effect that 'the least touching of another in anger is a battery',[23] and 'when the liberty of the subject is at stake questions as to the damage sustained become of little importance'.[24]

In actions on the case, as a general rule, damage had to be proved. As Littledale J. said:

> generally speaking, there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case.[25]

Today actions derived from the action on the case are still governed by the same principle. The High Court of Australia has affirmed this in respect of negligence:

> When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce. The essential ingredients in an action of negligence for personal injuries include the special or particular damage — it is the gist of the action — and the want of due care.[26]

(ii) Is negligent trespass actionable per se?

In England the prevailing authority restricts trespass to the person to

[21] *Williams v. Morland* (1824) 107 E.R. 620, 622.

[22] *Morris v. Beardmore* [1980] 2 All E.R. 753, 764. It is uncertain, however, whether trespass to goods is actionable *per se*. See *Everitt v. Martin* [1953] N.Z.L.R. 298, and discussion in Morison W. L., Sharwood R. L., Phegan C. S. and Sappideen C., *Cases on Torts* (5th ed. 1981) 50. Should a defendant be able to touch a plaintiff's statues, read his letters, erase his tapes, use his tooth brush, and feed his dog with impunity? There are privacy and other interests here which ought to be protected.

[23] *Cole v. Turner* (1705) 87 E.R. 907; *cf. Donnelly v. Jackman* [1970] 1 All E.R. 987.

[24] *John Lewis & Co. v. Tims* [1952] 1 All E.R. 1203, 1204. '. . . English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty': *per* Lord Reid in *S. v. McC; W. v. W.* [1972] A.C. 24, at 43.

[25] *Williams v. Morland* (1824) 107 E.R. 620, 622.

[26] *Williams v. Milotin* (1957) 97 C.L.R. 465, 474. The damage requirement is significant in the context of limitation of actions as time may not begin to run against the plaintiff until his cause of action accrues: *e.g. Roberts v. Read* (1812) 104 E.R. 1070.

intentional interferences.[27] In Australia trespass to the person may be committed either intentionally or negligently.[28] Although the cases are concerned only with trespass in the form of direct physical interference (battery), it is likely that by analogy false imprisonment is covered as well. It is possible to argue that one of the advantages for a plaintiff suing in trespass rather than negligence is that he need not prove damage: *i.e.*, negligent trespass is actionable *per se*.[29] This will hardly be an advantage if the plaintiff has suffered actual damage sufficient to found an action in negligence. But in 1966 an article in this Review posed the following question:

> If A due to unintentional but careless conduct spits in B's face, an action in negligence will not lie in the absence of material damage; but may not an action in trespass be available to protect the plaintiff's dignity?[30]

A later article argued that a reader, locked up in a library by a careless attendant, may have an action for negligent false imprisonment.[31] In England, however, since trespass does not lie for negligent conduct, the only cause of action available to the carelessly imprisoned reader is negligence. Unless the reader can prove damage no such action will lie.[32]

(iii) Must damage be proved in the negligent certification cases?

The discussion so far would indicate that damage is the gist of an action for negligent certification. How then is the finding of liability in *Smith v. Iffla* explained? One explanation is that the action for negligent certification constitutes an exception to the rule that damage is the gist of case and its modern derivatives. An alternative explanation is that detention, or loss of freedom of movement, is itself 'damage'. As stated earlier, there is no discussion of this question in *Smith v. Iffla*. Higinbotham J. said:

> The jury are to give an amount which will reasonably compensate a plaintiff for *the effects of the wrong* that has been done to him.[33]

Williams J. said:

> [damages] are given to compensate a plaintiff for *the injury* sustained by him from the wrongful act of a defendant.[34]

[27] *Letang v. Cooper* [1965] 1 Q.B. 232.

[28] *Williams v. Milotin* (1957) 97 C.L.R. 465; *McHale v. Watson* (1965) 111 C.L.R. 384; *Venning v. Chin* (1974) 10 S.A.S.R. 299.

[29] A contrary view was expressed by Lord Diplock in *Letang v. Cooper* [1965] 1 Q.B. 232, 244-5.

[30] Heffey P. G. and Glasbeek H., 'Trespass: High Court versus Court of Appeal', (1966) 5 *M.U.L.R.* 158, 163.

[31] Trindade F. A., 'Some Curiosities of Negligent Trespass' (1971) 20 *International and Comparative Law Quarterly* 706, 710-11.

[32] This is the view adopted by Williams G. and Hepple B. A. in *Foundations of the Law of Tort* (1976) 53, and by Harding A. J. and Tan Keng Feng in 'Negligent False Imprisonment — A problem in the Law of Trespass', (1980) 22 *Malaya Law Review* 29. In *Sayers v. Harlow Urban District Council* [1958] 1 W.L.R. 623 the unfortunate plaintiff who was locked in a public toilet recovered damages in negligence on proof of actual injuries she incurred in attempting to escape. (If the plaintiff had sued for false imprisonment she may not have been able to establish directness.)

[33] (1881) 7 V.L.R. 435, 440 (italics added).

[34] *Ibid.* 441 (italics added).

