Problem areas in damages: economic loss, remoteness and betterment

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Economic loss (Helen Evans)

What is the general rule, why does it exist and when is it relevant?

1. The starting point is that generally, defendants are not liable in tort for “pure economic loss”. The term “pure economic loss” is used to denote financial loss suffered by a claimant which does not stem from damage to his property. As a consequence, no duty is owed by a defendant who negligently damages property belonging to a third party to a claimant who suffers loss because of a dependence upon that property or its third party owner. Whilst all of these propositions sound simple at first, thorny arguments commonly erupt over:
   a. The circumstances in which defendants can owe a duty to avoid causing economic loss notwithstanding the general exclusionary rule described above;
   b. What constitutes a claimant’s property for the purpose of avoiding the application of the general exclusionary rule.

2. In order to explore these two issues it is necessary to start with the rationale for the law’s approach to economic loss. The reason for treating economic loss differently to physical harm was explained by Lord Oliver in Murphy v Brentwood District Council [1991] 1 AC 398 at paras 487B-C in the following terms:

   “The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen. Thus the categorisation of damage as economic serves at least the useful purpose of indicating that something more is required.”

3. At para. 8.92, Clerk & Lindsell on Torts explain the basis for the exclusionary rule by pointing out that where there is physical damage there tends to be a limit on the type of relationships and the number of potential claimants to a claim. However, the relationships giving rise to economic loss are “are primarily human in creation and can form a complex web through which financial losses can ripple out from the one negligent act.” In other words, the concern motivating the general rule is a fear of indeterminacy of claims.
4. Problems with “economic loss” tend to arise in the sorts of case under discussion today where losses are caused to claimants as a consequence of fires, explosions, floods or the collapse of buildings. At one extreme, there is no exclusionary rule to assist a defendant if by his negligence he burns down a neighbouring building causing loss of profits to a business that owned that neighbouring building. At the other extreme, there is no rule to assist a claimant who has suffered loss of profits as a result of the electricity being cut off by a contractor drilling through a power cable belonging to a utility company and cutting off the power to thousands of properties. As Lord Denning observed in Spartan Steel & Alloys Ltd v Martin & Co [1972] 3 WLR 502: “if claims for economic loss were permitted for this particular hazard [power cuts], there would be no end of claims. Some might be genuine, but many might be inflated, or even false. ....... It would be well-nigh impossible to check the claims.”

5. The difficult cases are the ones in the middle, where there is room for debate about whether the defendant owed a particular duty to a claimant, or whether the claimant had sufficient rights in “property” to provide the springboard for a claim for loss of profits. The rules applying to this sort of case is the focus of this part of this paper.

(1) In what circumstances does a defendant owe a duty not to cause economic loss or are there any other useful routes around the general exclusionary rule?

Assumption of responsibility

6. The most common starting point for a claimant is to reach for the authorities applying Hedley Byrne v Heller & Partners [1964] AC 465. A useful and recent summary of this jurisprudence and the circumstances in which a defendant can be held to owe a duty not to cause economic loss is to be found in Sainsbury’s Supermarkets Ltd v Condek Holdings Ltd [2014] EWHC 2016 (TCC)Stuart-Smith J. The key principles emphasised in that case were:
   a. The need for an assumption of responsibility, which is not limited merely to statements but which may also apply to an assumption of responsibility for services;
   b. The fact that the test for whether the defendant has assumed responsibility is an objective one, meaning that the focus is on things said or done by the defendant rather than on his state of mind;
   c. That reliance by the claimant is a necessary ingredient.
7. The courts tend to police carefully the circumstances in which the above tests are met: they have repeatedly emphasised that they will be slow to extend the categories of case in which a duty to protect against pure economic loss arises, and astute to examine whether there has really been a voluntary assumption of responsibility by the defendant in relation to the particular type of damage in issue: see Greenway v Johnson Matthey plc [2016] 1 WLR 4503 at para 47 (referring in turn to Customs & Excise Commissioners v Barclays Bank plc [2007] 1 AC 181).

Other routes to liability

8. All is not necessarily lost for a claimant whose property has not been damaged and who is unable to prove an assumption of responsibility. Other routes to liability sometimes relied on include claims framed in nuisance and claims brought under the Latent Damage Act 1996. However, as set out below, these additional causes of action either do little to add to the ability to frame a claim in tort or are so restrictive in their application that they will only assist in extremely limited circumstances.

9. The need to frame a claim in nuisance has lessened since the judgment of the Court of Appeal in Shell UK Ltd v Total UK Ltd [2010] 3 WLR 1192 (to which this note returns later below). In order to bring a claim in nuisance, a claimant has to have a “proprietary interest” in the land affected. It was clear that a mere beneficial interest would suffice for the purposes of a claim in nuisance long before it became clear that it would or might suffice for a claim framed in negligence. Hence, cases used to be articulated in nuisance but can (since Shell UK) be brought in negligence instead.

10. As to the Latent Damage Act 1996, this is only comes to the assistance of an owner of property whose property was damaged before he acquired it but who was unaware of the damage at the time of acquisition. By reason of s. 3 of the 1996 Act, a fresh cause of action accrues to the new owner against the defendant on the date on which he acquires his interest in the property. However, Clerk & Lindsell on Torts points out at para 8.142 that the 1996 Act will not assist unless a new owner can prove he has suffered damage. Many latent problems discovered by new owners are regarded as defects in the building rather than damage to it, leaving the efficacy of the Act very limited.
(2) What is meant by “property” in the economic loss context?

11. If a claimant cannot found a duty on the part of a defendant to avoid causing him economic loss, his alternative method is to explain why his loss in fact flows from damage to relevant property (rather than being “pure” economic loss).

12. The classic formulation of what constituted “property” in this context is found in Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd [1986] AC 785, where at p. 809 Lord Brandon explained that:

“... in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.”

13. There have been numerous attempts by claimants to soften the strictures of this rule, some successful and others unsuccessful. The most successful example in recent years is Shell UK & Ors v Total UK Ltd & Ors [2010] 1 WLR 1192. Here, the claimants had stored oil in tanks and pipelines which were owned by two non-trading companies who held title on trust for them (and in which they owned the entire issued share capital). These tanks and pipelines were damaged in the Buncefield explosion near Hatfield. The claimants had the benefit of “participants’ agreements” which permitted them to use the tanks and pipelines to deliver and receive fuel. After the explosion they had to use more expensive routes to deliver the fuel, with a resulting loss of profits.

