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# SUCCESSIVE CAUSES AND THE QUANTUM OF DAMAGES IN PERSONAL INJURY CASES

By ULRICH WAGNER\*

## *Introduction*

In 1934 Robert J. Peaslee,<sup>1</sup> then Chief Justice of the Supreme Court of New Hampshire, wrote his famous article on "Multiple Causation and Damage", in which he discussed the perplexing problems arising when an innocent cause concurs with a cause negligently created to inflict loss upon an innocent third party. This article stimulated an interesting discussion in the United States,<sup>2</sup> which, however, remained rather theoretical because it did not take into full consideration the substantial number of cases dealing with this special kind of problem. Outside the United States it was Professor H. Street<sup>3</sup> who, in 1962, for the first time discussed similar problems at some length. During recent years a growing number of courts in different common law jurisdictions, particularly in England,<sup>4</sup> were confronted with problems of this type. Such cases have been held to be "novel and interesting" and of "exceptional difficulty", raising "an important point of principle upon which there is a surprising lack of authority."<sup>5</sup> This article is a further attempt to systematically examine these issues in the hope of bringing some order to this substantial case-material.

The main problem can be stated easily: Is the defendant allowed in an action for damages to defend himself by proving that probably at some time in the future the plaintiff would have suffered the same or similar damages in any event? The paper starts with a discussion of the familiar "thin-skull" rule, and subsequently considers a group of similar, sometimes almost identical cases which receive a different treatment. The main focus then becomes the effect which matters arising between the vesting of the cause of action and the date of judgment have on the measure of damages.

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<sup>1</sup> (1934), 47 Harv. L. Rev. 1127-42.

<sup>2</sup> E.g., Carpenter, *Concurrent Causation* (1935), 83 U. Pa. L. Rev. 941; Prosser, *The Minnesota Court on Proximate Cause* (1936), 21 Min. L. Rev. 19.

<sup>3</sup> Street, *Supervening Events and The Quantum of Damages* (1962), 78 L. Q. Rev. 70.

<sup>4</sup> It is probable that the growing number of English cases in this field may be due to the fact that the trial judges who have replaced the trial juries in England, have become more conscious of the difficult legal questions which may be involved in them; see note in (1970), 86 L.Q. Rev. 291.

<sup>5</sup> E.g., *Performance Cars Ltd. v. Abraham*, [1962] 1 Q.B. 33 at 38 (C.A.); *Baker v. Willoughby*, [1970] A.C. 467 at 479; *Cutler v. Vauxhall Motors Ltd.*, [1970] 2 All E.R. 56 at 62 (C.A.).

1. *The "thin-skull" rule: A tortfeasor must take his victim as he finds him*

Since Kennedy J.'s famous statement in *Dulieu v. White*,<sup>6</sup> it has been the well-established and unquestioned principle, recognized in all common law jurisdictions,<sup>7</sup> that responsibility for personal injury encompasses all those injurious consequences which were unforeseeable owing to some peculiar susceptibility of the victim. If the consequences of a slight personal injury are aggravated by the state of health of the person injured, the wrongdoer is none the less liable to the full extent, though he had no knowledge of that state of health and no reason to suspect it.<sup>8</sup> School-examples are persons who have the misfortune to suffer from haemophilia, or from "egg-shell" skulls. But the rule goes much farther. Thus in *Owen v. Dix*<sup>9</sup> the medical testimony tended to show that, prior to the present injury, the plaintiff had suffered for a long period of time from a diseased disc in his lower spine, and that the disc had become more susceptible to rupture than a normal disc. Notwithstanding this diseased and weakened condition the Supreme Court of Arkansas allowed the plaintiff to recover the full amount of his damages. A further very instructive illustration is found in *Love v. Port of London Authority*,<sup>10</sup> in which the judge used exact figures to demonstrate the effect of the "thin-skull" rule. The plaintiff, after he had sustained a head injury through the admitted negligence of the defendants, developed a neurosis, which was considerably aggravated by a pre-existing heart condition. Whether a substantial deduction had to be made from the amount of damages otherwise to be awarded because of the prior disease depended on the question of whether the plaintiff's incapacity was attributable at least in part to neurosis caused by the accident. Therefore, if it could be proved that but for this accident-induced neurosis there would have been no absence from work, the plaintiff would be entitled to recover in full for the financial losses flowing from such absence. In the words of E. Davies J.,<sup>11</sup> ". . . if what we may call the 70 per cent heart neurosis would not have prevented the plaintiff from working, but the addition of the 30 per cent accident neurosis produced total incapacity, the defendants have to recompense the plaintiff for all special damages arising from the 100 per cent neurosis which developed from these 2 causes."<sup>12</sup> This basic principle of the Law of Damages has found unanimous approval,<sup>13</sup> and was adopted by the Restatement of The Law of Torts, Second,<sup>14</sup> in section 461 (Harm Increased in Extent by Other's Unforeseeable Physical Condition). This section states that "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct."<sup>15</sup>

Though the "thin-skull" rule has today a much broader scope than perhaps Kennedy J. envisaged, and includes injuries to persons suffering from neurosis or hypersensitivity to shock,<sup>16</sup> it should be noted that this rule applies only to the measure of damages and not to the preceding question of whether the defendant is liable at all. Following the terminology of the

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<sup>6</sup> [1901] 2 K.B. 669 at 679; "If a man is negligently run over or otherwise negligently injured in his body it is no answer to the sufferer's claim for damages that he

would have suffered less injury, or no injury at all, if he had not had an unusually thin-skull or an unusually weak heart."

<sup>7</sup> Fleming, *The Passing of Polemis* (1961), 39 Can. Bar Rev. 489 at 527.

<sup>8</sup> Clerk and Lindsell, *On Torts*, ed. R. Dias (13th ed. London: Sweet and Maxwell, 1969) at 215.

<sup>9</sup> 210 Ark. 562 at 566, 196 S.W. 913 (1946).

<sup>10</sup> [1959] 2 Lloyd's L.R. 541.

<sup>11</sup> [1959] 2 Lloyd's L.R. 541 at 545.

<sup>12</sup> Accord,

(a) England: *Malcolm v. Broadhurst*, [1970] 3 All E.R. 508 at 511; *Bradford v. Robinson Rentals Ltd.*, [1967] 1 W.L.R. 337 at 346; *Owens v. Liverpool Corp.*, [1939] 1 K.B. 394 at 400-401; *Clippens Oil Co. v. Edinburgh and District Water Trustees*, [1907] A.C. 291 at 303.

(b) United States: *Sutton v. Webb*, 183 Ark. 865 at 869-70 (1931); *Louisville & Nashville Ry. Co. v. Wright*, 183 Ky. 634 at 643 (1919); *Moroney v. Minneapolis & St. Louis Ry. Co.*, 123 Minn. 480 at 482, 144 N.W. 149 (1913); *St. Louis Southwestern Ry. Co. v. Lewis*, 91 Ark. 343 at 350 (1909); *Vosburg v. Putney*, 86 Wis. 278 at 280 (1893); *Tice v. Munn*, 94 N.Y. 621 at 622 (1883).

(c) Canada: *Varga v. J. Labatt Ltd.* (1956), 6 D.L.R. (2d) 336 at 349 (Ont. H.C.).

<sup>13</sup> J. Mayne and H. McGregor, *On Damages* (12th ed. London: Sweet and Maxwell, 1961) at 94; Clerk and Lindsell, *supra*, note 8 at 215; Salmond, *On the Law of Torts*, ed. R. Heuston, (13th ed. London: Sweet and Maxwell, 1961) at 756; Winfield, *On Torts*, ed. J. Jolowicz and T. Lewis (7th ed. London: Sweet and Maxwell, 1963) at 221 n. 84; Street, *The Law of Torts* (3rd ed. London: Butterworths, 1963) at 145.

<sup>14</sup> Restatement (Second) of Torts, section 461 (1965). The original Restatement accepted the same rule.

<sup>15</sup> The rule laid down in section 461 has been judicially approved: e.g., *Jonte v. Key System*, 89 Cal. App. 2d 654 at 660, 201 P. 2d 562 (1949); *Hagy v. Allied Chemical & Dye Corp.*, 122 Cal. App. 2d 361 at 367, 265 P. 2d 86 (1953).

<sup>16</sup> Clerk and Lindsell, *supra*, note 8 at 217; *Varga v. J. Labatt Ltd.*, (1956), 6 D.L.R.(2d) 336 at 349 (Ontario H.C.): "... if you injure a person who suffers from hysteria, you must take him as you find him, and if injury is out of all proportion to the event, if it is genuine, then the one who suffers is entitled to damages."; *Malcolm v. Broadhurst*, [1970] 3 All E.R. 508 at 511; *Negretto v. Sayers*, [1963] S. Austl. 313 at 318-319 (Supreme Court of South Australia) (Plaintiff suffered from a pre-existing tendency to mental disorder, and the shock of the accident operated to bring on a major mental disturbance). Fleming, *The Law of Torts* (3d ed., Sydney: Law Book Company of Australasia, 1965) at 188. Professor Fleming appears to have discarded his prior opinion (Fleming, *The Passing of Polemis*, *supra*, note 7 at 527 n. 124, that the "thin-skull" rule should not be applied to a pre-existing mental disorder. This view was not only inconsistent with a substantial number of cases, but there was no justification for excluding those especially vulnerable persons. It has now to be considered settled that the "thin-skull" rule allows full recovery for purely mental injuries resulting from an actor's negligence even when those injuries are far more severe than or even qualitatively different from those as the actor as a reasonable man could have foreseen because the plaintiff suffered from a latent mental disorder (see Boehm, *Note to Steinhauer v. Hertz Corp* (1970) 39 U. Cin. L. Rev. 779-785. The chief safeguard against the feared flood of fraudulent claims is to require a high degree of medical proof. But see Stoll, *The Wagon Mound — Eine Neue Grundsatzentscheidung zum Kausalproblem im englischen Recht* (1963), Festschrift fuer Hans Doelle, Volume 1, 371 at 388 n. 71, who follows Fleming's old view uncritically.

Restatement of the Law of Torts, Second, the "thin-skull" rule goes to the extent of liability but not to the existence of liability. The rule is only applicable on the condition that a wrong has been established or admitted. Ordinarily no more is demanded in the way of care than precaution against the risk of injury to normal individuals. If no damage could have been foreseen to a person of normal sensitivity, and the plaintiff's abnormal sensitivity was unknown to the defendant, then he is not liable.<sup>17</sup> The rationale is that to require him to guard against such exceptional sensitivity would impose too great a restraint upon his conduct, whereas once it has been held that he should have foreseen some injury to an ordinary person it is justifiable to make him liable for the full injury resulting from the special sensitivity, so as not to permit a defendant nicely to calculate how much injury he might inflict.<sup>18</sup>

A different question concerns whether the application of the "thin-skull" rule presupposes that the plaintiff already suffered from abnormal sensitivity at the time he sustained the injuries, or whether it is sufficient that he acquired the disease subsequently. One court has held that this distinction might be decisive. In *Larson v. Boston Elevated Ry. Co.*<sup>19</sup> the Supreme Judicial Court of Massachusetts thought it appropriate to distinguish between the case where the plaintiff suffered from her disease (tubercular tendency) at the time she sustained the injuries, and the case where she contracted tuberculosis subsequently. The court indicated that, assuming the second possibility, the plaintiff might have no right to recover damages for the tuberculosis and its consequences. This view has not gained much support however, and even the same court adopted the opposite rule in later decisions.<sup>20</sup> The Restatement of the Law of Torts, Second, also adopts the opposite position. Illustration 1 to section 458 of Restatement, Second, is directly opposed to *Larson v. Boston Elevated Ry. Co.* "A's negligence causes harm to B which seriously lowers B's vitality. In consequence of the lowered vitality B contracts tuberculosis, irrespective of whether it is a 'lighting up' of a dormant tubercular tendency or is contracted by B, who had previously never suffered from tuberculosis or shown any tubercular tendency."<sup>21</sup> Therefore the "thin-

<sup>17</sup> *Hay (or Bourhill) v. Young*, [1943] A.C. 92 at 109-110; Fleming, *The Law of Torts*, *supra*, note 16 at 187; Williams, *The Risk Principle* (1961), 77 L. Q. Rev. 179 at 195.