In *De Freville v. Dill*, McCardie J., after considering various decisions and *dicta*, came to the conclusion that:

> such an action as the present is to be regarded as an action on the case for negligence in certification causing *damage* through detention in a mental hospital without just cause.[35]

In fact there has been some judicial variation in describing the nature of the cause of action for negligent certification; but generally it has been described as an action in negligence, or on the case. Viscount Haldane in *Everett v. Griffiths*[36] described it as 'a wrong bearing analogy to a trespass, and cognizable by what used to be an action on the case'.[37] The doctor in such a case is exercising a power under statute, and the statute gives some guidance as to what he should do. McGarvie J. recently referred to *Everett v. Griffiths* as a case where 'the doctor . . . was exercising a power under a statute and this, and the statutory structure within which the act was done, were borne in mind. These considerations were relevant to the nature of the duty of care. . . . However . . . it was the duty of care at common law which the court held to exist'.[38]

While there is no discussion in the cases of damage as such, the inference may well be drawn that in negligent certification cases the damage or injury is the unlawful detention itself.

(iv) Should loss of freedom be treated as damage?

All torts involve the violation of a right recognised by law. This is simply to say that a wrong is the violation of a right. But a distinction is drawn between the violation of a right *simpliciter (iniuria sine damno)* and the violation of a right through the infliction of damage (*iniuria cum damno*). A third category is damage without the violation of a right (*damnum sine iniuria*). The law of torts is generally regarded as being primarily concerned with compensation for loss or harm. But that is not its only function.

> It has another function . . . which, though traditional, has rarely been more important than now, namely to vindicate constitutional rights. Not every infraction of a right causes damage. That is precisely why the law of trespass does not insist on damage.[39]

Although this distinction is understandable, a problem remains as to what constitutes 'damage'. It would be difficult if not impossible to formulate a satisfactory definition of damage. Obviously it involves a notion of loss or harm and surely could cover any adverse invasion of a person's interests. For legal purposes it would be unhelpful but accurate to say that damage is what the law recognises as damage. Thus the notion of damage may vary from tort to tort, and from torts to other areas of law.

[35] [1927] All E.R. 205, 208 (italics added). In *Hall v. Semple* (1862) 176 E.R. 151, 159 Crompton J. instructed the jury in terms of damage to the plaintiff (two days in an asylum).
[36] [1921] 1 A.C. 631.
[37] *Ibid.* 658.
[38] *Seale v. Perry* [1982] V.R. 193, 235.

It has been said that in general 'any damage which is not of too vague a character to be estimated in money is recoverable'.[40] One still has to turn to the cases to find out what is damage and what is too vague for legal purposes. For example, the courts were originally reluctant to recognise nervous shock as damage for the purposes of negligence; in time recognition was granted provided the plaintiff suffered from a provable illness or recognised psychiatric disorder. Thus in 1937 Dixon J. said of a neurasthenic breakdown: 'I have no doubt that such an illness without more is a form of harm or damage sufficient for the purpose of any action on the case in which damage is the gist of the action'.[41] But it is still part of the law of negligence that 'sorrow does not sound in damages'.[42] The law in that area does not recognise sorrow as an independent head of damage, but there is no conceptual reason why it should not. In contractual cases where breach is actionable *per se*, damages may be awarded for injured feelings.[43] In assault damages are awarded for a form of mental anxiety, *i.e.* apprehension of an imminent battery.

Freedom of movement is certainly an interest which the law of torts protects and there does not seem to be any conceptual reason why the violation of this or any other interest should not be regarded as damage. Loss of personal liberty is almost as grave a deprivation as loss of life itself. Atkin L.J. described the imprisonment of a sane man in an asylum as a 'terrible injury' and an 'unspeakable torment'.[44] Loss of liberty is in fact regarded as damage in actions for malicious prosecution. This tort is primarily concerned with protecting a plaintiff's interest in freedom from improper litigation. But it may also incidentally protect his physical freedom. Since it is derived from the action on the case, proof of damage is an essential element. Since it is not trespass the damage need not be directly caused by the defendant. But it must be caused by the initiation of judicial proceedings by the defendant maliciously and without reasonable and probable cause. The damage is constituted by harm to the plaintiff's reputation, person, liberty, or property.[45] It is true that the plaintiff must prove that the proceedings terminated in his favour, *i.e.* he was not imprisoned at the termination of the proceedings. But often a person who has been maliciously prosecuted will be deprived of his freedom during or before the trial. In fact it appears that the plaintiff need only prove that he was put in jeopardy of imprisonment by the proceedings. Moreover, the plaintiff need only prove the proceedings terminated in his favour if such termination is legally possible. Thus the victim of an arrest warrant,

[39] Weir, *op. cit.* 258.
[40] Morison, Sharwood, Phegan and Sappideen, *op. cit.* 450.
[41] *Bunyan v. Jordan* (1937) 57 C.L.R. 1, 16.
[42] *Mount Isa Mines Ltd v. Pusey* (1971) 125 C.L.R. 383, 394 *per* Windeyer J.
[43] *E.g. Jarvis v. Swan Tours Ltd* [1973] Q.B. 233; *Cox v. Philips Industries* [1976] 3 All E.R. 161.
[44] *Everett v. Griffiths* [1920] 3 K.B. 163, 199, 223.
[45] *Savile v. Roberts* (1698) 87 E.R. 725.

maliciously procured to secure his attendance at court as a witness, may have an action.[46]

Earlier in this article it was suggested that it was not false imprisonment to dig a pitfall into which the plaintiff falls. The interference in such a case is not direct, even though the defendant may have intended the result. Assuming the plaintiff suffers no personal injury but is merely confined to the hole for a period of time, it surely cannot be argued that he would fail in an action on the case because he suffered no damage.[47] The damage is constituted by his loss of freedom.

