Torts: Remoteness of Damage and the Intervening Wrongdoer

John Kidd*

The facts of the decision of the English Court of Appeal in *Lamb v. Camden London Borough Council (Lamb)*[1] are not only particularly vivid, so vivid indeed as to rival the interrogative capacity of even the most imaginative torts examiner, but will also no doubt provide grist to the mill of future generations of historians as to contemporary social conditions in accommodation starved London. More immediately, the decision is of importance as a contribution to a notoriously difficult conceptual area of tort; that of causation and remoteness of damage, in particular the circumstances in which a tortfeasor might be liable for damage, the immediate cause of which was the intervening intentional wrongdoing of other persons. Whether the case facilitates an understanding of that area is, in the light of contrasting judicial views expressed therein, open to question. What is beyond doubt is that these views should serve to re-emphasise the practical limitations of traditional formulae in resolving such difficulties.

The plaintiffs in *Lamb* were the owners of a house "of quality"[2] in the prestigious London suburb of Hampstead. In 1972 the house had been let furnished to a tenant. In October 1973, the defendants, the local council and their contractors, while replacing a sewer in the adjoining road, fractured a water main. Escaping water weakened the foundations of the house, so causing subsidence which in turn caused the walls to crack. The house thereby became unsafe to live in and the tenant moved out. In 1974 the first plaintiff, who resided in New York, U.S.A., visited the house, made arrangements for repairs, which were in fact performed during the period 1977 to 1979, moved the furniture into storage, and then returned to New York, U.S.A.

As an unoccupied and unfurnished house in an inner London suburb it was, in the words of Lord Denning M.R., "a sitting target for squatters".[3] The target did not go unnoticed when, in October 1974, the first invasion of squatters occurred. Those squatters were evicted in January 1975, after which the plaintiffs, the second plaintiff being father of the first and a part owner of the house, made an attempt to board up the house at a cost of ten pounds. Such fragile precautions proved inadequate to guard against a further and more serious invasion which can best be described in the words of Lord Denning M.R.:[4]

> " ... in the summer of 1975, there was a second invasion of squatters. A shifting population. As some went out, others came in. [The plaintiff's] agents did what they could to get them out. The electricity and gas were

* LLB (Leeds), Senior Lecturer in law at the University of Queensland.

1. [1981] 1 Q.B. 625.
2. Lord Denning M.R.'s description: *ibid.*, at 632.
3. *Ibid.*, at 633.
4. *Ibid.*

> cut off. But to no avail. The squatters pulled off the panelling for fuel. They ripped out the central heating and other installations. They stole them. Eventually the police arrested the squatters on a charge of larceny. Whilst they were at the police station, [the plaintiff's] agents got in and made the premises secure with elaborate reinforced defences. That was in May 1977. The end of the squatters."

Not however the end of the matter. The damage done by the squatters cost nearly £30,000 to rectify. To have pursued an action against the individual squatters responsible for the damage would most probably have proved both impractical and futile. The plaintiffs therefore claimed compensation for that damage in their action against the defendants. At the trial the defendants admitted liability in nuisance for the structural damage caused by the subsidence of the house. The issue in dispute, and the sole issue on appeal, was whether the squatters' damage was too remote a consequence of their nuisance. To put it another way: was the intervention of the squatters, the immediate cause of the damage, such as to amount to a *novus actus interveniens* and thereby the effective cause of the damage, so breaking any chain of causation between it and the defendant's tort?

At first instance it was held that the squatters' damage was too remote. Although the intervention of the squatters was perhaps a reasonably foreseeable consequence of the defendants' tort, the trial judge held that that was not sufficient to ground liability in such a case of deliberate human intervention. Applying a dictum of Lord Reid in *Dorset Yacht v. Home Office,*[5] such intervention, he held, would operate as a *novus actus interveniens* unless it amounted to a *likely* consequence of the tort. On the facts he was not prepared to treat it as such a consequence, since there had, at the time of the defendant's tort, been no previous experience of squatters in the immediate vicinity of the plaintiff's house. The trial court also made no findings as to possible contributory negligence or failure to mitigate by the plaintiffs these being matters which, somewhat surprisingly, were apparently not pleaded by the defendants.