<sup>18</sup> Fleming, *The Law of Torts*, *supra*, note 16 at 189; Williams, *supra*, note 17 at 196.

<sup>19</sup> 212 Mass. 262 at 267-68, 98 N.E. 1048 (1912).

<sup>20</sup> *Wallace v. Ludwig*, 292 Mass. 251, at 256, 198 N.E. 159 (1935); "It is settled that, where an injury arising from a cause which entails liability on the defendant combines with a pre-existing or a subsequently acquired disease to bring out greater harm to the plaintiff than would have resulted from the injury alone, the defendant may be liable for all the consequences."; *McGrath v. G. & P. Thread Corp.*, 353 Mass. 60 at 62-63, 228 N.E. 2d 450 (1967); *Edwards v. Warwick*, 317 Mass. 573 at 577-578, 59 N.E. 2d 194 (1945); *Barnett v. Hancock Mutual Life Insurance Co.*, 304 Mass. 564 at 567, 24 N.E. 2d 662 (1939).

<sup>21</sup> Restatement of the Law of Torts, Second, Volume 2 (sections 281-503), (1965), section 458 to 499; for further cases, see Restatement of the Law of Torts, Second, Appendix, Volume 3 (sections 402A-503), section 458 at 276, 277 (1966).

skull" rule seems to apply no less when the aggravated injuries are brought about by a subsequent disease than by a pre-disposition.<sup>22</sup>

So far we have stated the "thin-skull" rule as applied by courts in all common law jurisdictions to the end of 1960. But two subsequent decisions<sup>23</sup> might have cast some doubt upon this principle.

At the beginning of 1961 the Judicial Committee of the Privy Council decided the "Wagon Mound", one of the most famous tort cases of this century. This decision reversed the rule, established by the Court of Appeal in *Re Polemis and Furness, Witny & Co. Ltd.*,<sup>24</sup> that a defendant is liable for all the consequences of his negligent act, whether reasonably foreseeable or not. The Judicial Committee held that the essential factor in determining liability for the consequences of a tortious act of negligence should be whether the damage is of such a kind as a reasonable man should have foreseen. This rule has been accepted in all common law jurisdictions of the British Commonwealth.<sup>25</sup> Foreseeability is the crucial test. At first sight it appears that the "thin-skull" rule is inconsistent with this test and therefore no longer good law. How can one claim that foreseeability governs not only the existence of liability but also the extent of liability, while at the same time holding the defendant responsible for those consequences of his negligent act which he had no reason to foresee since they were caused by plaintiff's abnormal sensitivity? Notwithstanding this argument the opinion is unanimously held that "The Wagon Mound" did not affect the "thin-skull" rule.<sup>26</sup> It is commonly believed that the Judicial Committee cannot be presumed to have intended an inroad on this principle and that therefore this type of case is an exception to the general rule established in "The Wagon Mound".

The second decision which might have influenced, perhaps even changed, the "thin-skull" rule is *Smith v. Leech Brain & Co. Ltd.*<sup>27</sup>

The plaintiff claimed in respect of the death of her husband, who was employed by the defendant company as a galvaniser. At the time of the mis-

<sup>22</sup> Fleming, *The Law of Torts*, *supra*, note 16 at 188.

<sup>23</sup> *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.* (The Wagon Mound No. 1), [1961] A.C. 388 (P.C.) (N.Z.); *Smith v. Leech Brain & Co. Ltd.*, [1962] 2 Q.B. 405.

<sup>24</sup> [1921] 3 K.B. 560.

<sup>25</sup> A similar principle was adopted by the Court of Appeals of New York in 1928: *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339.

<sup>26</sup> Fleming, *The Passing of Polemis*, *supra*, note 7 at 527; Street, *supra*, note 13 at 145; Megarry, *Note to Smith v. Leech Brain* (1962), 78 L. Q. Rev. 160 at 161; R. Dworkin, *A Negligent Tortfeasor Still Takes His Victim as He Finds Him* (1962), 25 Mod. L. Rev. 471 at 473; Dias, *Negligence - Remoteness - The Wagon Mound Rule* 1962 Camb. L.J. 20 at 21; *Smith v. Leech Brain & Co.*, [1962] 2 Q.B. 405 at 414; *Warren v. Scruttons*, [1962] 1 Lloyd's L.R. 497 at 502; *Winteringham v. Rae* (1965), 55 D.L.R. (2d) 108 at 109 (Ontario H. Ct.); *Negretto v. Sayers*, [1963] S. Austl. 313 at 318 (Supreme Court of South Australia); *Wilson v. Birt (Pty.) Ltd.* 1963, (2) S. Afr. L. R. 508 at 516 (Supreme Court of South Africa); *Malcolm v. Broadhurst*, [1970] 3 All E.R. 508 at 512.

<sup>27</sup> [1962] 2 Q.B. 405.

fortune upon which the claim was based the husband was engaged in dipping certain material into a tank of molten metal. Through the admitted negligence of the defendants a piece of metal flew out of the tank and caused a burn on his lip. Although it appeared to be a trivial injury, the burn turned out to be a direct cause of the man's death. This occurred because his previous contact with tar had, unknown to everyone, resulted in a pre-malignant condition such that a traumatic experience like a burn would easily cause cancer to develop. The plaintiff's husband died of cancer some three years after the accident. Lord Parker C. J. thought this was a case which came plainly within the old principle that the defendant must take his victim as he finds him, and therefore held the defendants liable in damages for plaintiff's loss.<sup>28</sup>

Notwithstanding the opinion of the distinguished judge, and all comments<sup>29</sup> on this case which consider it a clear-cut application of the "thin-skull" rule, doubts must be raised because the end of the report reads as follows: "His Lordship considered the question of damages, observed that he must make a substantial reduction from the figure taken for the dependency because of the fact that the plaintiff's husband might have developed cancer even if he had not suffered the burn, and awarded the plaintiff £3,064 17s. od."<sup>30</sup> Hitherto it was believed that the application of the "thin-skull" rule implied that a plaintiff was entitled to recover the full amount of his damages, notwithstanding that because of his special sensitivity the injuries went far beyond the ordinary and reasonably foreseeable extent. If Lord Parker C. J. is right, this is not true anymore. While ostensibly applying this old principle and with one hand holding the defendants liable for all of plaintiff's damages, with his other hand he is reducing the benefit of this rule by decreasing the damages because of the deceased's peculiar susceptibility. In effect this comes to holding a plaintiff entitled to only those damages he would have suffered if he had not been in a fragile state of health.

There is good reason to believe that Lord Parker C. J. was not aware that his decision worked a substantial inroad on the "thin-skull" rule.<sup>31</sup> Though the impact of *Smith v. Leech Brain* cannot yet be fully appreciated, it may well be that this represents a turning point. The unanimous approval of the decision and one subsequent case point in this direction. In *Warren v. Scruttons*,<sup>32</sup> the plaintiff, a man of 30, injured his finger when using a frayed wire rope which had been negligently provided by his employers. Unfortunately, when the plaintiff was in his teens he had suffered an injury which had left him with an ulcer on his eye. The present accident brought about a serious deterioration of his existing eye condition. Though Paul J. wondered

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<sup>28</sup> [1962] 2 Q.B. 405 at 415.

<sup>29</sup> See e.g., Megarry, *supra*, note 26 at 161; R. Dworkin, *supra*, note 26 at 473; Dias, *supra*, note 26 at 21; Clerk and Lindsell, *supra*, note 8 at 216.

<sup>30</sup> [1962] 2 Q.B. 405 at 416.

<sup>31</sup> This may be explained with the pre-occupation of the distinguished judge — and the commentators — to investigate the impact of "The Wagon Mound" on the "thin-skull" rule.

<sup>32</sup> [1962] 1 Lloyd's L. R. 497.

whether plaintiff's vulnerable eye condition was a matter he ought to take into consideration,<sup>33</sup> he thought it appropriate to follow *Smith v. Leech Brain & Co. Ltd.* and therefore reduced the amount of damages from £900 to £500.<sup>34</sup>

This new trend causes serious doubts.<sup>35</sup> First it must be argued that to take these hypothetical exterior events (promoting agencies) into account, which, in combination with plaintiff's hypersensitivity might have caused similar damages, involves nothing more than a blank guess about the future. This argument is supported by the medical testimony in both cases. In *Smith v. Leech Brain & Co. Ltd.*,<sup>36</sup> the medical testimony showed that "the burn was the promoting agency of cancer in tissues which already had a pre-malignant condition. In these circumstances, it is clear that the plaintiff's husband, but for the burn, would not necessarily ever have developed cancer. On the other hand, having regard to the number of matters which can be promoting agencies, there was a strong likelihood that at some stage in his life he would develop cancer. . ." And in *Warren v. Scruttons Ltd.*,<sup>37</sup> the medical testimony was that "any febrile condition, that is, a high temperature, brought on, for instance, by a very serious cold, could have brought about the very condition to which the plaintiff is reduced today . . ." In the latter case the plaintiff had lived with his vulnerable eye for nearly 15 years without any difficulties, he even had boxed considerably and in fact was a reserve on the Olympic team. Consequently it does not seem fair to reduce his damages by £400 on account of this condition, since the past 15 years indicate that there was a good chance that his disease would never cause any harm.

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<sup>33</sup> [1962] 1 Lloyd's L.R. 497 at 502.

<sup>34</sup> [1962] 1 Lloyd's L. R. 497 at 503.

<sup>35</sup> *Wilson v. Birt (Ltd.)*, 1963(2) S. Afr. L.R. 508 appears to follow this new development. But in this case epileptic fits might have developed in the future without any promoting agency, solely by the own progress of the disease. As we will see later this distinguishes the case (and not only this case but every "thin-skull" case) from the other line of cases where a pre-existing disease has to be taken into account when assessing the amount of damages. In the same way Professor Fleming's statement (Fleming, *The Law of Torts*, *supra*, note 16 at 187 n. 23) that the apparent harshness for the defendants is in some measure mitigated by the competing principle that allowance is due for the victim's "reduced value" owing to the disease should be restricted — though perhaps this is not the view of the learned author — to this second line of cases. Professor Fleming's illustration (defendant precipitated a fatal coronary occlusion in a sufferer of arterial sclerosis) at least indicated that the author might have had these cases in his mind. The difference between these two lines of cases is elaborated by Munkman, *Damages for Personal Injuries and Death* (2nd ed. London: Butterworths, 1960) at 40-41; "... troublesome questions of fact arise upon the medical evidence. For example it may be said that the present disability is not due to the accident, but to some pre-existing condition such as a weak heart or osteo-arthritis which would have disabled plaintiff in any event. (Note (e);) A defendant is liable, of course, if the accident aggravates a pre-existing weakness which might otherwise have been quiescent. To exonerate himself he must prove that the plaintiff would, at the time in question, have been incapacitated even if there had been no accident . . ." Accord, I. Goldsmith, *Damages for Personal Injury and Death in Canada* (Toronto: Carswell Co., 1959) at 11.