If it is not correct to classify loss of freedom as damage, it must be maintained that cases such as *Smith v. Iffla* and *De Freville v. Dill* represent an exception to the rule that in an action on the case the plaintiff must prove damage. Other exceptions exist, for example, libel and breach of contract.[48]

(v) Should negligently inflicted loss of freedom be actionable?

It can be argued that actionability *per se* has no place where the plaintiff is complaining of negligent behaviour. Harari in his admirable book on negligence took this view.[49] He presumed that a person who brought an action sounding in trespass to the person for an *unintentional* but direct and negligent contact with his person from which he sustained no actual injury, would be laughed out of court. The court would either apply the maxim *de minimis non curat lex* or find that the plaintiff had not shown negligence because he had not shown damage, thereby 'confusing the complex breach of duty plus damage with breach of duty *simpliciter*'.[50] Harari considered that the plaintiff who complained of direct *intentional* contact should be able to recover. He said:

> where trespass is brought for an intentional contact which did not result in actual damage, and plaintiff recovers, he does so for the affront offered to him: in trespass to the person, for the indignity, etc., inflicted upon him, and in trespass to chattels, for the usurpation of his rights in the object in question. There is no affront in a negligent contact.[51]

Some definitions of battery require that the contact be either harmful or offensive[52] whereas others state that contact simpliciter is sufficient.[53] It is possible to adopt either definition and still maintain that battery is action-

[46] *Roy v. Prior* [1971] A.C. 470. In such a case the defendant maliciously institutes some process short of actual prosecution: the plaintiff's action is for malicious abuse of the judicial process. *Cf. Varawa v. Howard Smith Co. Ltd* (1911) 13 C.L.R. 35.

[47] There was formerly an action on the case for the intentional infliction of injury by indirect means, *e.g. Bird v. Holbrook* (1828) 130 E.R. 911. Today the broad principle in *Wilkinson v. Downton* [1897] 2 Q.B. 57 could be applied.

[48] See Williams and Hepple, *op. cit.* 55-6.

[49] Harari A., *The Place of Negligence in the Law of Torts* (1962) 145.

[50] *Ibid.* Lord Diplock may have been guilty of this 'confusion' in *Letang v. Cooper* [1965] 1 Q.B. 232, 244-5. See *supra* n. 29.

[51] Harari A., *loc. cit.*

[52] *E.g.*, Fleming, *The Law of Torts* (6th ed. 1983) 23.

[53] *E.g., Street on Torts* (6th ed. 1976) 18.

able *per se*, because 'actual damage' need not be proved: mere contact or offensive contact is sufficient.

One difficulty with the foregoing reasoning is that it assumes that contact or even offensive contact is not damage. As stated earlier there is no conceptual reason why it should not be regarded as damage.[54] Sometimes judges say the damage is presumed. In a recent case Stephenson L.J. said:

> Whereas damage is presumed in trespass and libel, it is not presumed in negligence and has to be proved. There has to be some actual damage.[55]

If this means that in trespass non-existent damage is imputed, then it is a fiction that is best avoided. To say, for example, that when A walks over B's land damage is imputed serves no purpose. One can say this intrusion is actionable either because damage does not have to be proved or because, if damage does have to be proved, the intrusion in itself is damage. Under present law nominal damages for torts actionable *per se* are awarded not as compensation for loss but as a non-compensatory means of signifying the infringement of a right. In some cases the plaintiff might be equally well satisfied with an injunction, or a declaration — especially if he is seeking to protect or determine a property right. But he will often wish to claim substantial damages. He may, of course, establish actual damage. Where this damage is difficult to quantify in money terms the damages are said to be 'at large'. For items of loss such as loss of freedom, insult, distress, *etc.* the court must make an intuitive rather than a mathematical assessment. Such items of loss should be proved rather than presumed. But a distinction should be drawn between the difficulty of assessing damages for proven loss, and the difficulty of proving loss. For example, in libel cases it is difficult for the plaintiff to prove actual loss of reputation. Hence he need only prove the likelihood as distinct from the actuality of loss of reputation.[56] In such a case it is fair to say that damage is presumed, as substantial damages may be awarded without proof of actual loss. But even in such a case, the presumption may be rebutted.

The violation of a person's physical integrity or the restriction of his freedom of movement should be regarded as damage. Instead of saying as Holt C.J. said in *Ashby v. White*:[57] 'Every injury imports a damage', one might go so far as to say: 'every injury is a damage'. But whether one accepts this novel approach or prefers to regard the interferences in question as actionable *per se*, the question remains: should the negligent as distinct from the intentional *infliction of these interferences* give rise to liability? It is submitted that the answer to this question should be, yes. If the

[54] *Cf. le dommage moral* in French law: Amos M. S. and Walton F. P., *Introduction to French Law* (3rd ed. 1967) 209.

[55] *Forster v. Outred and Co.* [1982] 1 W.L.R. 86, 94. See text accompanying n. 21 *supra* for a similar judicial statement in respect of trespass to land.

[56] See: The Law Reform Commission Report No. 11, *Unfair Publication: Defamation and Privacy* (1979) paras 80-1.

