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*Would It Have Made Any Difference?
Cause and Effect in Commercial Law*

The Right Honourable
Lord Walker of Gestingthorpe

Justice of the Supreme Court of the United Kingdom

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to be invited to give this lecture.

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the footsteps of some very distinguished judges and jurists
who have given the Sultan Azlan Shah Law Lecture
in previous years.

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Commercial Law



Robert Walker
(b. 17 March 1938)

Robert Walker, Lord Walker of Gestingthorpe was born on 17 March 1938. He was educated at Trinity College, Cambridge where he graduated in 1959 with a first class Bachelor of Arts degree in Law and Classics. From 1959 to 1961 he served in the British army (Second Lieutenant Royal Artillery, National Service List).

He was called to the English Bar by Lincoln's Inn in 1960 and was appointed a Queen's Counsel in 1982, specialising in the law of trusts, pension schemes and tax.

In 1994, Lord Walker was appointed a High Court Judge in the Chancery Division and was promoted to the Court of Appeal in 1997. His promotion was widely regarded at the time as one of the fastest promotions

ever from the High Court to the Court of Appeal. He was appointed as a Lord of Appeal in Ordinary in 2002, and became one of the first Justices of the newly established United Kingdom Supreme Court in 2009.

Lord Walker has developed a reputation for the “logical and rigorously intellectual” style of his judgments (*Times*, UK). Many of his judgments are now regarded as authoritative statements of the law, such as his discussion on the law on without-prejudice negotiations in *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783, which was cited with approval by the UK Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] 4 All ER 1011. He also participated in the landmark decision in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961, where the English Court of Appeal had to decide whether conjoined twins should be separated in order to preserve the life of one while potentially sacrificing the life of the weaker twin.

Lord Walker’s eminence and authority as a specialist in equity and trusts can be seen from the Privy Council decision in *Henry v Henry* [2010] 1 All ER 988 where the Privy Council, in discussing the law on proprietary estoppel, referred solely to the judgments of Lord Walker in the cases of *Gillett v Holt* [2000] 2 All ER 289, *Jennings v Rice* [2003] 1 FCR 501, *Campbell v Griffin* (2001) 82 P & CR D 43 and *Yeoman’s Row Management Ltd v Cobbe* [2008] 4 All ER 713. His Lordship also delivered judgment in the authoritative decision of the House of Lords on proprietary estoppel in *Thorner v Major* [2009] 1 WLR 776.

In 2011, Lord Walker together with Lady Hale delivered the joint leading judgment in *Jones v Kernott* [2011] UKSC 53 (9 November 2011), an important case on constructive trust. The United Kingdom Supreme Court

had to determine the beneficial interests of an unmarried couple who had prior to their separation acquired a house in joint names intending it to be their family home, and to revisit the earlier decision of the House of Lords in *Stack v Dowden* [2007] 2 AC 432.

Apart from his duties as a judge of the UK Supreme Court and the Privy Council, Lord Walker has been sitting as a Non-Permanent Judge of the Hong Kong Court of Final Appeal since 1 March 2009.

Lord Walker became a Bencher of Lincoln's Inn in 1990 and was the Treasurer for Lincoln's Inn for the year 2010–2011. He was elected as an Honorary Fellow of Trinity College, Cambridge University in 2006.

Lord Walker of Gestingthorpe married Suzanne Diana Leggi in 1962. They have three daughters and one son. His interests include walking and gardening.

Editor's note

Lord Walker retired as a Justice of the United Kingdom Supreme Court on 17 March 2013.

In his final sitting before retirement, Lord Walker delivered the unanimous judgment of the UK Supreme Court in the landmark case of *Futter v Revenue and Customs Commissioners; Pitt v Revenue and Customs Commissioners* [2013] UKSC 26, upholding the well-known rule in *Re Hastings-Bass* [1975] Ch 25 and the doctrine of mistake in the field of equity and trusts law.

Where damages are claimed for breach of some professional duty, questions of causation cannot be considered apart from the scope of the duty owed.

In judicial review of official decision-making the official decision-maker may have failed to follow the appropriate procedure.

He may have failed to carry out proper consultations, or to give a proper period for lodging objections. In such a case the riposte “It would not have made any difference anyway,” carries very little weight.

Would It Have Made Any Difference? Cause and Effect in Commercial Law

Lord Walker of Gestingthorpe
Justice of the Supreme Court of the United Kingdom

Your Royal Highness, it is a great honour for me to be invited to give this lecture. I am deeply conscious that I am following in the footsteps of some very distinguished judges and jurists who have given the Sultan Azlan Shah Law Lecture in previous years.