The Court of Appeal unanimously upheld the decision that the squatters' damage was too remote, but for differing reasons. In the opinion of Lord Denning, the "likely" test suggested by Lord Reid in *Dorset Yacht* was unsatisfactory; as his Lordship put it: "For once Homer nodded".[6] The test was difficult to reconcile with authority, particularly with the reasonable foresight test of the *Wagon Mound*[7] cases. And it was a test that, applied to the human intervention situation, might lead to an unwarranted extension of a tortfeasor's liability. For example, in the situation under review in *Dorset Yacht*, the liability of a prison authority for damage done by escaping prisoners, many types of damage committed by escaping prisoners, not only to property in the immediate vicinity

5. [1970] A.C. 1004, at 1030.
6. [1981] 1 Q.B. 625, at 634.
7. See *Overseas Tankship (U.K.) Ltd. v. Morts Docks & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388., and *Overseas Tankship (U.K.) Ltd v. Miller Steamship Co. Pty. Ltd. (The Wagon Mound* (No. 2)) [1967] 1 A.C. 617.

of the place of escape, would be, in Lord Denning's view, very likely to occur; for example thefts from households many miles away. Yet, as a matter of policy the prison authorities "should not be liable for the depredations of escaped convicts."[8] Instead the property owners concerned should look to their insurance policies for indemnity and the insurers should not be able by subrogation to pass on the risk to the prison authorities. Just as unsatisfactory was the reasonable foresight test which, applied to the human intervention situation, would "extend the range of compensation far too widely."[9] In the final analysis the matter was one of policy which should preeminently and openly determine the range of liability. Applying policy to the facts of the case Lord Denning M.R. concluded that the responsibility to keep out the squatters in the circumstances clearly lay with the owners of the house, the plaintiffs and their agents. Also the damage done by the squatters was of a type usually covered by insurance (and if it was not it ought to have been) and again the insurers "should not be allowed, by subrogation, to pass [the risk] on to others."[10] For these reasons the defendants were not liable for the squatters' damage.

Lord Denning's advocacy of the role of policy in determining such issues of tortious liability is well known. The views he expressed in *Lamb* have been expressed with equal felicity and eloquence in other recent decisions.[11] That his advocacy has had a marked formative influence upon other English judges, who today openly address themselves to policy factors with a readiness that would have surprised, if not alarmed, their predecessors, cannot be doubted. Public policy is no longer seen as quite such an unruly horse as hitherto. However, very few judges have espoused its role as enthusiastically as Lord Denning. Occasionally indeed we still find judicial utterances to the effect that a public policy role is more appropriate to the legislative than to the forensic process. Take for example the views expressed in the House of Lords in the recent landmark decision in negligence and nervous shock, *McLoughlin v. O'Brian,*[12] from, on the one hand, Lord Scarman who stated that normally "the policy issue ... is not justiciable"[13] to, on the other hand, Lord Edmund-Davies who stated that such a proposition was "as novel as it is startling" and that "public policy issues *are* justiciable" although "their invocation calls for close scrutiny."[14] Close scrutiny of Lord Denning M.R.'s remarks on the perceived policy factors in *Lamb* might, with respect, induce a cautious reaction. When he says, for example, the damage in question would normally be covered by insurance and that the insurers should not be allowed to pass on the risk to *others* he must surely not be taken as denying an insurer's right to indemnity, by subrogation, against

8. [1981] 1 Q.B. 625, at 635.
9. *Ibid.*, at 636.
10. *Ibid.*, at 638.
11. See e.g., *Dutton v. Bognor Regis U.D.C.* [1972] 1 Q.B. 373, at 397; *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27, at 36, 37.
12. [1982] 2 W.L.R. 982.
13. *Ibid.*, at 998.
14. *Ibid.*, at 995.

any wrongdoer whose depredations were the immediate cause of the damage? And what of damage which is not "normally" covered by insurance?

Rather different was the approach of the other two members of the Court of Appeal, Oliver and Watkins L.JJ. Oliver L.J. upheld the "likely" test of Lord Reid, while being of the opinion that the trial judge had misinterpreted it. There was, in his Lordship's opinion, no such dichotomy between the reasonable foresight test and the likely test as suggested by the trial judge who had confused "foreseeable" with "*reasonably* foreseeable". What Lord Reid had really meant was that, in the human intervention situation, a reasonable man in the defendant's position cannot be said to foresee the intervening behaviour "unless that behaviour is such as would, viewed objectively, be very likely to occur."[15] In the circumstances of *Lamb*, if the intervention of the squatters was not at least a likely consequence of the defendant's tort then it was not a reasonably foreseeable consequence and therefore not a recoverable consequence. If anything Lord Reid might have understated the degree of likelihood required in such circumstances, which might be such that a court "would require a degree of likelihood amounting almost to inevitability before it fixed a defendant with responsibility for the act of a third party over whom he has and can have no control."[16] On the facts it was enough that the trial judge had found that the intervention was not likely for it to be too remote a consequence of the defendants' tort.