[57] (1703) 92 E.R. 126, 137.

interference is intentional but trivial only small damages should be awarded or the case may be a suitable one for the application of the *de minimis* rule. Costs may be awarded against an unmeritorious albeit successful plaintiff. If the circumstances are aggravated, for example, the plaintiff is wounded, or insulted, or confined for a lengthy period, these will be taken into account when awarding compensatory damages. There is no reason why these same principles should not apply to interference resulting from negligent behaviour. Rather than state categorically as Harari does that there is no affront in negligent contact, the matter of affront should be taken into account in assessing damages. Equally, if not more so, the negligent infliction of loss of freedom of movement should give rise to a claim for damages. The damages will depend on the duration of the loss of freedom, the degree of humiliation, illness resulting, and so forth. It is true that the victim's degree of humiliation or affront may be affected by his knowing whether the defendant interfered with him intentionally or negligently, but this goes to assessment of damages. Moreover the presence of malice on the part of the defendant may exacerbate the hurt to the plaintiff's feelings.

Prima facie negligently inflicted loss of freedom should be actionable. The reader locked in the library or the visitor confined to the pitfall should have a claim against the person who either intentionally or negligently brought about his loss of freedom. In the certification cases the defendant medical practitioner may in fact intend that the plaintiff lose his freedom. In *Smith v. Iffla*, for example, the negligence count in the plaintiff's declaration commenced thus: 'That the defendant . . . negligently . . . and with intent to cause the plaintiff to be imprisoned . . .'. But the medical practitioner in certification cases acts in the exercise of a statutory power. He will be held liable only if he is negligent in the exercise of that power, *i.e.* if he was negligent in the way he came to the conclusion that the plaintiff should lose his freedom.

IV. NEGLIGENCE VERSUS NEGLIGENT TRESPASS

If it is agreed that negligently inflicted loss of liberty is and *prima facie* should be actionable (whether the loss is regarded as damage or not), a final question remains: is the appropriate tort negligence or (negligent) trespass? The overlaps between trespass and negligence and the advantages of the former over the latter cause of action have given rise to a quite extensive literature. From the plaintiff's point of view, the advantage of trespass is that in non-highway cases the burden of disproving fault (*i.e.* intention or negligence) is on the defendant.[58] It has been argued in this article that the supposed advantage that trespass is actionable *per se* is not

[58] Bailey R. J., 'Trespass, Negligence and Venning v. Chin' (1976) 5 Adelaide Law Review 402; Fridman G.H.L., 'Trespass or Negligence?' (1971) 9 *Alberta Law Review* 250. See also Heffey and Glasbeek, *op. cit.* and Trindade, *op. cit.*

an advantage over negligence at all. Two further matters will now be considered: the duty concept and the remoteness test.

(i) *The duty concept.* The problem of negligent infliction of loss of freedom of movement can arise in a variety of contexts. The tort of negligence provides the degree of flexibility required for dealing with such variety. Whether negligence as an element of trespass involves a requirement of duty of care is a debatable question. But it is clear that the concept of duty in negligence allows for judicial assessment of all the circumstances.[59] According to Lord Wilberforce, the first question one has to ask is

> whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises.[60]

This relationship of proximity could no doubt be established between, for example, a library attendant and the reader he locks in the library, or a medical practitioner and the person he certifies to be insane. If that is so the second question is 'whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise'.[61] In respect of the library attendant's duty the answer is undoubtedly no; but in respect of the medical practitioner the answer is more controversial.

In jurisdictions such as Victoria where patients are committed to mental institutions by medical recommendations, it is the medical practitioner who determines the fate of the patient. Under section 42(1) of the Mental Health Act 1959, a person may be admitted into a psychiatric hospital upon the production of a request under the hand of some person and a recommendation of a medical practitioner. Section 42(3) provides that a medical practitioner 'shall not make a recommendation . . . unless after he has personally examined the person he is of the opinion that the person appears to be mentally ill and that he should be admitted for observation into a psychiatric hospital'. Section 43 provides in similar terms for admission to a mental hospital, except that the recommendation of two medical practitioners is required. Under section 104 the medical practitioner must specify in his recommendation the facts upon which he has formed his opinion 'distinguishing . . . facts observed by himself from facts communicated to him by others'. Non-compliance with the statutory requirements can give rise to criminal liability under the statute.[62]

[59] The flexibility of the duty concept is stressed by Atkin L.J. in *Everett v. Griffiths* [1920] 3 K.B. 163, 213, 216.

[60] *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-2.

[61] *Ibid.* 752.

[62] Mental Health Act 1959, ss 105, 110. The Report of the Consultative Council on Review of Mental Health Legislation (Victoria, 1981) recommends that the admission of a formal patient to a psychiatric hospital should in the first instance be for observation, on the recommendation of a medical practitioner: paras 5.14(i), 13.5(i). No recommendation is made in respect of the civil or criminal liability of such medical practitioner.

Should a doctor who negligently recommends under the statute be liable in a civil action? In *De Freville v. Dill*, McCardie J. only imposed a duty of care on the doctor because he felt bound by authority.[63] The reason for his disquiet is found in the following passage in his judgment:

> During the past seven years a number of medical men, who acted in perfect good faith, have been exposed to the most prolonged, harassing and costly litigation on the allegation that they acted without reasonable care in a matter which is the most difficult, delicate and indefinite in the whole range of medical practice. It may well be, as was stated at the trial before me, that, as a result of past litigation, many doctors have refused and will refuse to take any part whatever in the work of certification because of the perils and anxieties of litigation which may follow.[64]

On the other hand, Atkin L.J. in *Everett v. Griffiths*[65] put exactly the opposite view. He said:

> I doubt whether any person, taking upon himself the painful responsibilities imposed by the Lunacy Acts, was ever encouraged to act by the consideration that he could be negligent with impunity, or will be deterred from acting by the consideration that if he is negligent he will have to pay damages. It is not by such motives that public or professional men in this country are swayed.[66]