<sup>36</sup> [1962] 2 Q.B. 405 at 413.

<sup>37</sup> [1962] 1 Lloyd's L.R. 497 at 502.



Paul J. states<sup>38</sup> that this "may well be . . . because he has not had any serious illness since his teens to produce a high temperature. . .". But what reasons are there to justify his prediction of the future? Why must the future development of plaintiff's eye condition be necessarily different from its development during the previous 15 years? May the defendant really show — on a balance of probabilities — that the plaintiff would have suffered from a febrile condition and thereby suffered the damages anyhow? It is submitted that there is no reasonable basis to decide these questions the way the court did.<sup>39</sup> It must be stressed that this distinguishes the "thin-skull" cases from a second category of "tendency" cases, in which the disease plaintiff suffered from would have developed in the future and caused similar damages without any further exterior impact.<sup>40</sup> In these situations medical testimony and statistics can predict with reasonable certainty the future development of the disease and therefore form a sound basis for the court to take this into account when assessing the proper amount of damages. On the other hand, no one can foretell if and when plaintiff would have broken his "thin-skull" anyhow, or whether a future promoting agency would have caused the "lighting up" of his cancerous tendency.

Furthermore, the result in *Smith v. Leech Brain & Co. Ltd.* and *Warren v. Scruttons Ltd.* would only then be fair if no one could be held liable for "lighting up" plaintiff's mischievous tendency. If on the other hand someone could be held responsible then it would be utterly unjust to decrease plaintiff's damages, because in any case he has been injured by tortious conduct but cannot recover from the third party who never in fact caused any damages.<sup>41</sup> When Lord Parker C. J. and Paul J. nevertheless reduce plaintiff's damages substantially they exclude this possibility that someone might have been liable. Yet how do they know? Is there any justification for doing this? Who should bear the burden of proof, the plaintiff or the defendant?<sup>42</sup> Because it is the defendant who has negligently caused plaintiff's injuries, he should bear the onus at proving that at some time in the future another promoting agency of innocent origin would have "lighted up" the cancerous tendency. Since this is impossible, the plaintiff should be entitled to recover the full

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<sup>38</sup> [1962] 1 Lloyd's L.R. 497 at 503.

<sup>39</sup> But see Stoll, *supra*, note 16 at 399, who believes that in both decisions the result is "billig", i.e. equitably fair.

<sup>40</sup> This distinction is vaguely indicated by Cohn in (1970), 86 L.Q. Rev. 449 at 451 with reference to German Law: "A further distinction has been made between those cases in which the reserve cause arose from outside the affected person or object . . . and those cases in which some characteristic of the person or object was responsible for creating the reserve cause."

<sup>41</sup> This might have been the case in *Smith v. Leech Brain Co. Ltd.*, if the pre-malignant cancerous tendency of plaintiff's husband, which he apparently contracted while working for 9 years in the gas industry, was due to the negligence of his former employer, who failed to secure safe and healthy working conditions.

<sup>42</sup> Similar doubts let Windeyer J. in *Bresatz v. Przibilla* (1962) A.L.J.R. 212 at 213 (High Court of Australia) to the conclusion that it is erroneous always to make a deduction for contingencies, see note 138, *infra*.

amount of his damages.<sup>43</sup> The apparent harshness of the "thin-skull" doctrine is mitigated by the prevalence of liability insurance which spreads the risks. The inter-relation between this doctrine and liability insurance is occasionally recognized by American courts.<sup>44</sup>

At first sight it may appear that the Restatement of the Law of Torts, Second, does not follow this new trend. This is indicated by illustration 1 to section 461,<sup>45</sup> which is quite similar to *Smith v. Leech Brain & Co. Ltd.* "Through the motorman's negligent management of the A Company's trolley car the control level strikes the breast of B, a passenger. The injury is apparently slight, but it causes a cancerous tendency to "light up" and localize itself in the injured point, requiring the amputation of B's breast. A is answerable for the harm caused by the cancer and the amputation." It may well be however, that this illustration pertains only to the existence of liability and not to the extent of liability, and is therefore neutral on the question of damages.<sup>45a</sup>

## 2. "Tendency" cases<sup>46</sup>

In *McCahill v. New York Transportation Co.*,<sup>47</sup> the plaintiff was negligently injured by the defendant's taxicab. He died shortly thereafter of delirium tremens. It was undisputed at trial that the injuries suffered in the accident caused delirium tremens only because of the pre-existing alcoholic condition of the decedent. The defendant therefore argued that his negligence was not the proximate cause of the intestate's death. The Court of Appeals of New York, however, held that a tortfeasor who has negligently accelerated a diseased condition and thereby hastened and prematurely caused death cannot escape responsibility, even though the disease probably would

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<sup>43</sup> Again the "tendency cases" differ in one important respect: In all cases where it was held that the plaintiff's pre-existing disease had to be taken into account in assessing the amount of damages, it was obvious that the disease was of innocent origin, i.e. nobody was liable for having caused it.

<sup>44</sup> See *Steinhauser v. Hertz Corporation*, 421 F. 2d 1169 at 1173 n. 4 (2d Cir. 1970) and *Delaware & H. R. Corp. v. Felter* (Springfield Fire & Marine Ins., Intervener), 98 F. 2d 868 at 869 (3d Cir. 1938).

<sup>45</sup> Restatement (Second) of Torts, section 461 at 502 (1965).

<sup>45a</sup> However, one recent decision expressly rejected *Smith v. Leech Brain Co.* and adopted the view suggested here: *Wyed v. Bertram and Coats*, [1970] S. Austl. 1, at 5/6 (Supreme Court of South Australia, per Bray C.J.). Accord, *Marcroft v. Scruttons Ltd.*, [1954] 1 Lloyd's L.R. 395, at 401 (per Denning L.J.).

<sup>46</sup> This technical term is used to characterize those cases where plaintiff's legal interest, at the time it is injured by the defendant, is affected by a circumstance which anyhow, even without defendant's wrongdoing, would have caused the same or similar damage. It is conceded that this is a translation from German Law ("Anlagefaelle"), which for many years has dealt with similar problems. Though discussions of terminology are usually fruitless and idle the term "tendency cases" seems preferable to Cohn's suggested translation of "Anlagefaelle" as "situation cases" (Cohn, *Note to Baker v. Willoughby and Cutler v. Vauxhall* (1970), 86 L.Q. Rev. 449 at 451), because the school-example is the case where the plaintiff suffered from a disease (a mischievous *tendency*) which without any further impact would have caused similar damage.

<sup>47</sup> 201 N.Y. 221, 94 N.E. 616. This was an action brought by the administratrix of the estate of the decedent.

have resulted in death at a later time without defendant's agency. But the court continued that, though it is no defence to plaintiff's claim for damages that he would have suffered less injury or no injury at all if he had not had this pre-existing disease, the probability of later death from existing causes for which the defendant was not responsible should be an important element in fixing damages.<sup>48</sup> Therefore, if plaintiff's pre-existing condition was bound to worsen, an appropriate discount should be made for those damages which would have been suffered even in the absence of the defendant's negligence.<sup>49</sup>

Though these cases might seem simple and uncomplicated, they can bring courts into severe difficulties. This is illustrated by the recent decision of the Court of Appeal in *Cutler v. Vauxhall Motors Ltd.*<sup>50</sup> In November of 1965 the plaintiff grazed his right ankle in an accident at work due to the employer's negligence. This resulted in the formation of a varicose ulcer. However, prior to the accident he had already been affected by varicose veins in both legs. The ulcer necessitated an operation to strip the veins of the right leg and it was decided to treat the left leg similarly. Thereafter the plaintiff was off work for a while, which caused him to lose £173 in wages. It could be proved that, if the plaintiff had not grazed his ankle, a similar operation with similar consequences would have been necessary in 1970 or 1971, but this had now been made unnecessary by the operation in 1966. In an action brought against the plaintiff's employers, the trial judge refused to award special damages in respect of the £173 loss and the discomfort of undergoing the operation, and the Court of Appeal affirmed. Though it conceded that the immediate result of the operation was a cost to the plaintiff of £173 in lost wages, and therefore at first impression it might seem he should be compensated for this loss, it would be wrong to ignore the strong probability that the accident did no more than accelerate inevitable damage. To disregard this likelihood would be to put the plaintiff in a better position than he was in before the wrong, because had there been no accident at all

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<sup>48</sup> 201 N.Y. 221 at 224; accord, *Evans v. Groves & Sons Co.*, 315 F. 2d 335 at 347 (2d Cir. 1963); *Steinhauser v. Hertz Corp.*, 421 F. 2d 1169 at 1173 (2d Cir. 1970). When Boehm, in a lengthy note to this case ((1970), 39 U. of Cin. L. Rev. 779-785) frequently remarks (e.g., at 784) that the decision is an important application and extension of the "thin-skull" rule because it allows full recovery for mental injuries he is very much mistaken. It is clear beyond doubt that the court is inclined to take the latent mental disorder into account when assessing damages: "Although the fact that Cynthia had latent psychotic tendencies would not defeat recovery if the accident was a precipitating cause of schizophrenia, this may have a significant bearing on the amount of damages. The defendants are entitled to explore the probability that the child might have developed schizophrenia in any event ..." (421 F. 2d 1169 at 1173 (1970) ); see *Gates v. Fleischner*, 67 Wis. 504 at 510, 30 N.W. 674 (1886); *Louisville & Nashville Ry. Co. v. Jones*, 83 Ala. 376 at 382-83, 3 So. 902 (1888); *Schwingschlegl v. City of Monroe*, 113 Mich. 683 at 685-86, 72 N.W. 7 (1897); *Watson v. Rinderknecht*, 82 Minn. 235 at 238, 84 N.W. 798 (1901); *Pieczonka v. Pullman, Co.*, 89 F. 2d 353 at 356-57 (2d Cir. 1937).

<sup>49</sup> In the same way it has been held "in South Africa more than once that the possibility of attacks of epilepsy in the future must be taken into account as relevant to the plaintiff's present condition in assessing compensation to be paid to a plaintiff negligently injured", *Wilson v. Birt (Pty) Ltd.* 1963(2) S. Afr. L.R. 508 at 517 (Supreme Court of South Africa).

<sup>50</sup> [1970] 2 W.L.R. 961, [1970] 2 All E.R. 56.

he would have been obliged to bear the loss himself. This case is important because it is the first decision<sup>51</sup> which expressly holds that a pre-existing disease has to be taken into account even when assessing *special damages*, i.e. that part of the total damages which includes the accrued and ascertained financial loss suffered up to the date of trial and which therefore is capable of quantification by calculation rather than estimation. Prior to *Cutler v. Vauxhall Motors Ltd.* the courts had applied the "tendency" principle only to the assessment of *general damages*, i.e. those which compensate the plaintiff for future financial loss.<sup>52</sup> Since the distinction between special and general damages has only a procedural basis,<sup>53</sup> and the task of the court is the comprehensive one of assessing the totality of damages to be awarded, there was good reason for the court to extend the application of this principle to the computation of special damages.