On this occasion I cannot forbear to mention my sadness—shared, I am sure, by all who knew him—that last year’s lecturer,* my friend and colleague Alan Rodger, Lord Rodger of Earlsferry, died a few months ago. He was most unexpectedly struck down by a fatal disease while he was still in his intellectual prime. His death is a great loss to the British judiciary and public, and a grievous personal loss for many of us.

I am going to speak this evening about cause and effect in commercial law, with a quick look also at public law. Questions of causation are among the most interesting and difficult topics that have to be addressed by legal scholars, lawyers and judges. They are by no means limited

*Twenty-fifth
Sultan Azlan Shah
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on 1 December 2011
in the presence of
His Royal Highness
Sultan Azlan Shah*

to the tort of negligence, but that is probably the field in which they most often occur.

Late diagnosis in clinical negligence

In the area of clinical negligence, for instance, there is the recurring problem of late diagnosis. If a doctor negligently fails to send his patient for an x-ray, or an MRI scan, or a biopsy, and as a result there is a delay (whether measured in days, or weeks, or months) in the correct diagnosis of some serious condition, how much difference does that make to the patient's prospects of a full recovery? And how much difference does it make to the patient's legal rights? If expert evidence indicates, on the balance of probabilities, that prompt diagnosis would have made no difference to the patient's chances, then the law's hard answer is that the patient has no cause of action in tort (though there may be a claim for nominal damages for breach of contract). That is because the tort of negligence requires not only a duty of care and a breach of that duty, but also loss occasioned by the breach.

In the leading English case of *Gregg v Scott*¹ there was (through a doctor's negligence) a delay of nine months in the diagnosis of a particularly serious form of cancer. In the leading Australian case of *Tabet v Gett*² a six-year old child was admitted to hospital with headaches and nausea, and there was a delay of only 24 hours (but potentially a crucial 24 hours) in her being examined by CT scan and EEG. In each case the conclusion on the evidence was that there was

less than an even chance that early diagnosis would have made a significant difference to the prognosis. The House of Lords in the former case, and the High Court of Australia in the latter case, declined to develop the law so as to extend the notion of “loss of a chance” to the field of personal injury caused by medical negligence.

“Where difficult problems of causation arise in clinical negligence, it is usually because medical science cannot give a definite answer to a scientific question.”

That is a very interesting area, but it is not what I am going to speak about this evening. I have mentioned it to point a contrast. Where difficult problems of causation arise in clinical negligence, it is usually³ because medical science cannot give a definite answer to a scientific question. Expert witnesses differ in their opinions. The origin or the future course of some trauma or infection or carcinoma may be a matter on which medical science cannot yet give a precise aetiology or make a confident prognosis prediction.

Loss of a chance

In another type of negligence case establishing causation, and hence liability, depends not on medical science but

on the court's own judgment, on the evidence, as to how one or more human beings would have acted but for the negligence complained of. Some of these are "loss of a chance" cases in the full sense: a chance of future benefit is what the plaintiff has lost. All of them involve a lost chance in the wider and looser sense that the court has lost the chance of ever knowing for certain what would have happened but for the defendant's breach of duty. Instead the court has to construct a hypothetical, parallel universe in which there was no fall from grace, and decide what difference (if any) it would have made to the plaintiff if things had gone as they should.

The earliest well-known case on loss of a chance is *Chaplin v Hicks*⁴ which is celebrating its centenary this year. It is a case that is still cited in the courts of Malaysia,⁵ but I hope I may be pardoned for mentioning it again. It is sometimes referred to as the beauty contest case, but that is a misdescription which does not do justice to the talented Miss Chaplin. It was a competition for aspiring actresses, organised by a popular newspaper, no doubt in order to boost its circulation. The original plan was for the photographs of 24 finalists to be published in the paper and for the 12 winners to be decided by readers' votes (which might have made it little more than a beauty contest). But in the event over 6,000 young ladies entered the competition and the rules were changed to cope with the unexpectedly large number.

Fifty finalists were chosen by readers on a regional basis, and they were probably chosen for their looks. But the

winners were to be chosen by Mr Seymour Hicks,⁶ a well known actor-manager, by auditions (or at least interviews) at the Aldwych Theatre in London. Mr Hicks could be expected to choose the winners on the basis of acting ability as well as looks. We know from the law report that Miss Chaplin was the top finalist for the London region. We also know that she was already an actress, because she was at the time appearing at Dundee in Scotland, where a redirected letter reached her on 6 January 1909, telling her to be at the Aldwych Theatre at 4.00 pm that day. That was impossible for her, and that is how she lost her chance.