14. The defendants accepted liability for the explosion but argued that they were not liable for loss of profits because only a legal (not beneficial) owner or a party with a right to immediate possession of the tanks and pipelines could recover such losses. At first instance, the judge (David Steel J) accepted these arguments and found that the claimants could not claim for

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1 Relying on a “joint venture” is a method which some commentators suggest could amount to sufficient interest in or dependence on property to avoid loss being characterised as purely economic. However, this is (at best) a controversial issue. See para 18 below.
2 This reflected the law summarised e.g. at Halsbury’s Laws, “Pure economic loss”, para. 13 of Volume 78 (Negligence) which stated that “where a defendant negligently damages property belonging to a third party, a claimant who suffers economic loss through dependence on that property, or a relationship with its owner, will not be able to recover unless he too has an interest in the property or possibly in the venture in which the third party is involved.”
economic losses. The Court of Appeal found that this approach was “legalistic” in circumstances where the Claimants were the “real owners” of the tanks and pipelines (the legal owners being little more than a bare trustee). The Court of Appeal felt that recognising that a defendant’s duties to avoid causing economic loss might extend to beneficial owners did not risk causing a “ripple effect” because “beneficial ownership of the damaged property goes well beyond contractual or non-contractual required... It is in fact a closer relationship in many ways than that of a bare trustee having no more than the legal title” (p. 1203-1204).

15. The Court of Appeal went on to state that it was:

“prepared to hold that a duty of care is owed to a beneficial owner of property (just as much as to a legal owner of property) by a defendant....who can reasonably foresee that his negligent actions will damage that property. If therefore, such property is, in breach of duty, damaged by the defendant, that defendant will be liable not merely for the physical loss of that property but also the foreseeable consequences of that loss, such as the extra expenditure to which the beneficial owner is put or the loss of profit which he incurs (pp. 1205H to 1206B).

16. The Court of Appeal made no secret of the fact that its decision was strongly influenced by “the impulse to do practical justice”. But how far does this impulse stretch? It is not uncommon for parties to arrange their affairs, either by accident or design, in a way which puts hurdles in their path if they have the misfortune to suffer loss of profits as a result of an event such as a fire or explosion. Total was a case where the parties had deliberately decided “for reasons that seemed good to them...to vest the legal title to the pipelines in their services companies and enjoy beneficial ownership rather than formal legal title”. There are many more cases where the arrangements between parties are less formal or deliberate, such as cases where one person enters into a lease on behalf of or in relation to the business activities of a group or company, or where there are informal arrangements to occupy a property (including companies run from domestic premises owned by a director). What does the law make of these sorts of arrangements? If the concern is just to prevent indeterminacy of claims, then where should the boundary lie?

17. It is surprising, given the casual nature of many business arrangements, that there is a dearth of case law seeking to clarify or extend the scope of Total. The easiest way for a claimant to satisfy the Total test is to focus on articulating why he has an interest in rather than a mere dependence on the property in question. Help for such a claimant can sometimes be found in
legislation designed to assist with informal business arrangements, a good example being s. 20 and s. 21 of the Partnership Act 1989 which provide that all property acquired on account of a firm or for the purposes and in the course of partnership business is deemed to be “partnership property” and that unless the contrary is demonstrated, property bought with money belonging to the firm is deemed to have been bought on account of the firm. Alternatively, assistance may be found in the law of constructive trusts.

18. Will the future bring with it an extension of principles to encompass cases where a claimant has no formal interest in property but can prove sufficiently close dependence on it so as to negate concerns on the part of the court about the risk of indeterminate claims? The Supreme Court of Canada has been prepared to accept that participation in a joint venture by a claimant involving the property of a third party which suffers damage is sufficient to allow that claimant to recover for consequential economic loss: *Canadian National Rly Co v Norsk Pacific Steamship Co Ltd* (1992) 91 DLR (4th) 289, Can SC. There is no English case applying the “joint venture” approach outside the context of shipping. Nor is there any authority for the proposition that mere dependence on property owned by another is sufficient. It is likely that this will provide fertile ground for future disputes.
Foreseeability (Clare Dixon)

Why do we need a concept of “foreseeability”?

19. “The possible consequences of any human conduct are potentially endless. The defendant’s wrongdoing may trigger a series of events stretching well beyond one’s normal expectations of possible consequences” (Clerk & Lindsell para. 2-136).

20. It is in order to address this problem, that the courts apply the concept of ‘foreseeability’ or ‘remoteness’. So, even where damage can be shown to have been caused by the action of the defendant, foreseeability steps in to limit the consequences of the action for which the defendant is legally held responsible.

21. Foreseeability allows the court to put a boundary on ‘but for’ causation.

Does the remoteness test differ depending on the cause of action?

22. Contract: a contract breaker liable for damage resulting from his breach if, at the time of making the contract, a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from the breach. This is generally thought to require a higher degree of foreseeability than the remoteness test in tort.

23. Tort: at the time the breach was committed the type of damage must have been reasonably foreseeable as a consequence.

24. Strict liability (eg Rylands v Fletcher): even though liability is strict foreseeability of damage of the relevant type is a pre-requisite to liability.

25. But what about where a defendant is liable to the claimant pursuant to more than one cause of action? The Court of Appeal grappled with this in Wellesley Partners LLP v Withers LLP [2016] Ch 529 where a solicitor was liable to the client in both contract and tort. The defendant wanted the court to adopt the more restrictive contractual test and the claimant argued that it should be entitled to make use of whichever test was more favourable to it which, in this scenario was the tortious test. Lord Justice Floyd considered that, notwithstanding the existence of a tortious cause of action, the foreseeability test should be the contractual one. In doing so he said that:

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3 The Achilleas [2009] AC 61
26. This instinctively feels like the right result. Parties within a contract agree to assume responsibilities towards one another. A tortious duty is imposed by the law as a result of the relationship that the parties have with one another. To impose the more liberal regime of the latter where the ‘deal’ done by the parties is on the basis of the former feels instinctively wrong. The irony of this case however is that the defendant, having won the argument on which foreseeability test should apply, still lost on the issue because the Court found that the controversial head of loss was recoverable under the contractual remoteness test in any event.

What does type of damage mean?

27. The problem is neatly illustrated by *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507. The claimant, a fish merchant, engaged the first defendant to install a tank in which to store its lobsters. The claimant bought his lobsters in the summer but then saved them to sell on the Christmas market. The second defendant supplied pumps which would pump sea water around, and so oxygenate, the tanks. The motors for the pumps were supplied to the second defendant by the third defendant. The motors were not a success, largely because they were not designed for UK voltages. They kept cutting out and eventually cut out once too often leading to the death of all the lobsters in the tank. The first defendant went into liquidation, the second defendant was found not liable so the claim was between the fish merchant and the support of the motors for the pumps.