But, it is submitted, the Court of Appeal was wrong when it dismissed plaintiff's action in toto. A loss of £173 payable in 1966 is not the same as a possible future loss of £173 payable in 1971. At least the plaintiff should be held entitled to the interest he would have earned from 1966 to 1971 had he put the £173 in his savings account in 1966.<sup>54</sup> It cannot be argued that on the other hand an allowance is proper on account of prospective depreciation of the money which presumably would offset the interest, since under Anglo-American law it is the widely accepted rule that it is improper to indulge in mere speculation regarding the future,<sup>55</sup> and therefore thought inappropriate to make special allowance for future inflation.<sup>56</sup> Once the award is made the plaintiff must protect himself against a subsequent fall in the value of money by prudent investment.<sup>57</sup>

<sup>51</sup> [1970] 2 W.L.R. 961 at 963.

<sup>52</sup> See e.g., *Kerry v. England*, [1898] A.C. 742 at 744 (Privy Council); *Billingham v. Hughes*, [1949] 1 K.B. 643 at 647 (C.A.) (pre-existing serious arthritic condition of the knee might in any event have necessitated premature retirement from general practice); *Moore v. Cooperative Wholesale Society*, *The Times*, May 10, 1955 [Cited after Bingham, *Bingham's Motor Claims Cases* ed. J. Taylor (6th ed. London: Butterworths, 1968) at 358; *Smith v. Leech Brain & Co. Ltd.*, [1962] 2 Q.B. 405, at 416; *Warren v. Scruttons*, [1962] 1 Lloyd's L.R. 497, 502-503.

<sup>53</sup> Special damages have to be expressly pleaded whereas general damages have not. See: James, *General Principles of the Law of Torts* (3rd ed. London: Butterworths, 1969) at 398 (Chapter 2 Section 1): "The distinction between these two kinds of damages is a matter of practice and procedure, rather than of substantive law." and I. Goldsmith, *supra*, note 35 at 7.

<sup>54</sup> This view differs from Russell L.J. who dissented from the majority opinion in *Cutler v. Vauxhall Motors Ltd.* and who would have awarded the plaintiff £135, since he thought the total offset inappropriate because of the fact that the future operation was only very probable.

<sup>55</sup> This rather threadbare argument is cogently criticized by Fleming, *Damages: Capital or Rent?* (1969), 19 University of Toronto L.J. 293 at 314 n. 80, who, however, carefully elaborates the doctrinal as well as pragmatic soundness of this rule (at 313-14).

<sup>56</sup> See *Mallet v. McMonagle*, [1970] A.C. 166 at 176; *O'Brien v. Mckean* (1968), 42 A.L.J.R. 223 at 229 (High Court of Australia); *Gollan v. Duncan*, [1961] N.Z.L.R. 60 at 63-64 (Supreme Court of New Zealand). For the American position which appears rather obscure see Fleming, *supra*, note 55 at 314 n. 81.

<sup>57</sup> *Mitchell v. Mulholland*, [1971] 2 All E.R. 1205 at 1218 (C.A.).

A common characteristic of the cases we have considered is that the hypothetical event which would have caused similar damage was due to some peculiarity of the person himself, namely a disease. But this is not necessary. There is at least one case, *Dillon v. Twin State Gas & Electric Co.*,<sup>58</sup> in which the hypothetical cause arose from outside the affected person. In this famous incident a boy, standing upon the high beam of a bridge trestle, lost his balance and was falling to rocks far below. Serious injury, if not death, was certain to ensue, when he was caught upon defendant's charged wires and was electrocuted. In an action brought by the dependants of the deceased in order to recover damages against the defendant company, which was liable for the negligent and dangerous situation of the wires, the Supreme Court of New Hampshire held that in assessing the proper amount of damages the prior fall from the girder had to be taken into account. The decision allowed damages for only such sum as the boy's prospects for life and health were worth at the time the defendant's fault became causal. If solely by reason of his preceding loss of balance he would have fallen to his death, then his life or earning capacity had no value at all; whereas if he would have been seriously injured the damages should be measured by the value of his earning capacity in such injured condition.<sup>59</sup>

It should however be noted that the outcome would have been different if both companies (one responsible for the bridge, the other for the electric wires) were wrongdoers. As Peaslee has demonstrated, in that case the defendant electricity company would have been liable for the full amount of damages, since it should not be allowed to set up the potential wrong of a third party, lying in wait to do harm if the victim missed the wires.<sup>60</sup> As we will see later,<sup>61</sup> this follows from the principle that a future hypothetical event which might have caused plaintiff's damages even without defendant's fault can only be taken into account if it is of innocent origin, i.e. nobody could have been held liable for it.

### 3. *Subsequent injuries arising between the vesting of the cause of action and the date of judgment*

#### *Introduction*

The basic principle for the measure of damages in tort as well as in contract is that there should be "restitutio in integrum", i.e. damages should

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<sup>58</sup> 85 N.H. 449, 163 A. 111 (1932) This case was the occasion for Peaslee's famous article.

<sup>59</sup> The decision is generally approved: e.g., *Labor v. Public Service Co. of New Hampshire*, 92 N.H. 256 at 257, 29 A. 2d 459 (1942); *Fredericks v. Pittsburgh Co.*, 59 Ohio App. 20 at 32, 16 N.E. 2d 1009 (1938); *Steinhauser v. Hertz Corp.*, 421 F. 2d 1169 at 1174 (2d Cir. 1970). Peaslee, *Multiple Causation and Damage* (1934), 47 Harv. L. Rev. 1127 at 1134; Williams, *Causation in the Law* 1961 Camb. L.J. 62 at 77-78.

<sup>60</sup> Accord, Fleming, *Law of Torts*, *supra*, note 16 at 634; Peaslee, *supra*, note 59 at 1139. Williams concurs: 1961 Camb. L.J. 62 at 78. This view has judicial approval, see *Fredericks v. Pittsburgh Co.*, 59 Ohio App. 20 at 32, 16 N.E. 2d 1009 (1938): "... the injured person's danger from other innocent factors at the time of harm must be considered ...".

<sup>61</sup> See text, *infra*, at pp. 382-87.

consist of such a sum of money as will put the plaintiff in the same position he would have been in had he not sustained the injuries for which he is now compensated.<sup>62</sup> Therefore a tortfeasor is liable for only such damages as, by reason of his wrongdoing, the plaintiff has suffered. Damages are not punitive, still less are they a reward; they are simply compensation, and this is true with regard to special damages as well as with general damages. There are, however, instances of exceptional cases in which this rule does not apply, as for instance, cases of insurance, or cases calling for punitive damages.<sup>63</sup>

To recover damages plaintiff must prove that his loss was caused by the defendant's wrongdoing. This means two things: First, he must show that his physical injuries were caused by the defendant, e.g., that the broken legs and arms were the result of defendant's negligent driving. Second, the plaintiff must prove that these physical injuries caused damages, e.g., that because of his broken legs he was disabled for 4 months and therefore suffered from loss of earning capacity. The importance of this second requirement cannot be overstressed, because very often courts and authors of legal articles appear to disregard it. It is, however, quite possible that a plaintiff sustains severe injuries but that nevertheless he cannot recover damages, because his injuries did not cause him any loss.<sup>64</sup>

The test which enjoys the widest acceptance as a key for ascertaining causal relation in the above-mentioned sense is the so-called 'but-for' test.<sup>65</sup> This formula postulates that any event but for which the result would not have happened is a factual cause of the result, or formulated differently, the defendant's fault is a cause of plaintiff's harm if such harm would not have occurred without (but for) it. This test, however, though sound as a general rule, necessitates exceptions, the most important of which is the situation where multiple causes combine to produce a single result.<sup>66</sup> If we presuppose that every cause would have been sufficient to produce the result, then, applying the 'but-for' test, nobody would be liable.

This can be illustrated by the following example. The first wrongdoer causes the plaintiff's (physical) injuries but a second (hypothetical) event would have caused the same or similar injuries. The question then arises as to which of the two wrongdoers is liable for the damages resulting from

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<sup>62</sup> E.g., *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker*, [1949] A.C. 196 at 221. In *Liesbosch Dredger v. Edison SS.*, [1933] A.C. 449 at 463 Lord Wright described the principle of *restitutio in integrum* as "the dominant rule of law"; "Subsidiary rules can only be justified if they give effect to that rule."

<sup>63</sup> *British Transport Commission v. Gourley*, [1956] A.C. 185 at 198 per Earl Jowitt; *Rookes v. Barnard*, [1964] A.C. 1129 at 1227-1232.

<sup>64</sup> See text, *infra*, at pp. 384-85. This fact explains the startling observation that often it is "cheaper" to kill than to maim.

<sup>65</sup> Fleming, *Law of Torts*, *supra*, note 16 at 177; Williams, *Causation in the Law*, [1961] Camb. L.J. 62 at 63.

<sup>66</sup> These causes can be concurrent or subsequent. This paper is solely concerned with subsequent causes. For concurrent (cumulative or alternative) causation see e.g., Lorenzen, *Multiple Causation and Apportionment of Damages in Negligence*, Berkeley 1961 (unpublished thesis) and Buxbaum, *Solidarische Schadenshaftung bei ungeklärter Verursachung im deutschen, französischen und anglo-amerikanischen Recht*, Berkeley-Kolner Rechtsstudien Band 7 1965, esp. at 72-112.

these injuries? If we apply the 'but-for' test strictly, the answer would be nobody. The wrongdoer responsible for the first cause would escape liability because the plaintiff would have suffered the damages anyhow due to the subsequent event, whereas the hypothetical wrongdoer cannot be held liable since he never in fact caused plaintiff's injuries. The unanimous opinion holds that this result cannot be accepted and that somehow an exception has to be made to the general 'but-for' test. The only question is who should bear the loss, the first or the second tortfeasor, or both as joint tortfeasors. All three solutions are logically tenable and, in fact, the first two solutions have been adopted by English courts<sup>67</sup> while the third has been unanimously rejected. A fair evaluation and distribution of the risks involved, rather than logical reasoning by itself, is required to solve this problem.

In our above-mentioned example both causes are of culpable origin, i.e. third parties (wrongdoers) are responsible for having set them. Does it make any difference if one of the two subsequent causes is of innocent origin, i.e. nobody can be held liable for having set the cause, as e.g., a supervening disease or an act of God?

If the first cause is of innocent origin, the subsequent wrongdoer is generally relieved of all liability since he did not in fact cause any damages. Very controversial, however, is the case where the second (subsequent or hypothetical) cause is of innocent origin. Should it be taken into account when assessing plaintiff's damages that he subsequently contracted a disease which would have disabled him anyhow, or that he spent some months in prison? Though we will deal with most of the pertinent cases at some length it is important to note from the outset that, notwithstanding an opposing *obiter dictum* of the Court of Appeal,<sup>68</sup> courts in most common law jurisdictions of the British Commonwealth do take these circumstances into account and reduce the amount of damages accordingly. This appears to be the only means by which the different cases can be reconciled. Otherwise we will encounter the same perplexities as Professor Street,<sup>69</sup> who seemingly saw no way to reconcile the decision in the Canadian case of *Stene v. Evans*<sup>70</sup> with the holding in the Australian case of *Leschke v. Jeffs and Faulkner*.<sup>71</sup> In *Stene v. Evans*, however, the subsequent event was of culpable origin (negligently caused accident), whereas in *Leschke v. Jeffs and Faulkner* it was of innocent origin (plaintiff was sentenced to imprisonment for 10 years). Both cases are therefore readily distinguishable.