The jury awarded her £100. We shall never know what was in the jury's collective mind. But in principle they had two tasks. The first was to decide whether there had been a breach of contract, and they decided there was a breach, since Miss Chaplin had not been given a reasonable opportunity of presenting herself for selection. The second task was to assess the value of what she had lost. This depended on whether Mr Hicks, as a very experienced judge of acting talent, would have chosen her for a prize. The jury's award showed that they thought she had a very good chance.

Solicitors

In *Chaplin v Hicks* the issue was what difference it would have made if Mr Hicks, as judge of a talent contest, had seen Miss Chaplin. A much more common version of that situation is when the court has to decide what conclusion a real judge would have reached on a plaintiff's

claim, which has never had, and never will have, its day in court. That happens whenever a claim becomes statute-barred or is struck out for want of prosecution as a result of a lawyer's breach of a professional duty of care, and the client seeks a remedy against the lawyer instead.

A well-known example in England is the case of Mrs Kitchen, whose husband was electrocuted in an accident said to have been caused by the negligence of the electricity board. Her solicitors' negligence led to the claim becoming statute-barred. In the Court of Appeal⁷ Lord Evershed MR said that the solicitor was liable if Mrs Kitchen had lost "a chose in action of reality and substance" and if so, though its valuation might be difficult, "it is the duty of the court to determine that value as best it can." Mrs Kitchen had been a truthful and candid witness and she was awarded £2,000, about two-thirds of the full amount of her claim against the electricity board. This all happened over 50 years ago, when the real value of money was very different.

It would be very rare for a plaintiff in that situation to recover 100% of a claim turning on the outcome of what would have been contested litigation. Many of you will be familiar with some well-known observations of Megarry J⁸ but they will bear repetition:

As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of

fixed and unalterable determinations that, by discussion, suffered a change.

Even more difficult questions can arise in claims for professional negligence in lawyers' advisory work. A striking example is the New Zealand case⁹ of Mr Benton's claim against his solicitors.

You need to know that New Zealand family law provides for a matrimonial home to belong to the married couple in equal shares, unless there is a written agreement, based on independent advice to both sides, for some other ownership. When Mr Benton married in 1976 he owned a house in Auckland and his wife owned a building plot in another town. At first they lived in his house but they also built a house on her plot. He paid most of the building cost and she transferred to him a 21% interest in the new house. In 1983 he retired and they decided to see whether they liked living in the new house. The next year he sold his house and used a large part of the proceeds to purchase her 79% interest in the new house. It was at this stage that his lawyer failed to advise him about the Matrimonial Property Act 1976. Later he spent more money on extending the house.

In 1995 the couple separated and in 1996 Mr Benton was advised by other lawyers that he must pay \$90,000 to settle his separated wife's unanswerable claim to half the value of the house, even though he had bought out the whole of her interest at market value, and disposed of his own house in the process.

I have had to go into the facts in some detail to explain the complexities of the causation problem as it was seen by the majority in the Court of Appeal.¹⁰ If in 1984 the solicitor had advised Mr Benton about the Matrimonial Property Act, he might have said that he trusted his wife, and that he didn't want to opt out of the Act. And if he had wanted to opt out, would she have agreed? And if she had not agreed, would he have gone ahead anyway?

At first instance, the Divisional Court dismissed Mr Benton's claim on the basis that he had suffered no loss. On a first appeal to the High Court he succeeded but was awarded only about 40% of what he claimed. On a second appeal the Court of Appeal awarded him \$90,000 (which included an element for deferment). Even the Court of Appeal was split in its reasoning. Hammond J thought it better to concentrate on what actually did happen:¹¹

It is correct that a great many solicitor's negligence cases, as to damages, turn on "what if" questions. That is one reason why they are so contentious, and so frequently go to appeal. However, I take the view (and this is my point of departure from the judgment of my colleagues) that it is more in accord with fundamental principle, and with the facts of this instance, to say simply that there was a direct form of loss which flowed from the failure of the solicitor to ... give the relevant advice ... the measure of damages is simply what it cost to remove the blot from the clean title which Mr Benton thought he was getting.

I see a lot of force in that. The \$90,000 which Mr Benton had to pay was a fact that made “what if?” questions irrelevant.