Certainly in *Smith v. Iffla* the court showed no diffidence or regret in imposing civil liability. As stated earlier, the defendant's negligence in that case consisted in not making an adequate personal examination of the patient. The Lunacy Statute[67] at that time as now required the medical practitioner to personally examine the person to whom the certificate related, and to distinguish in the certificate facts observed by himself from those observed by others.[68] The judgments of the Supreme Court reveal no discussion of whether a duty of care should be imposed or not. Holroyd J. seemed to consider it was essential to impose liability in order to ensure that the statute was complied with. He said:

> I think the defendant was not justified in relying entirely upon the information of others, and giving a certificate upon that. He was thus clearly guilty of negligence, and was frustrating the manifest intention of the Act of Parliament. If we were to disturb the verdict . . . we should be saying that an Act of Parliament may be violated with impunity.[69]

In the United Kingdom the legislature has provided that no action can be brought against a medical practitioner for negligently recommending a mentally disordered patient for hospital treatment without leave of the High Court. Such leave will not be given unless the court is 'satisfied that there is substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care'.[70]

[63] [1927] All E.R. 205. He preferred the dissenting view of Scrutton L.J. in *Everett v. Griffiths* [1920] 3 K.B. 163 (Court of Appeal).
[64] [1927] All E.R. 205, 211. See further *Everett v. Griffiths* [1920] 3 K.B. 163, 197-8, *per* Scrutton L.J.
[65] [1920] 3 K.B. 163.
[66] *Ibid.* 222-3.
[67] Lunacy Statute 1867 (Vic.).
[68] *Ibid.* ss 11, 12.
[69] (1881) 7 V.L.R. 435, 443.
[70] Mental Health Act 1959 (Eng.), s. 141(2). See also Mental Health Act 1963 (Tas.), s. 114(2).

Another solution would be to require the plaintiff to prove that the medical practitioner acted maliciously. The analogy here is with malicious prosecution. The burden on a plaintiff attempting to establish the tort of malicious prosecution is considerable as society has an interest in the efficient enforcement of the criminal law. This requires, as Fleming states, that 'private persons, who co-operate in bringing would-be offenders to justice, should be adequately protected against the prejudice which is likely to ensue from the termination of the prosecution in favour of the accused'.[71] It is doubtful if the interest of society in protecting medical practitioners who certify under mental health legislation is so strong that a similar qualified immunity should be granted to them. The courts on the whole have shown no inclination to grant such immunity. In *Hall v. Semple*[72] it was argued that if the forms of the Act had been pursued — at all events *bona fide* — the defendant could not be liable. But Crompton J. intimated that he thought the question would not turn on malice but on negligence, and the words 'falsely and maliciously' in the declaration were struck out. In *Smith v. Iffla*, words in the declaration indicating that the defendant *knew* the plaintiff was sane were struck out. Moreover, Higinbotham J. was critical of the use of the phrase 'without reasonable and probable cause' in the declaration. In the course of argument he said: 'The court would be slow to extend to other actions the rule applicable to actions for malicious prosecution, that the Judge is to say whether, on the facts, there was reasonable and probable cause'.[73]

The better view, it is submitted, is that no restrictions should be placed on actions against medical practitioners for making negligent recommendations under mental health legislation. As Crompton J. directed the jury in 1862, 'it is of great importance that they should very carefully sign certificates of this kind, and that personal liberty should not be interfered with improperly by an abuse of the power which the law has entrusted to these parties'.[74] It is true, as he said, that very often 'it is a difficult and delicate matter to be decided upon'[75] but this goes to standard of care. The medical practitioner, who may not be a specialist in the area, will not be liable for mere errors of judgment or mistakes which do not connote carelessness according to professional standards.[76]

[71] Fleming, *op. cit.* 576.

[72] (1862) 176 E.R. 151, 157. Statutory powers are not frequently held to impose a requirement of honesty only. See Craig P. P., 'Negligence in the Exercise of a Statutory Power' (1978) 94 *Law Quarterly Review* 428, 431, 453; de Smith S. A., *Judicial Review of Administrative Action* (3rd ed. 1973) 295-6.

[73] (1881) 7 V.L.R. 435, 436; see also 439.

[74] *Hall v. Semple* (1862) 176 E.R. 151, 157.

[75] *Ibid.*

[76] Contrast the absence of any immunity for reasonable mistake as to insanity in exercising the common law privilege to apprehend an insane and dangerous person. See *supra* n. 6. Reasonable mistake should surely not negate the privilege any more than it does under the modern statutory reform of the law of arrest: Crimes Act 1958 (Vic.), ss 458, 462.

(ii) *The remoteness test.* One disadvantage of trespass from the plaintiff's point of view is that he must prove *direct* interference as an ingredient of the tort. Negligence is not limited by this requirement. We have seen that the reader locked in the library by the careless attendant may sue in false imprisonment; but the trespass action was struck out in *Smith v. Iffla*, and withdrawn in *De Freville v. Dill*, probably for lack of directness. Assuming, however, that a wrongful imprisonment is made out in a trespass action, what is the test of remoteness governing consequences of that imprisonment? It was pointed out earlier that the test of remoteness in trespass may be 'directness' or 'reasonable and natural consequence'.[77] How does this compare with the test of foreseeability which prevails in negligence?