28. On the issue of foreseeability:
   a. The claimant argued that the third defendant knew that the motors were to be used to oxygenate fish tanks and oxygenation was necessary to keep the fish alive. It was, therefore, foreseeable that if the motors failed physical damage might result to the fish in the tank.
   b. The third defendant thought this was an oversimplification. It said that an additional element should be taken into account. Namely, the length of time during which a fish might be expected to survive in a tank, unharmed, if the motor failed. This was important
because the claimant had packed the lobsters in tightly such that lobsters would start
dying within about 48 minutes and after 90 minutes they would all be dead.

29. The third defendant’s argument found favour at first instance but not in the Court of Appeal.
Goff LJ said that what mattered was whether damage of the right type had occurred which
was “physical harm to fish stored in a tank at a fish farm by reason of failure of the circulation
and oxygen pumps”. If that was foreseeable, which it was, then “the fact that, by reason of
the full stocking of the relevant tank, the fish died more quickly or in greater quantities was of
no relevance, unless it could be said that over-stocking of the tank constituted the sole or a
contributory cause of the disaster which took place”.

**Does the extent or the amount of damage need to be foreseeable?**

30. Before looking at what the type of damage does mean it is necessary to set out what it doesn’t
mean. It does not matter if a defendant did not foresee the extent of the damage or the
amount of loss it would cause – all that matters is whether the type of damage was foreseen.

31. In *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88\(^4\) boron tribromide came
into contact with water causing an explosion. The explosion was foreseeable but the
magnitude of the explosion was not. To put it in context the scientist at the scene was killed,
the roof of the laboratory was blown off and the partition walls shattered. Mr Justice Rees
said:

> ...Here it was a foreseeable consequence of the supply of boron tribromide... that in
> the ordinary course of industrial use it could come into contact with water and cause
> a violent reaction and possibly an explosion. It would also be foreseeable that some
> damage to property would or might result. In my judgment the explosion and the type
> of damage being foreseeable, it matters not in the law that the magnitude of the
> former and the extent of the latter were not...

**An exception...**

32. The law applies a different standard to cases (which are relatively rare) where a defendant is
under a positive duty to act. An example of such a case is *Holbeck Hall Hotel v Scarborough
Borough Council* [2000] QB 836. The claimants owned the hotel; the defendant owned the
land forming the undercliff between the hotel grounds and the sea. A series of landslips

\(^4\) The case was appealed but not on this point.
necessitated the demolition of part of the hotel. The duty of care owed by the Council was a measured one limited to preventing danger to a neighbour’s land from lack of support when the hazard to the neighbour’s land was reasonably foreseeable. However, such a defendant was not liable for damage which although of a foreseeable type was vastly more extensive than was foreseen or could have been foreseen without extensive further geological investigation.

33. *Holbeck Hall* has been applied more recently in *Ward v Coope* [2015] 1 WLR 4081. The parties owned neighbouring properties. The Ward’s garden was some nine feet higher than the Coope’s and was supported by a wall. Following heavy snow part of the Coope’s wall collapsed taking part of the Ward’s garden with it. The Judge found that there was a “measured duty of care” confined not to the events preceding the collapse but to events post dating it in order to address and remediate the obvious danger of more of the Ward’s land falling into the Coope’s garden. Having so found at first instance, the Judge then ordered the Coope to contribute towards the cost of an, as yet, unidentified and uncosted remedial solution. The Court of Appeal agreed with the Judge’s duty of care analysis but not his findings on quantum. They considered that it would not be just and reasonable to impose on the Coopes a liability to contribute to an as yet unspecified engineering solution.
34. Sometimes following a property damage case the property is repaired or replaced in such a way that the claimant has an asset with greater value than the one which was damaged. That could be because an old chattel is replaced with a new one or because an item with a limited life space is replaced with a new one.


35. This was the problem which the Court grappled with in _The Baltic Surveyor_. In that case the Baltic Surveyor was moored on the same pontoon as the Timbuktu. The Timbuktu had been negligently moored as a result of which it went down, holing the Baltic Surveyor as it went and resulting in the Baltic Surveyor and its pontoon going down together.

36. The owner of The Baltic Surveyor and the pontoon made a claim which was, perhaps unsurprisingly, successful. The interesting aspect for our purposes was the pontoon. The pontoon which was lost was nearing the end of its useful life and was likely to be replaced in the next 8 years. There was no ready market for pontoons nearing the end of their useable life and so the pontoon as was could not be valued. The cost of the replacement pontoon was £60,000 and was expected to last 30 years. The Judge therefore awarded eight thirtieths of £60,000 ie £16,000.

37. On appeal Rix L.J. went through the authorities and drew out the following propositions:

a. Unless the parties have agreed otherwise where there is damage to or destruction of a chattel the measure of loss should be the same whether it was caused by a breach of contract or tort.

b. It should be exceptional for a claimant to recover more than he has lost. Such exceptions include the repair of chattels where the betterment is nominal or replacement of a building where it is necessary to prevent the collapse of a business or loss of profits and no second hand market is available (_Harbutt’s Plasticine v Wayne Tank & Pump Co Ltd [1970] 1 QB 447_).

c. Where what has been destroyed is a second hand chattel but there is no market for its replacement then the Court should “_make a fact specific review of what the claimant has lost and then attempt to put a financial figure on it as best one can_”.

d. When such a review is required the test of reasonableness has an important role to play.
38. Applying the test of reasonableness to the facts of the case the Court of Appeal concluded that it would be “unfair and unreasonable” to award £60,000 and so upheld the Judge’s finding.

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Fire Claims

1. Historically liability for damage to an adjoining owner from escape of fire was actionable without proof of fault. The liability was based on custom and the duty of property owners to keep their fires safe, known as liability for the escape of ignis suus.

2. Strict liability for fire was modified by statutory intervention following the Great Fire of London culminating in section 86 of the Fires Prevention (Metropolis) Act 1774 which is still in force and provides:

   “And .... no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall .... accidentally begin, nor shall any recompence be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding .... provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void.”

3. In subsequent case law “accidentally” has been interpreted as excluding negligence\(^1\), with the effect that an occupier of a house or land is potentially liable for a fire started deliberately or negligently and is also liable for the acts of servants, agents and independent contractors.

4. But what of the strict liability for escape of fire under Rylands v Fletcher? Despite Lord Hoffmann’s reference in *Transco Plc v Stockport MBC* [2004] 2 A.C.1 to counsel being unable to find a reported case since the Second World War of a successful claim under Rylands v Fletcher it had been used in fire cases, where the storage of inflammable materials had given rise to liability. There is a helpful summary of the authorities in *LMS International Ltd v Styrene Packaging and Insulation Ltd* [2002] EHC 2065(TCC).