There is one point on the majority judgment in *Benton* which it is worth emphasising.¹² The “loss of a chance” approach is appropriate only for quantifying damages once some loss has been established. If the plaintiff would have taken just the same course of action whether or not he got careful advice, he has lost nothing from negligent advice. And the fact of loss, as opposed to its quantification, is an all-or-nothing question to be decided on the balance of probabilities. This is established by numerous authorities, one of the clearest explanations being by Sir John Donaldson MR:¹³

Take the case of a solicitor who fails to advise his client that the property which he is about to purchase is subject to a right of way. If the client had been told, he would or would not have gone ahead with the transaction. That would have been *his* choice, not the choice of fate ... the damages recoverable by the solicitor’s client would therefore be all or nothing depending on whether he could prove, on the balance of probabilities, that he would have abandoned the transaction.

Similarly if Mr Benton had agreed in cross-examination that he did trust his wife and that he would not have tried to opt out of the Matrimonial Property Act,

or if other evidence had led the court to that conclusion, that would have been the end of Mr Benton's claim against his solicitor. His loss would have been the result of his own choice.

That distinction is reasonably clear in principle, but in practice it may become elusive. As it was put in *Allied Maples*¹⁴ it is sometimes difficult to tell where causation (leading to liability for a loss) ends and quantification (of the amount of the loss) begins.

Allied Maples was another solicitor's negligence claim raising quite complex questions of the "what if?" variety. The company was a subsidiary within the Asda supermarket group. It was negotiating to buy a portfolio of 48 leasehold retail outlets for £26 million. In the course of the negotiations the seller, a company in another group, proposed that four of them should be acquired indirectly, by the purchase of all the shares in one of its subsidiaries, after other leasehold properties had been hived off to another group company. The purchaser's solicitors failed to spot a defect in this change of plan: the purchaser might find that its newly-acquired subsidiary incurred losses because it was still liable on the tenant's covenants in respect of properties which it no longer owned, as they had been hived off.

The deal was completed on this defective basis, and the unforeseen liability did arise. The company sued its solicitors and a split trial was ordered (first on liability,

and then if necessary on quantum). The Court of Appeal criticised this decision for a reason that I have already mentioned: in a situation like this, it is hard to know where causation ends and quantification begins.

A lot turned on the hypothetical question: if the solicitors had drawn attention to the problem before exchange of contracts, what would have happened? At one extreme, the purchaser might have pulled out of the whole deal (the judge thought this very unlikely). At the other extreme, it might have decided to run the risk (this seems to have been regarded as even less likely). In between, the parties might have continued to negotiate and agreed a reduced price (unlikely, because of the difficulty of putting a figure on the risk). Alternatively the purchaser might have succeeded in negotiating a limited tailor-made covenant for indemnity (the judge thought this the most likely outcome, but did not quantify the chance). The Court of Appeal directed that the issue of quantum of damages (depending on evaluation of the chance of successful renegotiation) should go to trial.

Professionals

I do not want you to think that it is only lawyers who sometimes make expensive mistakes. So do auditors, valuers, and even (just occasionally) actuaries. In relation to auditors I should reiterate a very basic point: before a

plaintiff gets to quantifying his loss he must establish that loss has been caused by a breach of the defendant's duty, and before he gets to that he must establish that the defendant did indeed owe him a duty of care. The basic duty owed by a company's auditors is to the company as a corporation, not to individual shareholders, or creditors, or prospective lenders or equity investors. That was finally established as part of the law of England by *Caparo*¹⁵ in 1990. That decision is recognised as an important landmark in the general development of the tort of negligence.

“Before a plaintiff gets to quantifying his loss he must establish that loss has been caused by a breach of the defendant's duty, and before he gets to that he must establish that the defendant did indeed owe him a duty of care.”

It is only in special circumstances that auditors will be held (on an objective test) to have assumed responsibility towards a wider class. That may occur, for instance, if the auditors' firm has a hands-on involvement in arranging finance (so as to assume responsibility towards prospective lenders)¹⁶ or in preparing a valuation of shares which were to be compulsorily acquired from minority shareholders (so as to assume responsibility to the individual shareholders affected).¹⁷

If both a duty and a breach are established, issues of causation may arise. For some time the decision of the English Court of Appeal in *Galoo*¹⁸ was much cited as an authority. Auditors who had failed to spot overstatements of stock and profits in three consecutive years' accounts of a trading company were held not liable for its eventual decline into insolvency. Upholding a strike-out, the court stated:

The breach of duty gave the opportunity to Galoo and [its holding company] to incur and to continue to incur trading losses: it did not cause those trading losses, in the sense in which the word "cause" is used in law.