In 1961 the Privy Council stated in *The Wagon Mound (No. 1)*[78] that the reasonable foresight test 'corresponds with the common conscience of mankind'[79] and the directness test 'leads to nowhere but the never-ending and insoluble problems of causation'.[80] But the extent to which either test favours the plaintiff or the defendant, or corresponds with the 'common conscience of mankind',[81] depends largely on how the courts apply (or manipulate) the tests.

In cases in which the plaintiff sues a medical practitioner for negligent certification there is usually some intervening act of a third party following the certification, and it is this act which finally brings about the plaintiff's loss of freedom. The intervening act may be that of a police officer, a hospital superintendent, or a judicial or quasi-judicial tribunal. In the cases reported in this context, before the Privy Council adopted the foreseeability test of remoteness in 1961, the analysis of remoteness was concerned with whether the intervention constituted a new and independent cause. This is the same kind of analysis one would expect in a trespass case on the issue of remoteness, *i.e.* a test of direct causation.[82] Considerable judicial diversity is evident in the application of this test of remoteness. Thus in the Court of Appeal in *Everett v. Griffiths*[83] Scrutton L.J. said:

> the cause of the plaintiff's detention is the independent opinion of the justice, not the certificate of the doctor, though that may be evidence on which the justice after consideration acts.[84]

[77] *Harnett v. Bond* [1925] A.C. 669; *Hogan v. Wright* [1963] Tas.S.R. 44 (trespass to land). But in *McIntosh v. Webster* (1980) 30 A.C.T.R. 19, 31, O'Connor J. applied without discussion the foreseeability test of remoteness, holding the defendants liable for the foreseeable consequences of an illegal arrest: taking of photograph and fingerprints by third persons. This approach was affirmed on appeal by the Full Federal Court: *Webster v. McIntosh* (1980) 32 A.L.R. 603, 608.

[78] [1961] A.C. 388.

[79] *Ibid.* 423.

[80] *Ibid.*

[81] *Ibid.*

[82] See *Harnett v. Bond* [1925] A.C. 669.

[83] [1920] 3 K.B. 163.

[84] *Ibid.* 192. See also Lord Reading C.J. at first instance; and Scrutton L.J. again in *Harnett v. Bond* [1924] 2 K.B. 517, 565 (C.A.).

Atkin L.J., on the other hand, took the opposite view. He said:

> the certificate is given in the terms that the doctor is of opinion that the plaintiff is of unsound mind, in an inquiry which is to determine whether the plaintiff shall be confined or not, the defendant well knowing, as the fact is, that his certification is a condition precedent to such detention. I cannot doubt that, if the certificate is wrongfully given, the damages for detention may be the natural and direct result of the wrong.[85]

In *De Freville v. Dill*, McCardie J. held that the defendant who certified that the plaintiff was insane was the cause of her detention despite the intervention of a justice's order. He said: 'If I had been freed from authority, I should have thought, myself, that the effective cause of that detention was the order of the justice, and not the certificate of the doctor'.[86]

The remoteness issue was not considered in *Smith v. Iffla*, but it did arise in the earlier Victorian case of *Roberts v. Hadden*.[87] There the plaintiff was committed to an asylum by virtue of an (irregular) order of the justice, acting in reliance on the certificate of the defendant medical practitioner. Barry J. held that the plaintiff had failed to give any evidence of want of care on the part of the defendant. It was argued by the plaintiff that the fact that the defendant reported the plaintiff to be a 'dangerous lunatic' rendered the defendant liable for what followed. Barry J. rejected this argument, saying:

> If a report that the plaintiff was a dangerous lunatic could have been legally followed by what was done it might be so. But the magistrate was no more justified in acting on that certificate than he would have been justified in acting on a report that the plaintiff was a felon. It was the act of the justice only . . . and though the report might have been *causa sine qua non*, it was clearly not *causa causans*.[88]

Barry J. was apparently of the opinion that if the justice had been acting within jurisdiction the medical practitioner could have been held liable if he had been proved negligent.

In *Harnett v. Fisher*[89] the plaintiff was imprisoned under a justice's reception order following the defendant's certification. The judge at first instance, Horridge J., held that 'the negligent giving of the certificate was a direct cause of the reception order and detention'.[90] He also considered the result was reasonably foreseeable:

> In this case the doctor, who was guilty of the original negligence, *ought reasonably to have anticipated*, as the result of his negligence, the making of the reception order, *and therefore* . . . the making of the order was not the intervention of a fresh independent cause, and the defendant is . . . liable for the consequences of his negligence, even though the actual order under which the plaintiff was received was made by the justice.[91]

[85] *Everett v. Griffiths* [1920] 3 K.B. 163, 219. See also Lord Finlay in the House of Lords: [1921] 1 A.C. 631, 667-8.
[86] [1927] All E.R. 205, 211. He preferred the approach taken in *Harnett v. Bond* [1925] A.C. 669, but felt constrained by later authority such as *Everett v. Griffiths* [1921] 1 A.C. 631.
[87] (1873) 4 *Australian Jurist Reports* 167 and 181.
[88] *Ibid.* 182.
[89] [1927] 1 K.B. 402; [1927] A.C. 573 (House of Lords).
[90] [1927] 1 K.B. 402, 410.
[91] *Ibid.* (italics added).