Watkins L.J. deprecated the "likely" test or indeed any other refinement of the reasonable foresight test as "crisply stated"[17] in the *Wagon Mound* cases. The reasonable foresight test should usually be applied to resolve issues of remoteness "without any of the gloss which is from time to time being applied to it," otherwise "an understandable application of it will become impossible".[18] However, that test was not the sole and exclusive test of remoteness. There were exceptional circumstances which the test was inadequate to resolve; circumstances in which a "robust and sensible approach" produces an "instinctive feeling" that the damage in question is too remote.[19] The squatters' damage fell within such exceptional circumstances. Although in modern day London it was, in his Lordship's opinion, reasonably foreseeable, it was also productive of an instinctive feeling that it was too remote a consequence of the defendants' tort. That was because the damage resulted from the intervention of "anti-social and criminal behaviour" and an intervention of that sort would "inevitably, or almost so, be regarded as too remote."[20]

The commonsense or instinctive approach espoused by Watkins L.J. is really policy in another guise. Where Lord Denning M.R. and Watkins L.J. agreed was that, in the circumstances, the

15. [1981] 1 Q.B. 625, at 642.
16. *Ibid.*, at 644.
17. *Ibid.*, at 646.
18. *Ibid.*
19. *Ibid.*, at 647.
20. *Ibid.*

traditional legal principle of reasonable foresight was unsatisfactory and inadequate to resolve the issue; that the defendants for other reasons *ought* not to be called upon to compensate the plaintiffs for damage resulting from the anti-social and criminal behaviour of the squatters. Where they differed was in Watkins L.J.'s more orthodox approach; that principle of reasonable foresight should normally apply, to be displaced only exceptionally by instinctive feeling, namely policy. That approach is analagous to that favoured by the House of Lords in resolving the duty issue in negligence—that the Atkinian neighbour principle should normally apply, unless displaced by policy.[21] Lord Denning M.R. by contrast would allow policy a much higher profile, indeed the predominant role in "cases of new import".[22]

Lamb's case has also an Australian "connection". In the course of his judgment, and in his zeal for the role of policy, Lord Denning M.R. cast doubts on the decision of the New South Wales Court of Appeal in *Chomentowsky v. Red Garter Restaurant Pty. Ltd. (Chomentowsky),*[23] another decision concerning an intervening wrongdoer. There the plaintiff was employed as head waiter and manager of the defendant's restaurant. His duties included depositing each night's takings in the night safe of a bank half a mile away. One night while doing so, he was robbed and seriously injured. It was held that the defendant was liable in negligence for those injuries despite the fact that their immediate cause was an intervening intentional and criminal act. In Lord Denning M.R.'s opinion that decision perhaps extended the range of compensation too widely. The issue involved should have been treated as one of policy and policy might suggest a preference for the view that the plaintiff should have looked elsewhere for compensation, rather than making the defendant liable for a "pardonable want of foresight."[24] In particular, as a victim of violent crime recourse should be made, in such a case, to any available criminal injuries compensation scheme.[25] One is also tempted to surmise, in the light of his remarks referred to above, that Watkins L.J. would not have regarded the facts of *Chomentowsky* as giving rise to the instinctive feeling that the plaintiff's injuries from the robbery were not too remote from the defendant's negligence.

Despite Lord Denning M.R.'s comments, it is submitted that the decision in *Chomentowsky* is consistent with both principle and the decision in *Lamb*, and that public policy, in so far as it might be pertinent, supports it rather than the opposite. Let us examine the decision more closely. Particularly relevant was the fact that the plaintiff alleged breach of a duty of care arising from the relationship of employee and employer between himself and the defendant. More specifically he alleged breach of his employer's

21. See e.g. *Home Office v. Dorset Yacht Co. Ltd* [1970] A.C. 1004; *Anns v. Merton London Borough Council* [1978] A.C. 728.
22. See *Dutton v. Bognor Regis U.D.C.* [1972] 1 Q.B. 373, at 397.
23. (1970) 92 W.N. (N.S.W.) 1070.
24. [1981] 1 Q.B. 625, at 636.
25. *Ibid.*

duty to take reasonable care for his safety. Now, as is well known, the existence of such a common law duty, which is personal to the employer and cannot be delegated, is a fundamental aspect of the employment relationship.[26] The duty itself could not be challenged; the issue was whether in the circumstances it had been breached by unreasonably exposing the plaintiff to the risk of injury by wrongdoers.