But later cases have shown that *Galoo* does not establish any general rule. This is an area in which the court must pay close attention to the particular facts as pleaded and proved. There is a valuable discussion in the judgments of the New Zealand Court of Appeal in *Sew Hoy*,¹⁹ where Thomas J saw *Galoo* as

a timely reminder that the answer to this question will not be resolved by the application of a formula but by the application of a judge's common sense. The judge needs to stand back from the case, examine the facts closely, and then decide whether there is a causal link between the failure and the loss in issue which can be identified and supported by reasoned argument.

Sew Hoy, and numerous other cases, show that where damages are claimed for breach of some professional duty,

questions of causation cannot be considered apart from the scope of the duty owed. In *Caparo*²⁰ Lord Oliver said:

It has to be borne in mind that the duty of care is inseparable from the damage which the plaintiff claims to have suffered from its breach. It is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained.

Negligent valuation in falling property market

That brings me to the large and controversial topic of SAAMCO (an abbreviation for South Australia Asset Management Corporation).²¹ It raises the almost insoluble problem of damages for a negligent valuation made in a falling property market—a phenomenon that Britain has seen three times during my professional career.

The decision in SAAMCO has been followed in New Zealand²² but not in Australia.²³ It has been criticised by Professor Jane Stapleton, one of the world's leading scholars on legal causation, as a case in which Lord Hoffmann (who gave the leading speech) aimed at avoiding a false paradox, and in doing so created a real and disturbing one.²⁴

Let me try and explain the problem in SAAMCO, and then make just two brief comments on it. Suppose that at a time when the property market is booming and valuers are inclined to be bullish, a professional valuer values an

office block at £10 million. Suppose that this valuation is excessive, indeed so excessive as to be negligent. A proper valuation would have been £8 million. A bank, relying on the valuation, advances £6 million secured by a mortgage. The mortgagor defaults at a time when the property market has fallen by 40%, and on a forced sale the lender realises only £3 million. What is the proper measure of damages?

The bank's total loss is £3 million (disregarding interest and costs). But arguably this was the result of two causes: the valuer's negligence, which was his fault, and a general fall in the market, which was not his fault. One approach would be to say that 40% of the loss was caused by the falling market and 60% by the valuer's negligence, resulting in damages of £1.8 million. In *SAAMCO* Lord Hoffmann treated the fall in the market as having the effect of capping damages at the amount of the initial disparity between the valuer's figure and the correct figure. That would produce damages of £2 million. On this example the difference between £1.8 million and £2 million is not enormous, but different figures can produce a bigger gap, and the gap can go either way.

My first comment is that there is an important distinction, which Lord Hoffmann discusses at length, between providing information and providing advice. Normally a valuer provides no more than information: his expert opinion, right or wrong, as to the current value. If he goes further and makes a recommendation (for instance, to make a mortgage advance of 65% of his valuation) he is in danger of being held responsible for more remote

consequences, including a fall in the market, because he may be supposed to be providing for that risk. The fact that the valuation in the Australian case of *Kenny & Good* recommended a 65% advance is one of the reasons (though not the only reason) for the High Court of Australia differing in that case from the House of Lords in *SAAMCO*.

My second comment is that whether the scope of the duty of care is seen as a special aspect of causation, or as a separate element of liability for civil wrongs, is a question that legal scholars will continue to debate for a long time. Decisions of the highest courts will probably move at a slower pace in the wake of the academic debate. The clearest statement of where English law has got to at present is probably in the speech of Lord Hobhouse in the *Platform Loans* case, in which he said of the *SAAMCO* principle:²⁵

[The] principle is not derived from any application of mathematics. The loss suffered by the lender in the event of a market fall may not be directly proportionate or equivalent to the original over-valuation. The ... principle is essentially a legal rule which is applied in a robust way without the need for fine tuning or a detailed investigation of causation.

Other commercial cases

So far I have been looking at cases where the cause of action is the tort of negligence, sometimes with a concurrent

liability in contract. I want to mention three other commercial cases involving different causes of action.

“Whether the scope of the duty of care is seen as a special aspect of causation, or as a separate element of liability for civil wrongs, is a question that legal scholars will continue to debate for a long time.”