The general conclusion is that if a medical practitioner negligently certifies that a person is mentally ill and a third person acting on that certification orders or effects the confinement of that person, the medical practitioner is liable in negligence. According to pre-*Wagon Mound* terminology, the confinement is a 'direct' consequence; according to *Wagon Mound* terminology it would be described as 'reasonably foreseeable'. Can the decision in *Harnett v. Bond* be reconciled with this conclusion? That case, it will be recalled, concerned an action for false imprisonment. The House of Lords held that Dr Bond, the Commissioner, was only liable for the detention of the plaintiff for the period before the arrival of the attendants of Dr Adam, the manager of a private asylum. The subsequent detention was due to the reassumption of control over the plaintiff by Dr Adam. McGregor states:

> The dividing line between these two types of case, that of the Commissioner sued for false imprisonment and that of the doctor sued for negligent certification, is a thin and precarious one. Atkin L.J. in *Everett v. Griffiths*[92] thought the distinction a sound one, apparently on the ground that, whereas the subsequent decision by court or manager to detain the plaintiff would be influenced by the doctor's certificate, it would not be influenced by the fact of the false imprisonment as such.[93]

It should be noted, however, that Dr Bond not only detained the plaintiff, but advised Dr Adam that the plaintiff was not in a fit state to be at large. This is at least similar to a certification of mental illness.

In trespass 'directness' is, as we have seen, an element of the tort. A is liable to B in false imprisonment if he has directly imprisoned him. Thus Dr Bond was liable to Harnett for detaining him at his office. If indirect means are used by A to detain B the action must be in case or a modern equivalent. Thus if A maliciously initiates a prosecution or other judicial process against B to his detriment, B's action will be for malicious prosecution or abuse of process. The role of the court in such a case makes the interference with the plaintiff an indirect one, as the court acts not as an agent of the prosecutor but in the exercise of its own independent discretion. This 'indirectness' is certainly not a reason for calling the consequential effect on the plaintiff too remote. The main point of the tort is to protect individuals from being harassed by (the indirect means of) unjustifiable litigation. Equally, in the negligent certification cases the main reason for imposing a duty of care on the doctor is that there is a risk that if he is not careful he may make a mistake in his recommendation, and a third person may, albeit in the exercise of an independent discretion, act on the recommendation to the plaintiff's detriment.[94] In this sort of case, as in malicious prosecution, strictly speaking no question of remoteness arises. 'The question as to remoteness of damage must always be carefully distinguished from the

[92] [1920] 3 K.B. 163, 219 (C.A.).
[93] *McGregor on Damages* (14th ed. 1980), 84.
[94] Compare cases concerned with liability for intervening culpable acts such as *Stansbie v. Troman* [1948] 2 K.B. 48 and *Dorset Yacht Co. v. Home Office* [1970] A.C. 1004.

preliminary question whether the defendant has been guilty of any wrongful act at all.'[95] Whereas in trespass lack of directness is a bar to establishing the elements of the wrongful act, this is not the case in malicious prosecution or negligent certification. In *Everett v. Griffiths*[96] Atkin L.J. considered that had the action been framed in false imprisonment the result would have been different 'on the principle of cases where the prosecutor has been held not to be liable for imprisonment ordered by the judicial decision of the Court'; but in actions 'for negligence, different considerations apply'.[97] One consideration is that the defendant is held to be negligent because he failed to guard against the very eventuality which materialised.

Once the wrong is established — whether it be false imprisonment, malicious prosecution or negligent certification — a question may arise as to whether any consequences of that wrong are too remote. In *Harnett v. Bond*, where the wrong was established, the test of remoteness was said to be 'directness'. On that test, was the plaintiff's loss of freedom following Dr Bond's wrongful detention too remote? The court considered it was. As Viscount Cave said:

> The retaking and confinement were the independent acts of Dr. Adam, and each of them was a novus actus interveniens sufficient to break the chain of causation.[98]

Whether one agrees or not with this particular application of the directness test to the facts of the case, the principle is not inconsistent with the prevailing view that in the case of negligent certification the defendant is liable despite the 'independent acts' of the court or other third party. The question of remoteness in the strict sense has not arisen in the negligent certification cases. Remoteness is concerned with the consequences of the wrong, *i.e.* the consequences of the negligently inflicted loss of freedom.

If the test of remoteness in trespass is directness, and in negligence foreseeability, is this difference justifiable? If one were to apply the foreseeability test to the facts of *Harnett v. Bond*, it could no doubt be concluded that Dr Bond ought reasonably have anticipated that Harnett might be further detained by Dr Adam. Would such a result correspond with the 'common conscience of mankind'[99] or is it an example of a court having been led 'to nowhere but the never-ending and insoluble problems of causation'?[1] It is easy to dismiss the old vocabulary of questions which asked whether the direct chain of causation had been broken by an independent cause. But foreseeability has not proved to be a panacea in the troubled world of remoteness. It is apparent that foreseeability is a neccesary condition of liability in negligence, but it is not always a sufficient test of

[95] Heuston R. J. V. and Chambers R. S., *Salmond and Heuston on the Law of Torts* (18th ed. 1981) 505.
[96] [1920] 3 K.B. 163.
[97] *Ibid.* 219.
[98] [1925] A.C. 669, 682.
[99] *The Wagon Mound (No. 1)* [1961] A.C. 388, 423.
[1] *Ibid.*

remoteness. A voluntary intervening act may well be foreseeable but still regarded as a suitable reason for absolving the defendant from responsibility.[2] 'A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee.'[3] A judge may end up drawing the line where 'policy', 'common sense', 'instinct', or even the discredited directness test dictates. Life throws up too many complicated situations for any test of remoteness to be acceptable in all circumstances. Broadly speaking a defendant should be held responsible for interventions by third parties and other eventualities which fall within the risk created by his wrong, unless in the circumstances it is not reasonable so to hold. The wrong may be false imprisonment or negligence, but the test of remoteness governing the consequence of that wrong should be the same.