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\(^1\) *Filliter v Phippard* (18470 11 Q.B. 347)
5. In Gore v Stannard t/a Wyvern Tyres [2012] EWCA Civ 1248, a fire accidentally broke out in the workshop of a tyre fitter and supplier, the probable cause being electrical wiring. Adjacent to the workshop on the premises around 3000 tyres were crammed in in a haphazard fashion. The tyres had the effect of severely accelerating and intensifying the fire. The claim was brought in negligence and on the basis of strict liability under Rylands v Fletcher. The negligence claim failed however the Rylands v Fletcher claim succeeded at first instance on the grounds that by storing the tyres in a haphazard manner the defendant had brought something dangerous on to his land, creating a foreseeable risk of damage if fire broke out, there was an escape and by storing the tyres in that way the use was non-natural.

6. The Court of Appeal considered the application of Rylands v Fletcher specifically to fire claims in the post-Transco context, where the scope of the principle had been confined. Ward L.J summarised the requirements under Rylands v Fletcher:

“(1) the defendant must be the owner or occupier of land; (2) he must bring or keep or collect an exceptionally dangerous or mischievous thing on his land; (3) he must have recognised or ought to have reasonably recognised, judged by the standards appropriate at the relevant place and time, that there is an exceptionally high risk of danger or mischief if that thing should escape, however unlikely an escape may have been thought to be; (4) his use of his land must, having regard to all the circumstances of time and place, be extraordinary and unusual; (5) the thing must escape from his property into or onto the property of another; (6) the escape must cause damage of a relevant kind to the rights and enjoyment of the claimant’s land; (7) damages for death or personal injury are not recoverable; and (8) it is not necessary to establish the defendant’s negligence but an Act of God or the act of a stranger will provide a defence.”

7. Liability was ruled out in Stannard because:

a. the “thing which was brought on to the premises was a large stock of tyres which are not exceptionally dangerous;
b. The tyres did not escape;
c. Keeping a stock of tyres on tyre-fitting premises was not an unusual use of land;
d. On the issue of foreseeability, the defendant did not recognise nor ought he reasonably to have recognised that there was an exceptionally high risk of danger if the tyres escaped.

8. Following *Stannard*, certainly in relation to fire cases there are unlikely to be circumstances where Rylands v Fletcher liability will be of use, given the very restrictive requirement that it is the fire itself which must be brought on to the land and escape rather than a dangerous thing likely to catch fire. In practice this means that liability will be limited to cases where the occupier or someone for whom he is responsible deliberately or negligently starts a fire and where starting the fire is an extraordinary and unusual use of land.

9. The policy behind the decision is in part driven by the approach to insurance taken in *Transco*, namely that property owners can be taken to have insured against the risk of all non-natural uses of land and litigation should not then be required to shift the burden. As Ward L J concluded:

“The moral of the story is....make sure you have insurance cover for losses occasioned by fire on your premises.”

**Flood Claims**

10. As with fire, the common law is still heavily influenced by historical legacy and also by the modern statutory and regulatory environment, particularly where the potential defendant is a public authority or a water company.

11. The starting point for liability in flood claims between neighbouring landowners is the body of law which developed pragmatically in the nineteenth century drawing on the principle of the autonomous proprietor and reflecting certain general principles:

(a) A landowner generally had no legal responsibility for naturally flowing water so an occupier of lower land had no cause of action against a higher neighbouring occupier for permitting the passage of naturally flowing water over their land;

(b) Where a landowner diverted the flow of a natural watercourse or created a culvert or artificial structure resulting in damage to adjoining property, liability could follow;
The common enemy rule – landowners were entitled to take steps to protect themselves from flooding even if this increased the flow of water on to neighbouring land.

12. The modern approach stems from the measured duty of care in nuisance established in Leakey v National Trust [1980] 1 Q.B.485. Leakey decided by the Court of Appeal in 1980 not without misgivings and with “diffident reluctance” on the part of Shaw LJ held for the first time in English law that a neighbouring landowner had a duty to take care to do what is reasonable in the circumstances to prevent or minimise the known risk of damage or injury to one’s neighbour or his property. Previously landowners would be required to give neighbours an opportunity to abate the nuisance but there was no obligation to take positive steps. The duty of care is described as measured in that in determining the scope of the duty the court has to look not only at the extent of the foreseeable risk and damage but also the nature of the measures required, their cost and the resources of the respective parties. This “daunting multi-factorial assessment” was introduced to mitigate the anticipated difficulties of imposing liability for onerous works on landowners, simply because the risk arises naturally on their land.

13. Leakey was not a water case but it is the source of the modern approach to the regulation of liability between neighbouring owners for flooding. The example cited by Megaw L.J. as raising potential problems was drawn from a flooding situation.

14. The Leakey duty has been applied fairly restrictively by the Court of Appeal and that approach has been consistent in recent cases. In Green v Lord Somerleyton [2003] EWCA Civ 198 the Court of Appeal held that the duty could apply to naturally flowing water but on the facts it did not impose an obligation on the defendant to maintain barriers against occasional flooding from their marshland to the claimant’s adjoining marsh.

15. In Lambert v Barratt Homes Ltd (1) and Rochdale MBC (2) [2010] EWCA Civ 681 the house owners owned properties which backed on to a former playing field owned by the council. Part of the field was sold off and developed by Barratt Homes who blocked part of the drainage ditch and culvert which had been used to carry surface water away from the properties. This resulted in flooding to the properties and the need for relief work to be carried out on the Council’s land. Who should be responsible for the cost of the works?
16. The property owners’ insurers sued the developer in negligence and the Council in nuisance and succeeded against both at first instance. The developer did not appeal and on the Council’s appeal, the Court of Appeal adopted a very pragmatic approach to the scope of the measured duty of care. They were heavily influenced by the fact that the Council was not responsible for the flooding and that there was a solvent defendant who had caused the flooding and against whom judgment had been obtained. The approach adopted by the Court of Appeal of a continuing and varying duty of care on the Council which changes with the circumstances does however create significant uncertainty when trying to determine when liability will exist.

17. The restrictive approach was continued in *Vernon Knight Associates v Cornwall District Council* [2013] EWCA Civ 950 which was a claim by the owners of a holiday village brought against a local authority in its capacity as a highway authority in nuisance and negligence for flooding for failing to keep gullies clear from debris. Jackson L.J. conducted a whistle-stop tour of the authorities and the principles which he derived place considerable emphasis on the implications for public resources of the imposition of common law duties. This approach is consistent with the established restrictive approach of the courts to imposing liability on public authorities in cases such as *Stovin v Wise* [1996] A.C. 923 and *East Suffolk Rivers Catchment Board v Kent* [1941] A.C. 74.