The first is *Smith New Court*.²⁶ It was a case of deceit—that is deliberate deception inducing the plaintiff to act to his detriment. Citibank held 29 million shares in Ferranti, a quoted British electronics manufacturer. Citibank sold them to Smith New Court, a market-maker, telling them, falsely, that there were two other purchasers actively competing for the shares. As a result Smith New Court bought at 82 pence a share, paying the full market price, whereas a substantial discount might have been expected for such a large placing. What neither Smith New Court nor Citibank knew was that Ferranti had been the victim of a huge fraud, which was disclosed about six weeks after the deal. Ferranti lost almost half of its net assets and its profits dropped by 60%. Smith New Court disposed of its holding in parcels at a total loss of over £11 million.

The House of Lords held that Citibank was liable for the whole loss. The stock market valuation was not a

true indication of the value of the shares when they were purchased because there was a false market. Citibank was liable for the whole loss caused directly by its own employee's deceit, even though it had nothing to do with the fraud that caused the loss.

The next case is about the charter of a ship²⁷—the vessel's name was *The Golden Victory*—decided by the House of Lords four years ago. It was a sort of mirror image of the loss of a chance cases in that it was a case in which the court did know how events had turned out, but the parties did not, at the time of the breach of contract, know how events would turn out.

In 1998 Golden Strait, the owners of *The Golden Victory*, chartered it for seven years to Nippon Yusen. Either party had the right to cancel the charter in the event of war or hostilities between (so far as relevant) the United States, the United Kingdom and Iraq. In December 2001 the charterers repudiated the charter, when it still had four years to run. In March 2003 hostilities, sometimes called the Second Gulf War, broke out between the United States, the United Kingdom and Iraq. Various issues of law arose, the most interesting of which was whether the outbreak of hostilities put a cap on the charterers' liability to pay damages for their repudiation of the contract.

The arbitrator, looking at the factual situation as at December 2001, held that a reasonably well-informed person would have considered hostilities between the United States or the United Kingdom and Iraq as “not inevitable or even

probable but merely a possibility". But there were various delays in the arbitration process, hostilities did occur in March 2003, and the arbitrator, feeling himself bound by authority, reluctantly decided in favour of the charterers that there should be a cap on the damages. He was reluctant because as he put it:²⁸

It does not seem to me that it can be right that the value of that which the owners have lost (and which is calculable on the date of breach in the then prevailing circumstances) should thereafter vary according to when a determination is made in proceedings to enforce their rights and in perhaps quite different circumstances.

The arbitrator's decision was upheld by the Commercial Court and by a unanimous Court of Appeal. But the House of Lords was divided three-two in dismissing the further appeal. The majority thought it right, in order to avoid over-compensating the owners, to depart from the normal rule that damages should be ascertained as at the date of breach. They relied on an old House of Lords case²⁹ about statutory compensation for mining operations in which the Earl of Halsbury LC (with characteristic outspokenness) rejected the notion that "you should shut your eyes to the true sum now you do know it, because you could not have guessed it then."

For the minority Lord Bingham stressed the importance of certainty in commercial cases. In rejecting the argument about over-compensation he observed:³⁰

There are, in my opinion, several answers to this. The first is that contracts are made to be performed, not broken. It may prove disadvantageous to break a contract instead of performing it. The second is that if, on their repudiation being accepted, the charterers had promptly honoured their secondary obligation to pay damages, the transaction would have been settled well before the Second Gulf War became a reality. The third is that the owners were, as the arbitrator held ... entitled to be compensated for the value of what they had lost on the date it was lost, and it could not be doubted that what the owners lost at that date was a charterparty with slightly less than four years to run.

He distinguished the mining case as concerned with a statutory right to “full compensation”, not a common law claim for damages.

The third commercial case I want to mention brings us back to solicitors. It was treated primarily as a contract case because there was argument about an implied term. It could have been pleaded as a breach of fiduciary duty.³¹ I sat on the case in the House of Lords, and though I had by then been in the law for nearly 50 years I found the facts fairly shocking.

Mr Hilton was an honest, hard-working builder seeking to set up in a modest way as a property developer. He acquired a building plot, got a bank loan, and built a small block of flats. In the course of this activity he met Mr Bromage, who expressed interest in buying the flats, and introduced Mr Hilton to Barkers, Mr Bromage’s

solicitors. What Barkers knew, but Mr Hilton did not know, was that Mr Bromage had just come out of prison for numerous bankruptcy offences. Barkers knew because they had arranged his defence on the criminal charges. They did not disclose any of this to Mr Hilton, nor did they disclose that they lent money to Mr Bromage (who had no significant assets) to enable him to pay the deposit when he contracted with Mr Hilton to buy the flats. Barkers were acting for both parties. Mr Bromage then refused to complete the purchase but also refused to remove his caution from the register. Mr Hilton could not sell the flats to anyone. He got into more and more serious financial difficulties and was made bankrupt.