CONCLUSION

To the extent to which the historical division of torts into trespass and case has survived, the law is bedevilled with some unsatisfactory distinctions. The direct-indirect distinction is unsatisfactory, so also is the varying of the incidence of burden of proof in respect of fault, and the differing tests of remoteness of damage. This article has emphasised yet another unsatisfactory distinction: the rule of actionability *per se* in trespass and the 'actual damage' requirement in case. It was argued that despite the latter requirement a plaintiff can sue in negligence for the negligent infliction of loss of physical freedom, relying on this latter loss as 'damage'. But whether loss of freedom be regarded as 'damage' or not, a plaintiff suing for negligent certification is not dependent on an action for negligent trespass with its supposed advantage of actionability *per se*.

The general conclusion is that all these distinctions should be abandoned. Judicial discontent with them has been expressed from time to time. It has been stated that '[t]hese old forms of pleadings have long since been abolished and swept away and should not now govern the judicial approach';[4] and that '[t]he difference appears . . . to originate in history rather than to be based on logic'.[5]

In England, Lord Denning has attempted a new classification:

> Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery. . . . 'The least touching of another in anger is a battery', *per* Holt C.J. in

[2] See Millner M. A., 'Novus Actus Interveniens: The Present Effect of Wagon Mound' (1971) 22 *Northern Ireland Legal Quarterly* 168; *Lamb v. Camden London Borough Council* [1981] 2 W.L.R. 1038.

[3] *McKew v. Holland* [1969] 3 All E.R. 1621, 1623.

[4] *Foth v. O'Hara* (1958) 15 D.L.R. (2d) 332, 336.

[5] *Berry v. British Transport Commission* [1962] 1 Q.B. 306, 339 (*per* Ormerod L.J. referring to the distinction between case and other actions).

> *Cole v. Turner*.[6] If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence. . . .[7]

This reclassification, however, still leaves us with the direct-indirect distinction in respect of intentionally inflicted injuries. Trespass is said to be restricted to direct intentional injuries, whereas presumably intentional injuries indirectly effected will be covered by some other tort derived from case. If Lord Denning intends that the former be actionable *per se* and the latter dependent on proof of damage, one is compelled to ask: why? It is not a satisfactory answer to say that in trespass the plaintiff recovers for the affront offered to him, and that there can be no affront where the interference is indirect.[8] Moreover it has been argued in this article that to vary the requirement of proof of damage according to whether the action is for a negligent or intentional act is not satisfactory.

If an interest of the plaintiff which the law considers valuable has been violated by the defendant, then it can be said that the plaintiff has suffered 'damage'. This means that the actionability *per se* rule has no role to play in trespass. If the defendant has caused damage, either intentionally or negligently, he should be *prima facie* liable, whether the damage is caused directly or indirectly. Thus if the plaintiff suffers physical contact or loss of physical freedom and this is the result of the intentional or negligent behaviour of the defendant, *prima facie* he should have an action. The damages awarded may vary from small to substantial depending on all the circumstances. Damages are 'at large' in respect of matters such as duration of interference, degree of insult, *etc.* If the damage is trivial and the action unmeritorious then the *de minimis* principle could be applied; or, in the discretion of the court, the plaintiff should be deprived of his costs and in some cases even required to pay those of the defendant. While it may be debated whether the burden of proof in respect of fault should rest on the plaintiff or the defendant, it should be the same in all cases. Where abuse of the judicial process is alleged 'malice' should continue to be an ingredient of the tort.

It will be noticed that the above classification still retains the notions of intentionally and negligently inflicted damage. Is the distinction between negligent and deliberate harm worth maintaining? If negligence is defined as a failure to meet a standard of reasonable behaviour, then to intentionally inflict damage must surely be negligence. But if negligence is understood as being a state of mind, then negligence and intention are mutually exclusive. As Millner states in respect of negligence:

[6] (1705) 87 E.R. 907.
[7] *Letang v. Cooper* [1965] 1 Q.B. 232, 239.
[8] In Harari *op. cit.* 145, n. 93, the author states that 'the nature of the affront is different where it consists of anything which might be called "an application of force" (*i.e.*, a direct contact), and where the contact is brought about indirectly'. But even if it is 'different' does this justify a different rule in respect of proof of damage?

> in contrast with an intentional act, the consequences are not foreseen (inadvertent negligence), or, even though they are foreseen, at least as a possibility, they are not desired (advertent or conscious negligence). . . .[9]

If a plaintiff sues in negligence, the defendant should not be able to defend himself by saying that he intended the harm. The point is that he is guilty of an intentional breach of the duty of care. But because there is an important moral distinction between the states of mind of the person who desires harm and of the person who does not, it is probably worth maintaining the distinction between intentional and negligent infliction of harm. A greater degree of moral turpitude attaches to a finding of deliberate wrongdoing, as distinct from carelessness, and an award of exemplary damages may be appropriate. At least it is a rational distinction unlike the other distinctions which this article has suggested should be abandoned.

[9] Millner M. A., *Negligence in Modern Law* (1967) 171. 'An action for intentional trespass to the person . . . cannot be regarded as an action of negligence': *per* Cooke J. in *Long v. Hepworth* [1968] 1 W.L.R. 1299, 1302.