But is this distinction justified? It may be criticized on the ground that since the defendant (first wrongdoer) stands in the same logical relation to

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<sup>67</sup> *Baker v. Willoughby*, [1969] 2 W.L.R. 489, [1969] 2 All E.R. 549 (C.A. 1968); *Baker v. Willoughby*, [1970] A.C. 467 (1969).

<sup>68</sup> *Baker v. Willoughby*, [1969] 2 All E.R. 549 at 555 (1968) per Fenton Atkinson L.J.: "Counsel for the plaintiff has not been able to point to any distinction in principle between the case of a tortiously and non-tortiously-caused subsequent disability, but he argues that unless such a distinction is made a plaintiff may suffer injustice."; reversed on different grounds by the House of Lords, [1970] A.C. 467.

<sup>69</sup> Street, *supra*, note 3 at 78-79 (under 6.) and at 79 (under 7.).

<sup>70</sup> [1958] 14 D.L.R. 2d 73, 24 W.W.R. 592.

<sup>71</sup> 49 Q.J.P.R. 138 (1955).

the result whether the other is a wrongdoer, an innocent person, or a thunderstorm, his liability should not depend on a subsequently occurring circumstance, an event wholly outside of his control. Logic therefore would seem to demand the same result in both situations. This view appears to be further buttressed by the argument that to adopt the distinction as a rule of law would allow a wrongdoing defendant to escape "through the meshes of a logical net",<sup>72</sup> though, after all, the defendant has committed a tort which in fact has been a cause of the injury.<sup>73</sup> Wrongdoers should not be permitted to escape the consequences of their wrongful acts.<sup>74</sup> The rationale of this argument is that it seems more appropriate to impose liability in such cases and thereby deter negligent conduct, than to give the defendant an undeserved windfall. A further argument, however, not mentioned in the discussion, which appears to support this view would again be that in many cases the negligent defendant will be covered by liability insurance. Consequently it may be argued that it is fairer to hold the defendant liable and thereby distribute the loss among a large group, than to impose the entire loss on the innocent plaintiff.

These arguments, however, are far from conclusive. Again we encounter the misunderstanding already criticized,<sup>75</sup> that if it is established that a wrongdoer has caused plaintiff's physical injuries, this implies that he has caused his damages. Furthermore, the dialectical argument that because the defendant is a wrongdoer and the plaintiff is innocent, the defendant ought to bear the loss, is at least counterbalanced by the opposing argument that this is inconsistent with the idea of compensatory damages. The aim of civil actions is, as we have seen,<sup>76</sup> compensation for the results of a wrong done and not punishment of the offender. Punishment or deterrence are, with minor exceptions, not objectives of the civil law but of the criminal law.<sup>77</sup> If on the one hand it is urged that the defendant should not be heard to say, "some other cause would also have brought about the same harm", one may question with Peaslee<sup>78</sup> the validity of plaintiff's assertion that "You would have done me damage if some other cause had not."

In the same way the "liability insurance argument" is of questionable merit. Prosser has shown<sup>79</sup> that tort case opinions contain astonishingly little mention of insurance as a reason for holding the defendant liable. It has

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<sup>72</sup> Learned Hand, Circuit Judge in *Navigazione Libera Tristina Societa Anonima v. Newton Creek Towing Co.*, 98 F. 2d 694, at 697 (2d Cir. 1938).

<sup>73</sup> Carpenter, *Workable Rules for Determining Proximate Cause* (1932), 20 Calif. L. Rev. 229-259, 396-419, 471-539 at 405; 2 Harper and James, *Torts* (Boston: Little and Brown, 1956) at 1123.

<sup>74</sup> Carpenter, *supra*, note 2 at 951.

<sup>75</sup> See text *supra*, at p. 381. This mistake is made by Carpenter, *Concurrent Causation* (1935), 83 U. Pa. L. Rev. 941 at 948 and by 2 Harper and James, *supra*, note 73 at 1123.

<sup>76</sup> See text, *supra*, at pp. 380-81.

<sup>77</sup> See Stoll, *Penal Purposes in the Law of Tort* (1970), 18 Am. J. Comp. L. 3 at 10-13.

<sup>78</sup> Peaslee, *supra*, note 59 at 1133.

<sup>79</sup> Prosser, *Torts* (3d ed., 1964) at 568-577.



often been said that liability insurance does not create liability, but provides a means of indemnity against it once it has arisen; and that it is not to be considered in determining whether a person is liable in the first instance.<sup>80</sup> If we accept the argument that the defendant's liability could be conveniently distributed among a large group through insurance premiums, we must not lose sight out of the fact that the group as a group still has to pay. Since liability insurance premiums have risen constantly to higher figures it would appear not unreasonable to prevent a further increase if this can be done without harm. The rates of liability insurance premiums are already now a real and serious obstacle to adequate coverage, or even any coverage at all.<sup>81</sup>

The arguments almost balance each other. To which side we tip the scales more or less depends therefore on our sense of justice. Though this might appear unsatisfying and even appear to be an escape from sound legal reasoning, this in fact is the rationale of the opposing views. We should be mindful of the dictum of the Supreme Court of New Jersey in *Rappaport v. Nichols and Hub Bar, Inc.*,<sup>82</sup> "that policy considerations and the balancing of the conflicting interests are the truly vital factors in the molding and application of the common law principles of negligence and proximate causation." The reason that we do not permit two tortfeasors to plead the wrong of the other as a defense to his own conduct is that our sense of justice demands the imposition of liability on the first wrongdoer; otherwise we would permit both to escape and penalize the innocent party who has been damaged by their wrongful acts.<sup>83</sup> But our sense of justice does not make the same demand when the harm would have been produced either by an innocent person (or perhaps by the plaintiff himself) or by a natural force if there had been no wrongful human action.<sup>84</sup> Therefore, though it is conceded that this argument is neither intellectually nor dogmatically fully satisfying, the defendant should be relieved of his liability in this situation, since if there is no good reason to shift the loss the general rule is that it should be left where it has fallen. As we will see subsequently, this view has found judicial approval.

### *The subsequent (hypothetical) cause is of culpable origin*

#### (1). *The cases decided before Baker v. Willoughby*<sup>85</sup>

The first case which dealt explicitly with this problem was decided by the Alberta Supreme Court in *Stene v. Evans*.<sup>86</sup> The plaintiff was seriously

<sup>80</sup> *Id.* at 574.

<sup>81</sup> *Id.* at 589.

<sup>82</sup> 31 N.J. 188, at 205, 156 A. 2d 1 (1959).

<sup>83</sup> *Kingston v. Chicago & Northwestern Ry. Co.*, 191 Wis. 610, at 617, 211 N.W. 913 (1927).

<sup>84</sup> Edgerton, *Legal Cause* (1924) U. Pa. L. Rev. 211-244, 343-375, at 347; Peaslee, *supra*, note 78 at 1133; Williams, *supra*, note 65 at 77; Prosser, *supra*, note 79 at 256.

<sup>85</sup> [1969] 2 W.L.R. 489, [1969] 2 All E.R. 549 (C.A. 1968); reversed by the House of Lords, [1970] A.C. 467 (1969).

<sup>86</sup> *Stene v. Evans, Thibault v. Stene*, [1958] 14 D.L.R. 2d 73, 24 W.W.R. 592, (Alberta Supreme Court, Appellate Division, 1958).

injured in an accident on November 8, 1952, as a result of the defendant's negligence. An action for damages was instituted in October, 1953, and the trial thereof took place in April, 1957. In the meantime, the plaintiff was injured in a second accident on November 5, 1954, which left him with spastic paralysis with no future prospects for earnings. The defendant contended that any damages allowed in respect of the 1952 injury should be only for the period prior to the second accident. The court, however, repudiated this argument because they thought it impossible to hold the second wrongdoer liable for the full amount of plaintiff's damages. Since he did not injure a "100 per cent man", but injured an already disabled man, an "80 per cent man", the second tortfeasor could be made responsible only for those additional damages which he had caused.

To the same effect is an *obiter dictum* in *Dingle v. Associated Newspapers Ltd.*<sup>87</sup> Devlin, L. J. took a hypothetical case<sup>88</sup> to demonstrate that a subsequent wrongdoer is liable only for the added damage done by the second injury. In that example the plaintiff lost one eye, which diminished his earning capacity by 10 per cent. Subsequently he lost the other eye and was totally disabled. The second wrongdoer will have to pay for 90 per cent of the loss of earnings, but he will not have to pay the full 100 per cent because he can properly plead that the plaintiff's earning capacity was already damaged.

The most remarkable case, however, is the Canadian decision in *Long v. Thiessen and Laliberte*,<sup>89</sup> since for the first time a court clearly elaborated how the damages should be distributed between two sets of injuries. In this case, the facts of which are very similar to *Stene v. Evans*, the court held that a plaintiff should not receive more in respect of the first accident than he would if the second accident had not occurred, nor should he receive less because it did occur. The court found the following three steps<sup>90</sup> helpful in determining the proper amount of damages: (a) to assess as best as one can what the plaintiff would have recovered against the first tortfeasor had his action against him been tried the day before the second accident had happened, and to award damages accordingly; (b) to assess global damages as of the date of the trial in respect of both accidents; and (c) to deduct the amount under (a) from the amount under (b) and award damages against the second tortfeasor in the amount of the difference.

Therefore, before the English case of *Baker v. Willoughby* was decided, the rule of law could be stated the following way: When a person is injured by two subsequent wrongdoers, the second wrongdoer is liable only to the extent he enhances plaintiff's damages; whereas the first wrongdoer remains liable as if there had been no second injury.

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<sup>87</sup> [1961] 2 Q.B. 162 (C.A.); affirmed [1964] A.C. 371 (1962).

<sup>88</sup> [1961] 2 Q.B. 162 at 194 (C.A.).

<sup>89</sup> 65 W.W.R. 577 (Court of Appeal of British Columbia, 1968).

<sup>90</sup> 65 W.W.R. 577 at 591 (1968).

(2). *Baker v. Willoughby*<sup>91</sup>

In 1964 the defendant, who was driving his car negligently, knocked the plaintiff down, causing him severe injuries to his left leg and ankle which reduced his earning capacity substantially.<sup>92</sup> With some difficulty the plaintiff found employment sorting scrap metal and, one day in 1967 while so engaged, he was shot in the left leg by two men who demanded money from him. As a result of this shooting the plaintiff's leg had to be amputated and he had to wear an artificial limb. The plaintiff's action against the defendant came to trial in 1968. The plaintiff claimed that the damages payable to him in respect of the 1964 accident should in no way be decreased by the fact of the second injury; the defendant argued that by reason of the 1967 shooting and resulting amputation the damages should be limited to those relevant to the period between the two injuries. The House of Lords held in favour of the plaintiff and decided that the second injury did not operate to cut down the damages to which the plaintiff was entitled in respect of the first injury, thereby reversing the Court of Appeal which had adopted the defendant's view. Since the decision of the Court of Appeal, though reversed by the House of Lords, offers one of the three possible solutions to the problem in question, it seems appropriate to deal with the issues raised in both judgments.

At first sight the decision of the Court of Appeal appears to be an inevitable consequence of the principle of *restitutio in integrum*. Applying this doctrine it can be argued that the defendant cannot be held responsible because the plaintiff would have suffered the same damages without the defendant's tortious act, and that consequently the subsequent wrongdoer is bound to compensate the plaintiff.