When he sued the solicitors he lost both at first instance and in the Court of Appeal. Their reasoning was (in part) that if the solicitors had told Mr Hilton that they could not act for him, he would have gone elsewhere, still ignorant that Mr Bromage was a rogue, and the same sorry story would have unfolded—so no loss was caused, it was said, by that breach of duty. I did not agree with that, and I am glad to say that my colleagues agreed with me:³²

The notion that one breach of duty by [the solicitors] (failure to tell Mr Hilton that they could not act for him and that he should seek independent advice) should exonerate [the solicitors] in respect of a second and more serious breach of duty (failure to disclose to Mr Hilton facts which would have saved him from ruin) seems contrary to commonsense and justice.

Public law

With increasing statutory regulation commercial law often gets entangled with public law. It is therefore appropriate to add a short postscript about causation in public law.

Judicial review is not in general concerned with the award of damages. But in England private law claims for damages can arise as a so-called “follow-on” claim under public law regulation of competition, and when they do questions of causation often arise. For example, a large company may have abused its market dominance, but it may be difficult for a smaller company to establish that a loss which it has suffered (for instance, failure to win a lucrative contract) is attributable to that cause.³³

Compensation for compulsory purchase of land also involves questions of causation of a hypothetical nature, but they are largely regulated by detailed statutory provisions of limited interest except to specialists.³⁴ Let me give you a flavour of just how hypothetical it can get.

It was a general principle of law, now qualified by numerous statutory exceptions, that on the compulsory acquisition of land for a scheme of development any value added by that scheme is to be disregarded in assessing the compensation, since the landowner is to be compensated for what he has lost, and no more. In one case³⁵ land on the edge of Evesham, a market town in the west of England, was needed for the construction of a by-pass to relieve traffic

congestion in the town. There were two possible routes, referred to by the planners as the yellow route and the green route. The authorities chose the yellow route and so in the acquisition of land on that route the construction of a by-pass on the yellow route had to be disregarded, and the possibility of the land being developed for housing was also disregarded.

“With increasing statutory regulation commercial law often gets entangled with public law.”

But the owners of the land on the yellow route put forward the ingenious argument that if the construction of a by-pass on the yellow route had to be disregarded, Evesham still needed a by-pass, and so it must be assumed that there would be a by-pass on the alternative green route. If that were to happen the new road on the green route would form a physical boundary to the outward spread of Evesham, and would add force to the argument that planning permission would then have been granted for the residential development of most of the land (including the yellow route) which lay within the physical boundary. The Court of Appeal accepted this argument, but the effect of the decision was quickly altered by amending legislation. The case illustrates the general principle that there are limits to how far any statutory hypothesis can be taken to its apparently logical conclusion.

The *Takaro Properties* case³⁶ was something of a cause celebre in New Zealand 25 years ago, though the claim came to nothing in the end. Some investors developed a high-grade holiday resort in the New Zealand uplands aimed at the top of the tourist market. It failed to attract enough wealthy customers and it had to close. Other foreign investors showed an interest in trying to turn it round, but their investment needed government approval, which the Minister, Mr Rowling, repeatedly declined to give. The company sued him in a private law action for damages.

“In a democratic society the public are entitled to have their say, and to deny that right is a serious failing, regardless of the likely outcome.”

At first instance it failed completely, the judge finding that even if approval had been given, the enterprise was facing “nothing but disaster”. The Court of Appeal took a different view, holding that the Minister had failed to exercise due care in his decision, and awarding NZ\$300,000 for the loss of a chance of turning round the enterprise.

In the Court of Appeal Cooke J agreed on NZ\$300,000 but by a different route, reducing his original figure of NZ\$500,000 because the Minister might have been induced to change his mind by judicial review. That seems contrary to the normal principle that the duty to mitigate does not

require a plaintiff to embark on speculative litigation. Finally the Privy Council held that there was no breach of any duty, and probably no private law duty at all.

The last point I want to make about causation in public law is the most important. In judicial review of official decision-making the official decision-maker may have failed to follow the appropriate procedure. He may have failed to carry out proper consultations, or to give a proper period for lodging objections. In such a case the riposte “It would not have made any difference anyway,” carries very little weight.

Occasionally, because judicial review is a discretionary remedy, it may be enough to cover a small defect. But in a democratic society the public are entitled to have their say, and to deny that right is a serious failing, regardless of the likely outcome. It was put very well by Lord Hoffmann in the *Berkeley*³⁷ case, in which one gallant lady protester upset plans for the redevelopment of the Fulham football stadium in West London. The European Directive on Environmental Impact Assessment required, Lord Hoffmann said,

... the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.