18. The approach is echoed in the House of Lords decision in *Marcic v Thames Water Utilities Ltd* which was an unsuccessful attempt by Mr Marcic to use a claim in nuisance to impose liability on the water company which was held to be inconsistent with the statutory scheme under the Water Industry Act 1991. Mr Marcic’s home was repeatedly flooded by sewage from sewers operated and maintained by the defendant due to overloading of the system through increased use. The statutory scheme imposed a duty on the sewerage undertaker under s 94 (1) of the Water Industry Act 1991 to provide a system of public sewers which was regulated by OFWAT utilising the enforcement provisions under s18. The rights of individual landowners were limited to bringing proceedings if the undertaker had failed to comply with an enforcement order but in *Marcic* no enforcement order had been made.

19. However some inroads have recently made in two first instance decisions, *Bell v Northumbrian Water* [016] EWHC 133 (TCC) and *Oldcorn v Southern Water Services Ltd*
1. After a flurry of decisions roughly five years ago there have been limited recent decisions relating to tree roots. It is worth considering the law as stemming from those slightly less recent authorities.

2. In *Berent v Mosaic Family Housing* [2012] EWCA Civ 961 Tomlinson LJ (with whom Mummery and Kitchin LJJ agreed) considered an appeal in a case relating to alleged tree-root subsidence damage from plane trees. Ds argued that nearby railway tunnelling works and leaking drains were the cause of the damage. The Court was required to consider the degree of knowledge required by a local authority to support a finding of liability. The Court of Appeal held that:

   a. Tree root claims are subject to the general law of negligence and nuisance: well-established principles of causation and foreseeability apply. Reasonable foreseeability of a risk means reasonable foreseeability of a “real risk” (*The Wagon Mound 2*). It was not possible to separate the enquiry as to reasonable foreseeability of damage from the related enquiry as to what it is reasonable to do in the light of the reasonably foreseeable risk. The Court was required to carry out a balancing exercise between the risk of damage, the seriousness of the potential damage, the cost of removing the risk and the social value of the trees.

   b. On the facts, there was no basis to infer that Ds knew or ought to have known that there was a real risk that the tree would cause damage.

   c. The claimant’s expert had not recommended pruning as an effective management tool and felling was not reasonable before there was any evidence of damage given that the risk of damage was not real until some damage had occurred.

3. In *Robbins v London Borough of Bexley* [2012] EWHC 2257 (TCC) Edwards Stuart J observed at paragraph 169 of his judgment that the effect of *Berent* is “to make clear that there are no special principles of law that relate to tree root cases: they are subject to the same general law of negligence and nuisance.” He held that the damage had been caused by the Council’s poplar trees and that damage had been reasonably foreseeable to the Council as other property owners on the same road had made claims and been paid for damage to their properties caused by the same row of poplars. His decision was upheld by the Court of Appeal ([2013] EWCA Civ 1233) which agreed with his approach in terms of causation in asking what
the local authority would have done had it taken reasonable steps to prevent the damage. The Court of Appeal left open the question of whether the burden of proof shifted on to the defendant to show that, if it had acted with reasonable care, the damage would still have eventuated.

4. In Denness v East Hampshire District Council [2012] EWHC 2951 Mr Recorder Acton Davis QC considered and dismissed a claim for tree root caused subsidence on the basis that causation had not been established and the damage was probably caused by heave. The case is a useful reminder that the burden of proof lies on claimants and they must have sufficient lay and expert evidence to make out their cause of action in private nuisance.

5. Khan v Harrow Council and Helen Kane [2013] EWHC 2687 (TCC) is a decision of Ramsey J following a trial of the claim brought by C against the local council and a neighbour for damage to property caused by various neighbouring trees and shrubs. By the date of trial, the action against the Council had been settled and only the claim against the neighbour persisted. In his judgment, Ramsey J:

a. Noted that the burden was on C to show actual or imputed knowledge on the part of D of a risk of damage to C's property by the relevant trees. Imputed knowledge was to be judged from the perspective of the reasonably prudent landowner with tree(s) on their land. However, knowledge of a general risk that trees pose in terms of settlement damage was insufficient to impose liability for subsidence damage caused by tree roots. There needed to be knowledge of the actual risk posed by the particular trees in question.

b. Distinguished between the reasonable foreseeability of damage caused by separate vegetation in the immediate area.

c. Held that D had failed to take appropriate steps to eliminate the risk of subsidence caused by tree roots.

d. Followed the guidance in Perrin v Northampton Borough Council [2008] 1 WLR 1307 in relation to the existence of a TPO, noting that a TPO did not prevent a claimant recovering damages for nuisance from a defendant.

e. Reduced damages by 25% to reflect C's contributory negligence in failing to inform D of the damage to the property and the risks of further damage in a timely manner.
6. In *Burge v South Gloucestershire Council* [2016] UKUT 300 (LC) C did not pursue an action in nuisance but rather a claim for damage to property under section 203 of the Town and Country Planning Act 1990 for the Council’s refusal to allow C to fell an oak which was subject to a TPO. Section 203 provides:

“A tree preservation order may make provision for the payment by the local planning authority, subject to such exceptions and conditions as may be specified in the order, of compensation in respect of loss or damage caused or incurred in consequence:

(a) of the refusal of any consent required under the order, or

(b) of the grant of any such consent subject to conditions.”

7. The TPO provided for exceptions to compensation: (a) where the damage was not reasonably foreseeable when consent was refused or granted subject to conditions; and (b) where the damage was reasonably foreseeable by the property owner and attributable to a failure to aver the loss or mitigate. D argued unsuccessfully that the damage was not reasonably foreseeable and that the foundations of the conservatory were so shallow that the damage would have occurred as a result of seasonal ground movement even without the influence of surrounding vegetation and the damage was reasonably foreseeable to C because the foundations were so inadequate. In relation to the second argument, the Upper Tribunal held that it was for D to prove that at the time that the conservatory was constructed the damage was reasonably foreseeable to C.

8. This case was interesting from a causation perspective as the experts essentially agreed that the damage to the property would have occurred in any event because of the inadequate foundations. However, this was determined to be irrelevant when considering statutory compensation under s.203. The only question is whether the damage was foreseeable at the time consent was refused by D. It should be noted that this contrasts with nuisance claims where foreseeability is to be assessed at the date of damage.