This argument, however, would leave the injured plaintiff without adequate redress, because it would apply in the same way to the benefit of the second wrongdoer. It leads therefore to the result that the victim who sustains injuries by reason of two successive and independent torts finds himself in a worse situation than the victim who sustains the same injuries at the hands of a single tortfeasor.<sup>93</sup> The law can hardly regard such an utterly un-

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<sup>91</sup> [1969] 2 W.L.R. 489, [1969] 2 All E.R. 549 (C.A. 1968); reversed by the House of Lords, [1970] A.C. 467.

<sup>92</sup> The plaintiff was found guilty of contributory negligence which consequently gave rise to an apportionment issue, but this aspect of the case is not relevant here. It is interesting to note, however, that prior to 1945 the contributory negligence of the plaintiff was a complete defence to the claim. This was changed in England by the Law Reform (Contributory Negligence) Act 1945 which in section 1 (1) provides that "the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." This solution has now been adopted by modern statutes in most parts of the British Commonwealth, "so as to correct an adventure of the common law which represents one of its outstanding failures"; Fleming, *Law of Torts*, *supra*, note 16 at 223, 236, 237. A similar development takes place in the United States; see Prosser, *supra*, note 79 at 443-49 and especially Lambert, *The Common Law is Never Finished: Comparative Negligence on the March*, *Personal Injury Annual* — 1968, at 369-446.

<sup>93</sup> McGregor, *Successive Causes of Personal Injury* in (1970), 33 Mod. L. Rev. 378 at 380; Strachan, *The Scope and Application of the 'But For' Causal Test* (1970), 33 Mod. L. Rev. 386 at 395.

just result as acceptable. The 'but-for' test, therefore, does not help to solve this causal dilemma.

A different argument which seems to support the decision of the Court of Appeal is that this rule, at least in some cases, might distribute the loss among the several successive tortfeasors in a similar manner to the rule of law governing the contribution among joint tortfeasors. Let us illustrate this by the following example: The plaintiff is injured in January 1966, with incapacity resulting for the next four years. One day before the trial in January 1968 he is injured by a second wrongdoer, causing injuries which would keep him from working and earning wages for the next two years. A rule which in one way or another distributes the loss among the two tortfeasors would seem desirable. The only way available under the common law to reach this result appears to be the principle suggested by the Court of Appeal. This theory however, is fallacious. Following the Court of Appeal the first tortfeasor would be liable for plaintiff's loss of earning capacity between January 1966 and January 1968, whereas the second tortfeasor would be held responsible for all of plaintiff's damages accruing between January 1968 and January 1970. But only for this last period should plaintiff's damages be distributed among the two wrongdoers, since it cannot be seriously doubted that the first wrongdoer is liable for all damages between the two sets of injuries and the subsequent wrongdoer is liable for the loss caused in addition to the first injury. We are concerned here, however, solely with that period where both causes concur in producing the result, i.e. plaintiff's incapacity from January 1968 to January 1970. Since the Court of Appeal imposes exclusive liability on the subsequent wrongdoer for this period of time, this theory does not lead to a fair distribution of the loss among the successive tortfeasors in a way analogous to the joint tortfeasors situation. Also inconclusive for the same reasons is McGregor's argument<sup>94</sup> in support of the decision of the House of Lords that it is more equitable to hold each tortfeasor liable for the loss he himself has inflicted — the first for the initial loss and the second for the additional loss — than to place the total liability upon the second tortfeasor. McGregor overlooks the fact that the House of Lords imposes 'total liability'<sup>95</sup> upon the first tortfeasor, a result which is not more consistent with equity than the opposite view of the Court of Appeal.

The main argument against the holding of the Court of Appeal, propounded by the House of Lords<sup>96</sup> and adopted by legal authors,<sup>97</sup> is that the relief of the defendant for those damages accruing after the robbery might lead to apparent injustice. The contention is based on two grounds: (i) If one envisages the plaintiff suing the robbers who shot him, they would be

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<sup>94</sup> McGregor, *supra*, note 93 at 381.

<sup>95</sup> It has to be stressed that the only problem which arises in the context of cases here discussed is who should compensate the plaintiff for those damages where the 'but-for' test would relieve both tortfeasors from liability.

<sup>96</sup> [1970] A.C. 467 at 495-96.

<sup>97</sup> *Note to Baker v. Willoughby*, (1969), 85 L.Q. Rev. 307 at 309; McGregor, *supra*, note 93 at 381.

entitled to 'take the plaintiff as they find him', i.e. as an already disabled man. The Court of Appeal attempted to fill the gap by holding that the damages recoverable from the subsequent tortfeasors (the robbers) would include the diminution of the plaintiff's damages recoverable from the original tortfeasors. This attempt, however, is not only unique and without precedent,<sup>98</sup> but in the words of Lord Pearson, using the phraseology of causation, this novel head of damages looks too remote. (ii) Even if the plaintiff could claim against the robbers the damages which he could otherwise recover from the defendant, this 'ingenious' attempt of the Court of Appeal is unanimously rejected. It is argued that this solution would not help the plaintiff, if the later tortfeasors could not be found or were indigent or uninsured. A rule which substitutes for a right which is presumably protected by insurance liability a doubtful claim against criminals who, even if found, would almost certainly not be able to make any payments, does not appear to accord with justice.

This last argument, however, is of doubtful value. First, it ignores the existence of the Criminal Injuries Compensation Board.<sup>99</sup> However fruitless the plaintiff's claim against the robbers might have been there is no doubt that he had a valid claim against the Board. Nevertheless, and contrary to Atiyah's assertion,<sup>100</sup> this does not overcome our concern, since if the Compensation Board would have awarded any compensation to the plaintiff it would be compensation for the injury done to the useless leg, which from the financial standpoint was substantially nil. Above all there does not seem to be any sound reason why the public, in the person of the Compensation Board, should have to pay damages because the defendant was negligent.<sup>101</sup>

A second consideration, however, raises more serious doubts. Though the argument we referred to above is correct insofar as the special facts of *Baker v. Willoughby* are concerned, it cannot justify the decision as establishing a general rule, because for the very reason it avoids an obvious, unjust result in this case it can further injustice in the converse situation where the first tortfeasor is indigent but not the second one. Under the rule of *Baker v. Willoughby*, the plaintiff has no action against the wealthy wrongdoer but only a worthless right of recovery against the indigent. A distinction between the previous example and *Baker v. Willoughby* concerning who of the successive tortfeasors is able to satisfy the plaintiff's action is impossible, since this in effect would mean holding both tortfeasors jointly liable for

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<sup>98</sup> Note to *Baker v. Willoughby* (1969), 85 L.Q. Rev. 307 at 310: "This . . . seems to be carrying the 'thin skull' doctrine considerably further than has been done in the past. Thin skulls, although unusual, are foreseeable but it is less foreseeable that a person who is injured had a right to damages arising from a previous accident caused by A which he will now lose because of the negligence of B in causing a second entirely independent accident."

<sup>99</sup> See e.g., Fleming, *An Introduction to the Law of Torts* (1967), reprinted (with corrections) (1969), at 21 N.2 and 59-60.

<sup>100</sup> Atiyah, *Baker v. Willoughby: An Addendum* (1969), 85 L.Q. Rev. 475.

<sup>101</sup> Note to Atiyah (1969), 85 L. Q. Rev. 476-477.

the loss, a result rejected by all common law courts.<sup>102</sup> Equally inconclusive for the same reason is McGregor's additional argument<sup>103</sup> in support of the decision of the House of Lords, that if the victim's own negligence has contributed to the second but not to the first injury, a victim who had himself been at fault with respect to the second injury but not to the first would find, if he were required to claim for his total loss from the second tortfeasor, that his contributory negligence in the second accident would go also to reduce his damages in respect of the injury suffered in the first. The converse case where the plaintiff's negligence has contributed to the first but not to the second injury, demonstrates that McGregor's contention that the victim is afforded a larger measure of protection if the first tortfeasor's liability is retained, is wrong.

Nevertheless, Lord Parker hinted at the right direction. The injustice, however, cannot be seen in any substantive reason but solely in the procedure it forces upon the injured party. The main defect of the decision of the Court of Appeal seems to me that it compels the plaintiff to bring two separate actions against two or more parties, perhaps in widely separated courts.<sup>104</sup> The outcome of these trials might be contradictory, in some cases the plaintiff might fall between two stools. It is amazing that the Court of Appeal was willing to burden the plaintiff with this risk.<sup>105</sup> As has been said in a different context, logic does not always have the last word in law, and when it leads to morally unjustifiable results, moral considerations have prevailed.<sup>106</sup> This view is supported by an additional argument which has to be made against the holding of the Court of Appeal, namely that the decision is based on a wrong view of what is the proper subject for compensation. The court obviously accepted the defendant's argument that the second injury removed the very limb from which the earlier disability had stemmed, and that therefore no loss suffered thereafter can be attributed to the defendant's negligence. A man, however, is not compensated for the physical injury, as we have said earlier<sup>107</sup> he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg; it is in his inability to earn as much as he used to earn or could have earned if there had been no accident. The second injury did not diminish this loss. The rule of law established by the House of Lords, therefore has the

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<sup>102</sup> It appears, however, that this is the fairest solution. Since quite often the distinction between joint and successive tortfeasors is negligible the analogy would seem justified. However, the soundness of this solution is considerably impaired by the prevalence of liability insurance today. If both tortfeasors are covered by insurance — this will be true in many cases — the ultimate loss allocation will be between insurance companies, which of course are not interested in recouping from each other, since this would cause tremendous expenses for the sake merely of shifting a marginal loss.

<sup>103</sup> McGregor, *supra*, note 93 at 382.

<sup>104</sup> The counterargument that the plaintiff might be forced to bring two actions even under this rule, namely if the subsequent tortfeasor causes additional harm, does not weaken my argument because this result is inevitable whereas the theory of the Court of Appeal burdens the plaintiff unnecessarily.

<sup>105</sup> [1969] 2 All E.R. 549 at 555 per Fenton Atkinson L.J.

<sup>106</sup> Strachan, *supra*, note 93 at 395.

<sup>107</sup> See text, *supra*, at p. 381.

greater merit and hopefully will be adopted in all jurisdictions of the Common Law.

*The subsequent (hypothetical) cause is of innocent origin*

As discussed earlier,<sup>108</sup> a basic distinction should be made between the case where the subsequent cause is of culpable origin and the case where the cause is of innocent origin. The only decision which centers on this problem is the English case of *Harwood v. Wyken Colliery Co.*,<sup>109</sup> which was decided by the Court of Appeal in 1914. Though the case arose under the Workmen's Compensation Acts, 1897-1925, which were replaced by the National Insurance Industrial Injuries Act, 1946,<sup>110</sup> the decision is still of substantial importance because in *Baker v. Willoughby* the House of Lords<sup>111</sup> indicated that it considered *Harwood v. Wyken Colliery Co.* to be good law. Therefore, it seems appropriate to discuss the decision of the Court of Appeal in order to examine the wisdom of following this *obiter dictum* of the House of Lords.

In October of 1909 and 1911, the plaintiff was injured in the course of his employment. These injuries caused his incapacity. The defendants admitted liability under the Workmen's Compensation Act, 1906, and paid compensation until May 1912, when they ceased to pay on the ground that since it appeared from the medical evidence that the plaintiff was suffering from heart disease (first noticed by the doctor in April, 1912) his inability to work was not due to the effect of the accidents but to this condition. In June, 1912, the plaintiff asked for compensation on the ground of total incapacity. The trial judge held that there was no work that the accident prevented the plaintiff from doing that the heart disease had not also prevented him from doing and that for this reason his action must fail. The Court of Appeal, however, reversed and remitted the case in order for the judge to award such weekly sum by way of statutory compensation as he might think fit.<sup>112</sup>

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<sup>108</sup> See text, *supra*, at pp. 381-84.