There are many similar statements of principle about the importance of proper procedures in official

decision-making, especially where it involves consultation in order to assess public opinion. For instance in another environmental case³⁸ the court said that only “in the very plainest of cases ... one can say that the breach could have made no difference.”

That is enough. I have taken you on a rather wandering and inconclusive journey. Thank you very much for your patience in accompanying me on the journey. 🍵

Editor's note

*Lord Rodger of Earlsferry delivered the Twenty-fourth Sultan Azlan Shah Law Lecture in 2010, *Bias and Conflicts of Interests—Challenges for Today's Decision-Makers*, reproduced in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, Professional Law Books and Sweet & Maxwell Asia, 2004, pages 435–499.

Endnotes

- 1 [2005] 2 AC 176.
- 2 (2010) 240 CLR 537.
- 3 Occasionally it depends on what the patient would have decided if properly advised of an unavoidable risk: *Chappel v Hart* (1998) 195 CLR 232; *Chester v Afshar* [2005] 1 AC 134.
- 4 [1911] 2 KB 786.
- 5 **Editor's note:** *Chaplin v Hicks* was discussed in detail by Peh Swee Chin FCJ in the Federal Court decision of *Selva Kumar Murugiah v Thiagarajah Retnasamy* [1995] 2 AMR 1097; [1995] 1 MLJ 817.
Chaplin v Hicks was also referred to by the Federal Court in *Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171, FC.
- 6 You can learn more about Mr Hicks from the judgment of Gummow J in *Tabet v Gett* (2010) 240 CLR 537, 560.
- 7 *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, 575.
- 8 *John v Rees* [1990] Ch 345, 402.
- 9 *Benton v Millar & Poulgrain* [2005] 1 NZLR 66.
- 10 Glazebrook and Young JJ, who gave a joint judgment.
- 11 Note 9 above, at page 90.
- 12 Ibid, at pages 79–80.
- 13 *Hotson v East Berkshire Health Authority* [1987] 1 AC 750, 762.
 The situation envisaged in the example actually occurred six years later in *Lillicrap v Nalder & Son* [1993] 1 WLR 94.
- 14 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, 1609.
- 15 *Caparo Industries Plc v Dickman* [1990] AC 605.
Editor's note: See also the Sixth Sultan Azlan Shah Law Lecture, *Negligence in the World of Finance* (1991) by Lord Mustill, where *Caparo* is discussed, in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, Professional Law Books and Sweet & Maxwell Asia, 2004, pages 133–181.

- 16 *Barings Plc v Coopers & Lybrand* [1997] PNLR 179.
- 17 *Killik v Price Waterhouse Coopers* [2001] PNLR 1.
- 18 *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, 1375.
- 19 *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392, 408.
- 20 [1990] 2 AC 605, 615, quoting Brennan J in *Sutherland Shire County v Heyman* (1985) 157 CLR 424, 487.
- 21 *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191.
- 22 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664.
- 23 *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413.
- 24 “Negligent valuers and falls in the property market” (1997) 113 LQR 1.
- 25 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190, 207 (Lord Hobhouse referred to it as the *Banque Bruxelles* principle, that of another of the conjoined appeals in the Court of Appeal [1995] QB 375).
- 26 *Smith New Court Ltd v Citibank NA* [1997] AC 254.
- 27 *Golden Strait Corporation v Nippon Yusen Kubishika Kaisa (The Golden Victory)* [2007] 2 AC 353.
- 28 *Ibid*, at paragraph 7.
- 29 *Bwllfa & Merthyr Dare Collieries v Pontypridd Waterworks Co* [1903] AC 426, 429.
- 30 Note 27 above, at paragraph 22.
- 31 *Hilton v Barker Bouse & Eastwood* [2005] 1 WLR 567.
- 32 *Ibid*, at paragraph 38.
- 33 See for instance *Enron Coal Services v English Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2.

- 34 See for instance *Spirerose v Transport for London* [2009] 1 WLR 1797.
- 35 *Porter v Secretary of State for Transport* [1996] 3 All ER 693.
- 36 *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22; [1988] AC 473.
- 37 *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 615.
- 38 *R v Chelsea College of Design, ex parte Nash* [2000] ELR 686, at paragraph 50.

The fact of loss, as opposed to its quantification,
is an all-or-nothing question to be decided
on the balance of probabilities.

Lord Walker of Gestingthorpe