**Japanese Knotweed**

9. The Court of Appeal heard in June 2017 an appeal from the decision of Recorder Grubb in the Cardiff County Court relating to claims by two neighbouring homeowners against Network Rail: *Williams v Network Rail Infrastructure Limited*. If the Court of Appeal upholds the decision it has wide-reaching consequences for claims involving Japanese Knotweed.
10. In that case two homeowners sued Network Rail in private nuisance. It was argued that the knotweed had (a) encroached on to their land from a railway embankment and (b) the mere presence of knotweed in close proximity interfered with their use and enjoyment of their land because they could not sell their properties at proper value. Claim (a) failed because there was no physical damage to the properties.

11. However, claim (b) succeeded. The Recorder referred (at paragraph 107) to Thompson-Schwab v Costaki [1956] 1 WLR 335 and Laws v Florinplace Limited [1981] 1 All ER 652 noting that in those two cases claims for interference with quiet enjoyment of the land had succeeded where there was no actual emanation from the neighbouring land on to the claimants’ land but based on the stigma of the activity on the adjoining land. He held: “the right to use and dispose of a residential property at a market value is... so important a part of an ordinary householder’s enjoyment of his property that an interference with this right would result in a reduction in the amenity value of the property.” Objectively viewed, a landowner in Cs’ circumstances would suffer a diminution in value and this was properly characterised as an aspect of the “amenity” of the land protected by the tort of private nuisance.

12. It was determined that NR had known about the knotweed and its potential risk to Cs but had not taken reasonable steps to prevent or minimise the potential damage. Cs recovered damages representing: costs of treatment programme and insurance-backed guarantee, miscellaneous losses, general damages and residual diminution in value of their properties.

Lawrence v Fen Tigers Limited

13. Whilst not a property damage case, it is worth considering the Supreme Court’s decisions in Lawrence v Fen Tigers Limited [2014] AC 822, a case which concerned the liability of various parties for noise nuisance from a motor sports track. The Supreme Court determined that the occupiers of the stadium were liable in nuisance to the claimant appellants. The mere fact that the activity which was said to give rise to the nuisance had planning permission would
not, as a matter of law, offer a defence. However, the existence of planning permission might be relevant evidentially when assessing the character of the area and it might also justify an award of damages in lieu of an injunction.

14. In terms of remedy, prima facie the remedy for private nuisance was an injunction to restrain the defendant from committing such nuisance in the future. However, the court has power to award damages in lieu and the Supreme Court emphasised that there was no presumption or inclination either way between those two remedies.
EXHAUSTING CAUSATION: WHERE CAUSATION, MITIGATION AND RELIANCE COLLIDE

1 An old chestnut which frequently arises in property damage claims is the extent to which it is available to a defendant to argue that the actions of the claimant broke the chain of causation or otherwise disentitle the claimant from recovering at the expense of the defendant. This has been considered in the cases discussed below.

*Lambert v Lewis* [1982] AC 225

2 Lexmead supplied and fitted a towing hitch to farmer Lewis’s Land Rover. At some point, a brass spindle and handle became detached from the towing hitch. The judge at first instance held that Mr Lewis should have appreciated the absence of the spindle and handle. As it was, he continued to use the towing hitch to tow his trailer. One day, the trailer detached causing an accident in which Mr Lambert and his son were both killed.

3 Mr Lewis was found liable to the Lambert family on the grounds of his negligence in continuing to use a towing hitch which he knew, or ought to have known, was defective. Mr Lewis sought damages from Lexmead amounting to an indemnity against his own liability to the Lamberts on the grounds that his liability was caused by Lexmead’s failure to supply a towing hitch which was fit for purpose or of merchantable quality.

4 The Court of Appeal held that the dangers inherent in the patent defect in the towing hitch would not themselves have been apparent to Mr Lewis and that the real issue to be determined was whether Mr Lewis’s carelessness was so unreasonable to break the chain of causation between Lexmead’s breach of warranty and the accident. Accordingly, Mr Lewis was entitled to recover damages from Lexmead amounting to an indemnity against his own liability to the Lamberts.

5 The House of Lords allowed Lexmead’s appeal, Lord Diplock observing:

(a) The implied warranty of fitness for purpose relates to goods at the time of delivery and for a reasonable time thereafter (what is reasonable would depend on the nature of the goods);

(b) Once Mr Lewis was aware that the towing hitch was no longer in the same state as it had been when delivered he was not entitled to rely upon the continued application of the warranty of fitness for purpose. In such circumstances, the only warranty which
might have availed the farmer would have been a warranty that he could continue safely to use the towing hitch notwithstanding its obviously damaged state;

(c) The Court of Appeal’s reasoning had been erroneous: Mr Lewis’s liability arose not from the defective state of the towing hitch but from its continued use at a time when he knew that it was damaged; his negligence did not result directly and naturally from Lexmead’s breach of warranty.

*Schering Agrochemicals Ltd v Resibel NV SA* (1993) 109 LQR 175

6 The facts of the case were as follows. Schering produced and bottled highly flammable chemicals. Resibel supplied Schering with equipment that heat-sealed caps onto bottles. The equipment contained a safety device the purpose of which was to switch off the heat sealer and sound an alarm if a bottle was stationary under the heat sealer for too long and thereby exposed to too much heat. About one month after the equipment had been put into operation, a fire broke out in Schering’s factory owing to a defect in the safety device of the heat sealer. Resibel admitted that it was in breach of contract for delivering equipment of unsatisfactory quality, contrary to section 14(3) of the Sale of Goods Act 1979.

7 It transpired that about two weeks before the fire broke out, on 8th September, two of Schering’s workers had noticed that the safety device did not switch off the heat sealer when it should have done. This was reported to a supervisor, but no action was taken. If Schering had investigated the problem, the defect would have been discovered and there would have been no fire.

8 Resibel denied full liability. At first instance, Hobhouse J held that there could not no apportionment of liability for contributory negligence, on the basis that this was not available in contractual claims. He also held that neither causation nor remoteness could assist Resibel. He did, however, find that there had been a failing on Schering’s part to mitigate the loss once its employees became aware of Resibel’s breach of contract, which was the point at which the problem was noticed, prior to the fire. Alternatively, it was held that Schering had broken the chain of causation by failing to take action once the problem had initially been detected.

9 Hobhouse J accordingly limited Schering’s damages to losses that could not have been avoided even if the earlier problem had been investigated and the fire prevented. Schering recovered only the costs that would have been incurred by an investigation of the incident and the consequent temporary production halt.
This judgment was upheld by the Court of Appeal, with Nolan LJ observing that Resibel was fortunate that the 1945 Act could not be applied in the circumstances, because he would have preferred apportionment of liability to the all-or-nothing decision required by the analysis of causation, in combination with the doctrines of remoteness and mitigation.