<sup>109</sup> [1913] 2 K.B. 158.

<sup>110</sup> James, *General Principles of the Law of Torts* (3rd ed. London: Butterworths, 1969) at 239; Fleming, *supra*, note 55 at 301 N. 30.

<sup>111</sup> [1970] A.C. 467 at 492 and 496.

<sup>112</sup> The medical testimony is not very clear. Though the court treated the case as one of subsequent causation, i.e. the heart disease developed after the second accident between October 1911 and June 1912, it appears that the plaintiff must have been affected by the heart disease already at the time of the accident. He suffered from a defective condition of the mitral and aortic valves of the heart ([1913] 2 K.B. 158 at 169), a disease which most probably — according to medical experience — was dormant before October 1911. The court stated that for the first time the heart disease was noticed in April 1912, but did not mention that the plaintiff contracted the disease at that time. If our contention is true then this case would be a typical "tendency case" (see text *supra*, at pp. 377-78), i.e. the heart disease would have to be taken into account in assessing the proper amount of damages. This leads to the argument which we will discuss later (see text, *infra*, at p. 392) that it seems arbitrary to make the outcome of an action for damages dependent upon the question whether the disease which would have caused the same or similar damages without defendant's tortious conduct, was subsequently contracted or whether the plaintiff suffered from it already at the time of the wrongdoing (pre-existing disease).

Let us now consider the opposing arguments in detail. The court relies heavily on the wording of Section 1 of the Workmen's Compensation Act, 1906,<sup>113</sup> and rejects the defendant's argument that there is no continuing consequence resulting from the accident after the plaintiff contracted the heart disease on the ground that Section 1 does not contain the word 'solely' after the word 'injury',<sup>114</sup> and that therefore Section 1 is applicable even when the injury results from two independent causes. This argument, however, is weakened considerably when we again remember that compensation is not paid for the injury but for the consequences resulting from the injury.<sup>115</sup>

The court concedes that Schedule I, Section 16,<sup>116</sup> of the Workmen's Compensation Act, 1906, which provides for a review of the weekly payment, suggests a basis for arguing that the altered circumstances (i.e. the subsequent development of the heart disease) justify an order ending the payment. Nevertheless the court believes that Schedule I, Section 17,<sup>117</sup> which provides under certain circumstances for a commutation of the weekly awards by the payment of a lump sum, affords an argument the other way and that both sections can be reconciled with each other only if the subsequent disease is disregarded.<sup>118</sup> The court obviously accepts the plaintiff's contention<sup>119</sup> that if the defendant's argument is right no employer would seek to redeem because there would be the chance of the workman becoming incapacitated by illness apart from the injury by accident and so put an end to his right to compensation altogether.<sup>120</sup>

Schedule I, Section 16, however, not only allows the diminution of the weekly payment, it also justifies an increase in appropriate circumstances. Not only does the injured plaintiff run the risk that the application of Section 16 might end his right to compensation, but there exists the risk for the defendant that later circumstances might cause an increase of the weekly

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<sup>113</sup> Section 1 reads: "(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation . . ."

<sup>114</sup> [1913] 2 K.B. 158 at 166 per Buckley L.J. and at 169 per Hamilton L.J.

<sup>115</sup> See text, *supra*, at p. 381.

<sup>116</sup> First Schedule: Scale and conditions of compensation "(16) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, . . ."

<sup>117</sup> Schedule I, section (17): "When any weekly payment has been continued for not less than 6 months, the liability therefore may, on application by or behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, . . ."

<sup>118</sup> [1913] 2 K.B. 158 at 166-67 per Buckley L.J.

<sup>119</sup> [1913] 2 K.B. 158 at 160.

<sup>120</sup> It is interesting to note that the court arrived at this conclusion though it was possible under the Workmen's Compensation Act to award weekly payments and section 16 allowed for review of such periodical payments. The different result of this case when compared e.g., with similar German cases can, therefore, not simply be explained by the fact — as one is first inclined to believe — that this merely shows up the peculiarity of the common law system which makes a final lump sum award mandatory and allows neither awards by way of periodical payments nor subsequent revision of awards in the light of changed circumstances after judgment.



payments. Both risks are equal and balance each other.<sup>121</sup> It therefore offers no advantage to the employer to wait and hope that the employee falls ill, and it is unlikely that a defendant would refuse to redeem the weekly payments solely on this ground.

Again we have to observe that the court fails to distinguish between the case at bar, where the subsequent cause is of innocent origin and the example discussed in the course of argument,<sup>122</sup> where the subsequent cause is of culpable origin. Buckley L. J. is right when he observes that in that example compensation for the first injury must continue even after the second accident, but he is wrong when he implies that this result suggests a similar decision in the case at bar. He overlooks the fact that these two situations present different problems which should be discussed independently.<sup>123</sup>

Even if it is conceded that under the common law the subsequent development of the heart disease has to be taken into account, it may be argued that under a statutory regulation as the Workmen's Compensation Act the result is different. Since a man who is totally incapacitated by an accident can, under the statute, get only half his average weekly earnings during the previous twelve months,<sup>124</sup> it seems unjust to burden him with the additional risk that even this part-compensation may be further diminished in certain circumstances. Indeed, this argument was made by the Court of Appeal.<sup>125</sup> However, it must be pointed out that the Workmen's Compensation Act burdens the employer with strict (absolute) liability, i.e. liability without fault, and that the injured workman can always at his option take proceedings independently of the Act, e.g., bring an action in negligence,<sup>126</sup> so that the inadequacies of the Workmen's Compensation regulation are sufficiently compensated by its obvious advantages. Therefore it is unjustified to distinguish in this respect between compensation under the common law and compensation under the Workmen's Compensation Act.<sup>127</sup>

As observed earlier,<sup>128</sup> the medical evidence in *Harwood v. Wyken Colliery Co.* is ambiguous, and it is very probable that the plaintiff already suffered from heart disease at the time he was injured — a factor which consequently would have resulted in a reduction of the damages to be awarded.<sup>129</sup> This leads to the question whether the distinction between a

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<sup>121</sup> This point is important. Very often it is argued against the here suggested solution that subsequent innocent causes should be taken into account that such a rule would induce the defendant to prolong the trial in the hope that the plaintiff may be incapacitated by illness, etc. before judgment and thereby escape liability. This motive, however, is neutralized by the converse possibility that the plaintiff's injuries deteriorate and so put a heavier burden on the defendant.

<sup>122</sup> *Harwood v. Wyken Colliery Co.*, [1913] 2 K.B. 158 at 167 per Buckley L. J.

<sup>123</sup> See text, *supra*, at pp. 281-84.

<sup>124</sup> Workmen's Compensation Act, 1906, Schedule I Section (1) (b).

<sup>125</sup> [1913] 2 K.B. 158 at 162 per Cozens Hardy, M.R., and at 170 per Hamilton L.J.

<sup>126</sup> Workmen's Compensation Act, 1906, Section (2) (b).

<sup>127</sup> It appears that the House of Lords is in accord: see *Baker v. Willoughby*, [1970] A.C. 467 at 492 per Lord Reid.

<sup>128</sup> *Supra*, note 112.

<sup>129</sup> Text, *supra*, at pp. 277-78.

“subsequently acquired” and “pre-existing” disease is sound. The argument most commonly made in support of this distinction is that in the case of a pre-existing disease the defendant injures an already injured person and therefore at no time was responsible for plaintiff’s total loss, whereas in the situation where the disease is contracted subsequent circumstances should not be admitted as evidence to show that the plaintiff in fact suffered less damages than originally anticipated.

This argument, however, is inconclusive. It may be, if the matter comes to trial expeditiously, that judgment must be given when many matters are left in doubt, but the court or the jury has always to decide the case on the available information. Therefore, though it is quite true that the measure of damages has to be assessed as at the date when the plaintiff sustained his injuries, courts in assessing damages are not only entitled but also obliged to consider circumstances ‘which have arisen since the cause of action accrued and throw light upon the reality of the case.’<sup>130</sup> Furthermore, as the *Harwood* case vividly illustrates, a distinction between these two situations must cause arbitrary decisions, since in many cases it will be impossible to prove exactly when the plaintiff contracted the disease. A final argument against the recognition of this distinction can be derived from an analogy to a converse situation. When discussing the scope of the ‘thin-skull’ rule it was suggested that the application of this rule does not depend upon the question of whether the plaintiff suffered from his peculiar susceptibility at the time he was injured or not.<sup>131</sup> Both alternatives are dealt with in the same manner to the benefit of the injured plaintiff. There is also good reason to treat the converse case in the same way, i.e. where the plaintiff suffers from a mischievous tendency which necessarily and without any further exterior impact would have resulted in the same damage.<sup>132</sup> This would mean that the rule of the so-called “tendency cases” is applicable to the situation here in question, where the plaintiff contracts the disease subsequently. The analogy seems obvious: if the distinction between a ‘pre-existing’ and a ‘subsequently acquired’ disease is repudiated to the advantage of the plaintiff, then the same rule should apply to his disadvantage.

The main point, however, which has to be made against the rule laid down by the Court of Appeal in *Harwood v. Wyken Colliery Co.* and relied upon by the House of Lords in *Baker v. Willoughby*, is that its acceptance would cause an anomalous result. To appreciate this submission it must be kept in mind that the common law allows no periodical payments, but awards

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<sup>130</sup> *Williamson v. John Thornycroft and Co. Ltd.*, [1940] 2 K.B. 658 at 659 per Scott L. J. (C.A.). This, however, is not true of American Law where damages must be assessed as of the time when it occurred: See below at 396-97.

<sup>131</sup> See text, *supra*, at pp. 372-73.

<sup>132</sup> Cases where the court took a pre-existing defective heart condition into account include the following: *Clay v. Ministry of Transport and Civil Aviation*, [1959] 2 Lloyd’s L.R. 45; *Alexander v. John Wright & Son (Blackwall) Ltd.*, [1959] 2 Lloyd’s L.R. 383; *Jason v. Batten*, [1969] 1 Lloyd’s L.R. 281.

a lump sum once and for all to fully compensate the plaintiff for his loss.<sup>133</sup> In calculating the lump sum it is the practice of courts in all common law jurisdictions of the British Commonwealth to take *future contingencies* into account, e.g., the chances of decrease in the earnings or profits and the possibility that death, illness or further injury<sup>134</sup> unconnected with the present claim may occur.<sup>135</sup> This practice is described by Brett L. J. in *Phillips v. The London and South Western Ry. Co.*:<sup>136</sup> With regard to subsequent time, if no accident had happened, nevertheless many circumstances might have happened to prevent the plaintiff from earning his previous income; he may be disabled by illness, he is subject to the ordinary accidents and vicissitudes of life; and if all these circumstances of which no evidence can be given are looked at, it will be impossible to exactly estimate them; yet if the jury wholly pass them over they will go wrong, because these accidents and vicissitudes ought to be taken into account." This procedure can cause a substantial reduction of the amount of damages which would otherwise be awarded.<sup>137</sup> In South Australia it was even common practice to make a standard subtraction of 25 per cent for contingencies without considering whether this was justified by the facts of the individual case.<sup>138</sup> Thus if the rule in *Harwood v. Wyken Colliery Co.* were adopted we would arrive at a very anomalous result; when assessing the lump sum for personal injuries we would take into account that at some future time the plaintiff might have fallen ill and thereby sustained similar damages without defendant's wrong, accordingly we would make a reduction for 'contingencies' or, as they are sometimes called, the 'vicissitudes of life'. On the other hand, if the plaintiff has in fact contracted a disease between the time he sustained his injuries and the date of trial, this would not be taken into account under the rule of *Harwood v. Wyken Colliery Co.* This means that we take the 'vicissitudes of life' (e.g. illness) into account when this is only a hypothetical possibility, but when it becomes a reality we ignore it entirely and award him full compensation for his loss.