At trial the jury had found that the duty had been breached and on appeal it was held that the circumstances justified such a finding. They included the fact that the plaintiff, unarmed and carrying large sums of cash to the night safe, was, in the words of Sugerman P., "a specially attractive target for the evilly minded. His movements were regular and could be studied and anticipated."[27] Also the defendants could quite easily and conveniently have avoided exposing the plaintiff to the risk of attack by, for example, having a safe on their premises and banking the cash the next day. In these circumstances, it was not open to the defendant to rely on the attack being a *novus actus interveniens*. As it was put by Mason J.A.:[28] "The injury which the plaintiff sustained, although occasioned by deliberate human intervention, was the outcome of the very risk against which it was the duty of the defendants to safeguard the plaintiff as their employee."

There might also be other circumstances in which the nature of the relationship between parties generates a duty to safeguard against the wrongdoing of others, and where, as in *Chomentowsky*, the wrongdoing does not operate as a *novus actus interveniens*. Take, for example, the night watchman or security patrolman who negligently absents himself, thereby facilitating the entry of burglars to the premises he is engaged to protect. The circumstances are analagous to *Chomentowsky*. The tortfeasor, whether the negligent individual employee or his employer or both would be liable for the burglary losses, as again they are the outcome of the very risk against which it was the duty of the tortfeasor to safeguard the plaintiff, the owner of the premises, in the above example. Those circumstances are very different from the situation in *Lamb*. If one asks, "What is the nature of the duty owed to neighbouring property owners by contractors doing road repair work?" one would with little hesitation reply, "To take care to avoid the risk of structural damage to their properties or unnecessary interruption of power or water supplies to them." However, one would not so readily reply, indeed it would be a far-fetched response, "To take care to avoid the risk of exposure of their properties to the depredations of wrongdoers".

As well as principle, policy also, it is suggested, supports the decision in *Chomentowsky*. Whether or not a criminal injuries compensation scheme, as mentioned by Lord Denning M.R., is available, in the circumstances of that case surely it is both reasonable and salutary that an employer should be liable for his

26. See e.g. *Wilsons and Clyde Coal Co. v. English* [1938] A.C. 57; *Katsilis v. The Broken Hill Pty. Co. Ltd.* (1977) 52 A.L.J.R. 189.
27. (1970) 92 W.N. (N.S.W.) 1070, at 1075.
28. *Ibid.*, at 1086.

negligent failure to safeguard his employee? The employer is usually in a better position than the employee to insure against the risk and the liability to suit could be a potent factor in promoting greater protection of employees called upon to perform hazardous tasks. The laudable objective of safety at work is more likely to be encouraged in that way, rather than by permitting the employer to "wash his hands" of the matter.

In conclusion it can be said that the facts and decision in *Lamb* provide a vivid and classic illustration of a *novus actus interveniens*. The decision, whether for policy or "instinctive feeling" reasons, vide Lord Denning and Watkins L.J. or because of the ambit of reasonable foresight, vide Oliver L.J., vindicates, in the case of the intervening wrongdoer, the general proposition stated by Lord Sumner in 1920, in *Weld Blundell v. Stephens*, that[29] " ... even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause." That, however, is a statement of the general rule applicable to intervening intentional wrongdoing. There are two situations on which a tortfeasor can be liable for the consequences of such conduct and which are unaffected by *Lamb*. They are:

(1) where the tortfeasor is legally responsible for or has control over the actions of the intervening wrongdoer, for example, the employer vicariously liable for the acts of his employee or the parent responsible for the acts of his child; and
(2) where the intervening wrongdoing, which is the immediate cause of the damage, is the very thing that the tortfeasor has a duty of care to prevent, such as in *Chomentowsky*, and an instance, such as that of a hypothetical negligent nightwatchman referred to above.

29. [1920] A.C. 956, at 986.