Hobhouse J’s decision was upheld on different bases. Scott LJ held that the mitigation doctrine was inapplicable in circumstances in which the Claimant had no knowledge of the loss or breach at the point of the alleged failure to mitigate, and based his decision instead on the doctrine of causation, finding that Schering had broken the chain of causation. Purchas LJ, on the other hand, took the view that the judge’s decision could be upheld on either ground.

In relation to the causal chain, Nolan LJ held that:

‘if the evidence establishes that the incident which occurred on the evening of 8th September should have caused the operation to be shut down and the cause effectively investigated, then this is sufficient to break the chain of causation and relieve the vendor of liability’.

On the subject of causation, Purchas LJ agreed with Hobhouse J that when the problem was initially detected by the Claimant, these events:

‘were not themselves causative of the fire on the 30th. They gave rise to an opportunity, which reasonable ought to have been taken, to avoid the situation which did cause the fire on the 30th... Accordingly, on the basis of a simple application of the concepts of causation and remoteness, I would agree with the judge’s conclusions that neither of these concepts stood in the way of the plaintiffs succeeding’.

Having said this, however, he then discussed the Claimant’s failure to mitigate and found that:

‘The same result is reached if one adopts the broader approach to the concept of causation for which the defendants contend and treats the continued operation by the plaintiffs of the heat sealer after 8th September as causative of the fire. The concepts of causation and mitigation are, of course, closely linked. In the ‘Elena D’Amoco [1980] 1 Lloyd’s Rep 75 at page 88 Robert Goff J (as he then was) described the three aspects of mitigation which he there identified as ‘aspects of the principle of causation’. Like the judge however, I have for my part and for the reasons given found it more helpful in the circumstances of the present case to separate the two concepts’.
Clearly, then, although Purchas LJ considered the concepts of mitigation and causation to be separate, he considered there to be a significant degree of conceptual overlap. Purchas LJ accordingly considered that the initial discovery of the problem was not itself causative but the continued operation of the heat sealer after the initial discovery was sufficient to break the chain of causation.

Scott LJ considered that the principles of causation, remoteness of damage and the duty to mitigate:

‘are not concepts which are independent of one another. Each of them serves a function in placing a limit on the extent of the liability of a wrongdoer, whether for breach of contract or in tort’.

Scott LJ did not, however, consider the concept of the duty to mitigate to be of assistance in the case, stating:

‘I would, for my part, confine the use of the ‘duty to mitigate’ tool to cases where there is actual knowledge on the part of the plaintiff of the loss or of the wrongful act and where, with that knowledge, the plaintiff has done something wrong whereby the loss sought to be recovered has been increased or has omitted to do something which, if done, would have reduced or eliminated the loss’.

This was not one such case.

Considering the question of causation, Scott LJ said the following:

‘In a breach of contract case the question whether a particular act or omission was the cause, in the causa causans sense, of the damage for which recovery is sought must, in my opinion, be examined in the context of the contract in question... In my opinion, therefore, the approach in the present case should be to consider the relevant ‘causes’ of the fire, each of which contributed to the fire, and to ask whether a fire thus caused was something that was within the assumed contemplation of the parties at the time of contract as likely to result from the breach of contract’.

Considering the events surrounding the discovery of the problem by the Claimant, Scott LJ went on to hold that:

‘I would, for my part, use the causation tool and hold that the breach of contract was not, in view of the incident of 8th September, the real cause of the fire. In so holding I do not
believe I am saying anything more than the assumed contemplation of the parties at the
time of the contract was, in my opinion, that an incident of the sort that occurred on 8th
September would be reported and would be investigated and that, if that had happened,
precautionary steps would have been taken and the fire would not have taken place. In
these circumstances the liability of the defendants for their admitted breach of contract
does not, in my judgment, extend to liability for the fire’.

On Scott LJ’s analysis, therefore, it is comparatively easy for a claimant to break the chain of
causation by failing to take action once a problem has been identified.

What seems clear from all of the judgments is that such a harsh result might have been
avoided had the court been able to award reduced damages due to contributory negligence.
In the event, however, this option was not available to the judges, so the concepts of
mitigation and the breaking of the causal chain were applicable with the result that the
defendant was shielded from liability for most of the claimed damages.

County Ltd v Girozentrale Securities [1996] 3 All ER 834

This was another Court of Appeal case involving consideration of the issue of causation in the
context of a breach of contract claim. It was not a product liability claim, but the judgment
involved consideration of Schering.

The facts were as follows: the claimant bank underwrote the issue of 26 million shares in an
oil exploration company. The defendant was a firm of stockbrokers engaged by the claimant
to find investors interested in the shares. The defendant set about finding investors but acted
outside the terms of their agreement with the claimant and, as a result of this and other
factors, many of the shares remained unsold. The claimant brought an action to recover the
loss, which was in the region of £7 million.

At first instance, the judge had found that three causes combined to bring about the plaintiff’s
loss. But for any of them the loss would not have happened. The judge found that the plaintiff
had to assume the major responsibility for the fact that there was ultimately a doubt about
the quality of the commitment. He based his decision on Schering, notwithstanding that the
facts were significantly different.

The Court of Appeal upheld the claimant’s appeal on the basis that the defendant had acted
outside of its instructions and that this breach of contract was an effective cause of the
claimant’s loss. It was immaterial that other factors, including the claimant’s own conduct,
contributed to its loss. This was on the basis that the brokers’ breach of contract was an effective cause of the bank’s loss. The fact that another cause also contributed the occurrence of the loss did not require the judge to choose which cause was the effective one. It was sufficient that the breach of contract was an effective cause of loss.

Beldam LJ made the following comments on causation:

‘The fact that the parties contemplate circumstances in which loss can occur may be an indication that such circumstances commonly follow breach of a contract of that kind and this may be helpful in deciding as a fact whether the loss was caused by the breach or merely followed it; but the fact that the parties do not contemplate other circumstances which contribute to the loss, suggesting that such circumstances may not be probable, cannot determine the question whether the loss was a consequence of the breach. The fact that unforeseeable events combine with the breach to cause loss cannot alone be a sufficient reason for a decision that the unforeseeable events have superseded the breach of contract as the cause of the loss. The effects of the breach of contract may continue though other causes combine to produce the final result.’