<sup>133</sup> The difficulties in arriving at a fair sum are shown by Scarman J.'s statement in *Hawkins v. New Mendip Engineering Ltd.*, [1966] 1 W.L.R. 1341 at 1348 (C.A.): "Whatever figure I decide upon will on any view be guesswork and my guess is as good or as bad as anybody else's."

<sup>134</sup> It is, however, unjustified to make such discount if the injury would have been caused by the tort of a third party. The opposite view of Streatfeild J. in *Pope v. D. Murphy & Son Ltd.*, [1961] 1 Q.B. 222 at 227 is no longer tenable after the decision of the House of Lords in *Baker v. Willoughby*; cf. *Bresatz v. Przibilla*, (1962) 36 A.L.J.R. 212 at 213: "... He might have been injured in circumstances in which he would receive no compensation from any source ...".

<sup>135</sup> *Roach v. Yates*, [1938] 1 K.B. 256 at 269 (C.A.). 1 D. Kemp and M. Kemp, *The Quantum of Damages* (3rd ed. London: Sweet and Maxwell, 1967) at 24; Goldsmith, *supra*, note 53 at 8-9.

<sup>136</sup> (1879), L.R.C.P.D. 280 at 291 (C.A.). To the various stages of this litigation see D. Kemp and M. Kemp, *supra*, note 135 at 25-28.

<sup>137</sup> E.g., in *Billingham v. Hughes*, [1949] 1 K.B. 643 at 645 (C.A.) the trial judge discounted one third.

<sup>138</sup> This practice was rejected by the High Court of Australia in *Bresatz v. Przibilla* (1962), 36 A.L.J.R. 212 at 213 per Windeyer J. The criticism was adopted by the Court of Appeal in *Mitchell v. Mulholland*, [1971] 2 All E.R. 1205 at 1212: "... A further instance of this too-general approach is the adoption a rule-of-thumb discount for all contingencies...".

This cannot be the law. The only way to avoid such a contradiction is to disregard *Harwood v. Wyken Colliery Co.* and to accept the suggestion made here that a subsequent event of innocent origin which would have caused similar damages has to be taken into account.<sup>139</sup>

As the Court of Appeal indicated, the rule of law laid down in *Harwood v. Wyken Colliery Co.* should be changed.<sup>140</sup> Since the decision of the House of Lords in *Baker v. Willoughby* involved the case of a subsequent tort, McGregor is right in stating that the question is still an open one.<sup>141</sup> Therefore, it can be hoped that the House of Lords may reconsider the problem and adopt a different solution.

The solution suggested here is in accord with a substantial number of cases which have not yet received the attention they deserve. *Baily v. Derby Corporation*,<sup>142</sup> involved the compulsory acquisition of plaintiff's property, consisting of a factory where he carried on his business as a building contractor and repairer. The plaintiff suffered from ill-health subsequent to the acquisition so that he would have been unable to continue his former profession even if his property had not been acquired by the defendant corporation. Nevertheless he asked for compensation on the basis of the total extinguishment of his business. The court granted damages for the costs of removal of his business to another place and for temporary loss of profits, but because of the subsequent deterioration in his health it refused to award anything further.<sup>143</sup> Contrary to the decision of the House of Lords in *Baker v. Willoughby*, therefore, the court took the subsequent disease into account.

To the same effect is a case which arose in 1939 under the Fatal Accidents Act, 1846, where it was decided that the amount of damages may be reduced by reason of the subsequent outbreak of war.<sup>144</sup> The court thought it proper to take into account the possibility of the deceased breadwinner being killed in the war, either as a member of the fighting forces if he was of military age or as a result of air raids, although he was killed before the commencement of the war. This decision has been criticized as irreconcilable with the rule that one does not get less damages for loss of property because

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<sup>139</sup> Since compensation under the common law and under the Workmen's Compensation Act, 1906, with regard to the problem here discussed is the same (see text, *supra*, at p. 391), the argument just presented does not only apply to cases arising under the common law but as well to cases under statutory regulations as the Workmen's Compensation Acts which award weekly payments and allow periodical review of these payments.

<sup>140</sup> [1969] 2 All E.R. 549 at 555 per Fenton Atkinson L.J.: "If a workman claims damages against his employer for personal injuries causing permanent partial loss of earning capacity, but by the date of trial he has been reduced to permanent complete incapacity for work by disease or some pure accident wholly unconnected with the original injury, counsel for the plaintiff concedes that the damages for future incapacity would properly be reduced and might in some cases have to be reduced to nil."

<sup>141</sup> McGregor, *supra*, note 93 at 383.

<sup>142</sup> [1965] 1 W.L.R. 213 (C.A. 1964).

<sup>143</sup> [1965] 1 W.L.R. 213 at 219-20 per Lord Denning, M.R.

<sup>144</sup> *Hall v. Wilson*, [1939] 4 All E.R. 85; accord, Williams, *supra*, note 65 at 77 N. 33.

the risk of war reduced its value.<sup>145</sup> However, as Professor Street has shown,<sup>146</sup> the cases have to be distinguished; in one the law requires the property to be valued at the time of the wrong, whereas in the other the court is required to decide how much loss from the death of the breadwinner the defendant has sustained. This implies that the court has to take regard of all circumstances which arise before the date of trial.

Similarly it has been held that a plaintiff, who was injured by the defendant but subsequently and before the action was brought, was sentenced to imprisonment for ten years, cannot ask for damages for the period he was imprisoned, because during that time he did not suffer any financial loss which can be fairly ascribed to his injuries.<sup>147</sup> For the same reason, an accidentally disabled workman is not compensated for his injuries if he would have lost his job subsequently because the factory where he worked closed and because of a general depression the chances of finding other employment were small.<sup>148</sup> Another example is the well-known American case of *Douglas, Burt & Buchanan v. Texas and Pacific Ry. Co.*<sup>149</sup> where the defendants unlawfully maintained a bridge which obstructed the waterway and delayed the plaintiff's barge so that he suffered financial loss. But a lawfully maintained bridge further along the waterway would in any case have obstructed the barge and caused the same delay. The Louisiana court held that no damages were recoverable for the loss attributable to the delay. The unlawfully maintained bridge undoubtedly caused the delay of the barge, and this remains true even if another bridge would in any event have caused a similar delay. It does not follow however that the defendant's bridge caused the plaintiff's financial loss, for this is only true if he would, apart from the defendant's act, have been able to exploit certain economic opportunities.<sup>150</sup>

It must be noted that American law<sup>151</sup> differs from other common law jurisdictions. The prevailing American position is that neither contingencies nor subsequent events are taken into account when assessing the measure of

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<sup>145</sup> Note in (1940), 56 L.Q. Rev. 22.

<sup>146</sup> Street, *supra*, note 69 at 80.

<sup>147</sup> *Leschke v. Jeffs and Faulkner*, 49 Q.J.P.R. 138 (Supreme Court, Brisbane, 1955). To the same effect is the obiter dictum of du Parcq J. in *Smith v. Cawdle Fen, Ely (Cambridge)*, [1938] 4 All E.R. 64 at 71.

<sup>148</sup> See *Phillips v. The London and South-Western Ry. Co.*, (1879) L.R.C.P.D. 280 at 291 per Brett L.J. (C.A.) and *Missouri, Kansas & Texas Ry. Co. v. Flood*, 35 Tex. Civ. App. 197 at 199, 79 S.W. 1106 (Court of Civil Appeals of Texas, 1904).

<sup>149</sup> 150 La. 1038, 91 So. 503 (1922).

<sup>150</sup> However, if the second bridge had also been unlawfully maintained, then the defendants would have been liable: Williams, *supra*, note 65 at 77; McLaughlin, *Proximate Cause* (1925), 39 Harv. L. Rev. 149 at 154-55; H.L.A. Hart and A.M. Honore, *Causation in the Law* (Oxford: Clarendon Press, 1962) at 227 n. 3; see generally text *supra* p. 381. Cf. *Thompson v. Louisville and Nashville Ry. Co.*, 91 Ala. 496 at 500-501, 8 So., 406 (1890): "If two persons block up a street, so that one is injured in attempting to pass, neither of the culpable parties can excuse himself, by showing the wrong of the other, for the injury is the natural and proximate result of his own act."

<sup>151</sup> With the exception, of course, of Louisiana because of its civil law tradition; see *Douglas, Burt & Buchanan v. Texas and Pacific Ry. Co.*, *supra*.

damages. Two reasons are offered in support of this rule: first, it is too speculative to take future contingencies into account,<sup>152</sup> and second, damages must be assessed as of the time when the loss occurred, i.e. when the plaintiff sustained his injuries.<sup>153</sup> Additional support can be derived from the so-called "collateral source rule", which provides that in an action for compensatory damages the defendant will not be permitted to establish that the plaintiff did not actually sustain the damages alleged, if the diminution emanated from an independent source. Therefore, in spite of the primarily compensatory theory behind tort damages,<sup>154</sup> the plaintiff may be overcompensated, i.e. he may be better off than he would have been had he sustained no injuries by defendant's negligence. Notwithstanding this technical overcompensation, the American view can be defended on the ground that damages never fully compensate for the injuries suffered anyway, mainly because a substantial share of the award (one third to one half) is paid to the plaintiff's own lawyer. This situation is without parallel in other countries. The American and English (including all common law jurisdictions of the British Commonwealth) solutions, therefore, though theoretically opposed, are in practice not so far removed as one might first be inclined to believe. This is because reducing damages on account of contingencies or subsequent events, but casting the plaintiff's lawyer's costs on the defendant, may leave the plaintiff with the same net recovery as the American practice of awarding him full damages but requiring him to pay his lawyer himself.<sup>155</sup>

### Conclusion

Two questions are waiting for authoritative settlement: (1) What is left of the "thin-skull" rule after *Smith v. Leech Brain*?, and (2) What is the effect on the measure of damages of subsequent causes of innocent origin (e.g. illness, imprisonment, or "Act of God") arising between the vesting of the cause of action and the date of judgment? It is hoped that the solution suggested here will be adopted, i.e. that the "thin-skull" rule entitles the plaintiff to the full amount of his damages, without any deduction because of his vulnerable state of health, and that a subsequent event of innocent origin has to be taken into account when assessing damages.

This second problem has in recent years played an important and increasing part in personal injury cases in Germany, mainly in accident litigation. Insurers have considered it a welcome possibility in the task of defeating claims. One may well wonder whether a similar development will take place in the common law, and whether it will be used for the same purpose.

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<sup>152</sup> *Bunda v. Hardwick*, 376 Mich. 640 at 656, 138 N.W. 2d 305 (1966).

<sup>153</sup> Fleming, *supra*, note 55 at 312 (see especially n. 69).

<sup>154</sup> Restatement of the Law of Torts, Section 901 (a) and 903 (1939).

<sup>155</sup> Fleming, *supra*, note 55 at 312 n. 70.