Of Scott LJ’s judgment in Schering he said:

‘I would question the soundness of Scott LJ’s conclusion that the defendant’s breach of contract could not be regarded as an effective cause of the subsequent fire because the parties at the time of making the contract could not have contemplated that the initial explosion and its significance would have been overlooked or ignored by such a major specialist chemical producer as the plaintiff’.

Having assessed Schering thus, Beldam LJ concluded:

‘the mere fact that County’s failure to take reasonable precautions in its own interest could be regarded as an effective and concurrent cause of the need to refresh places did not justify the conclusion that Gilbert Elliott’s breach of contract was not an effective cause’.

Hobhouse and Aldous LLJ agreed with Beldam LJ, with Hobhouse LJ stating that:

‘if [Schering] is to be followed in preference to the other judgments of the Court of Appeal, [it] has to be analysed on principles of remoteness though even then it presents difficulties’.

Turning to the question of causation (as opposed to remoteness) he held that:
‘it is inescapably correct that the defendants’ breaches were an effective cause of the plaintiffs’ loss. It follows that the judgment in favour of the defendants cannot be upheld and the appeal must succeed’.

Like Beldam LJ, Hobouse LJ was critical of the judgment of Scott LJ in Schering:

‘It uses what is essentially a test of remoteness to excuse a defendant from liability for a consequence which was in fact within the contemplation of the parties at the time the relevant contract was made... the basis of this decision remains the attribution to the plaintiff of a duty to act reasonably and the finding that he has failed to do so. The conclusion that the causative effect of the breach has been exhausted therefore arises from the attribution of a duty; in the law of contract (apart from express or implied terms) it is the duty to mitigate’.

As to mitigation, Hobhouse LJ’s approach reflected Purchas and Nolan LJ’s approaches, since he held that there was a duty to mitigate that arose as soon as ‘facts have come to the knowledge of the plaintiff which suffice to disclose that a breach of contract has occurred’. This clearly contrasts with the approach taken by Scott LJ, which was that only actual knowledge of a breach would suffice to trigger the duty to mitigate because mitigation is predicated on deliberate or voluntary conduct by the claimant.

County, therefore, represents an approach to the chain of causation and mitigation that differs significantly from Schering. It is a significantly more claimant-friendly judgment.

Trebor Bassett Holdings Ltd & Anor v ADT Fire and Security Plc [2012] EWCA 1158

In this case there was an initial minor fire which led to a second catastrophic fire in a confectionary factory. A carbon dioxide suppression system installed by the defendant failed to extinguish the initial fire and was held to be defective. The defective system was held to be the cause of the damage from the first fire. The defendant asserted that the claimant’s failures to segregate the relevant production area and to install a sprinkler system were intervening acts that either broke the chain of causation or amounted to contributory negligence. In the alternative, the defendant asserted that the claimant’s losses had been caused or contributed to by the claimant’s own negligence.

At trial, Coulson J held that the critical breach of duty by the defendant was a breach of an obligation to design the fire suppression system with reasonable skill and care. As a result, it
was open to the defendant to advance a defence of contributory negligence (Barclays Bank plc v. Fairclough Building [1995] QB 214 distinguished).

34 Following consideration of the authorities, Coulson J held that for there to have been a break in the chain of causation, the claimant’s act or omission must be the true or effective cause of the loss. If the defendant’s breach and the claimant’s conduct were merely concurrent causes, the chain could not be considered to be broken. The claimant’s conduct was, in the circumstances, insufficient to break the chain of causation. The claimant’s failure to heed recommendations from its own risk department to install a sprinkler system was considered to be unreasonable, but not causative, because it was only a concurrent cause, and not a true cause, of the damage.

35 Although the claimant’s conduct did not break the chain of causation, it did result in a significant reduction of 75% for contributory negligence. Coulson J distinguished Sainsbury v Broadway Malyan (1999) and Fosse Motors v Conde Nast (2008), in which lack of compartmentalisation and sprinkler systems did not amount to contributory negligence due to the clear risk of fire posed by the use of naked flames and the claimant’s failure to heed warnings in the circumstances.

36 The judgment was upheld in the Court of Appeal. No clear judgment was expressed on Schering, although it was noted that Schering was a controversial judgment and that Hobouse LJ had preferred the judgment of Nolan LJ to the judgment of Scott LJ. It was held that ‘whatever be the correct approach, I have no doubt that it is critical to a proper analysis to determine whether the knowledge alleged to break the chain of causation or to give rise to a duty to mitigate can properly be attributed to the claimant party.

37 Tomlinson LJ supported the trial judge’s finding that the defendant’s breach of contract caused the fire, going on to say that:

‘In my judgement the judge’s finding is effectively that the spread of fire to the rest of the building... was one seamless whole or development without there intervening some event or conduct which was ‘of so powerful a nature that the [breach of ADT] was not a cause at all [of the loss of the building’ but was merely a part of the surrounding circumstances’.
This analysis appears closer to the ‘effective cause’ analysis seen in County and suggests that a defendant must overcome a significant hurdle to show that a claimant’s unreasonable conduct has broken the chain of causation.

*Howmet Ltd v Economy Devices Ltd* [2016] EWCA Civ 847

The defendant designed and manufactured a safety device called a thermolevel which was supposed to monitor the level of heated liquids in various tanks which were internally coated with (inflammable) polypropylene. Following (small) fires in December 2006 and January 2007, some of the claimant’s employees (including its facilities manager) appreciated that the thermolevel might not be working properly. Two weeks after the January fire, an operative mistakenly switched on the heater for one tank when it was empty. A fire broke out, causing £20m of damage.

At trial, Edwards-Stuart J held that:

(a) There were three potential causes of failure of the thermolevel, of which only one would have been EDL’s fault;

(b) The claimant had failed to demonstrate that the thermolevel’s failure had been attributable to the potential cause involving fault on the part of EDL;

(c) Accordingly, and applying *The ‘Popi M’* [1985] 1 WLR 948, the claim failed.

The Court of Appeal dismissed Howmet’s appeal:

(a) The knowledge of the Howmet employees who knew about the defective thermolevel was to be attributed to Howmet since the latter’s directors had delegated the task of safely operating the plant to those employees;

(b) *Per* Jackson LJ and Akenhead J: once the end user of a chattel is alerted to its dangerous condition:

(i) The chattel is no longer dangerous;

(ii) Any use thereafter is (normally) entirely at the end user’s risk;¹

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¹ Save where the end user has no choice but to continue using the chattel as before.
In continuing to use the plant after the second fire, Howmet was relying upon a system of operator vigilance introduced following that fire. The effective cause of Howmet's loss was the failure of the system of operator vigilance instituted after the January 2007 fire.