

The Sins of the Fathers:
The Interaction Between the Negligence of Third Parties
and the Fault of Parents of Injured Children

A child is injured at birth, allegedly by the negligence of the hospital during delivery. The consequence is cerebral palsy, a permanent condition which in the case of this particular child is so severe that the court describes him as 100 per cent disabled.¹ But the hospital wishes to argue that such children may have their conditions somewhat ameliorated by appropriate treatment, presumably by physiotherapy, and that ensuring that this treatment was received was the responsibility of the child's parents. They wish to join the father as third party in the litigation and to claim contribution from him as joint tortfeasor.² These were the circumstances in which *Lee Fai v Tung Wah Group of Hospitals*³ came before the courts, and so far only the application to join the father has been reported.

The Court of Appeal, upholding Seagroatt J at first instance, refused to allow the application. The court held that parents are not liable in tort to their children for failing to obtain the best treatment for them, or, to be strictly accurate, that no authority had been cited for the proposition that parents are liable in negligence for failing to secure the best treatment for their children.⁴ (It is not crystal clear to me where the court's doubt focused, but this is discussed further below.) Second, the court held that, even if parents could be so liable, no possibility of joint tortfeasors could arise on these facts. The defendants would be liable only to the extent that the plaintiff's injuries could not be mitigated by treatment which it was reasonable for the plaintiff to undergo; the parents would be liable for that failure to mitigate. Thus, the two allegedly negligent parties would not be liable for 'the same damage,' which is the requirement for two or more tortfeasors to be jointly or severally liable.

If I may declare my personal view at this stage: I suggest that, unless his or her parents deliberately delay treatment in order to increase damages,⁵ a child in such a case ought not to be deprived of damages, whether directly or indirectly, by virtue of the parents' fault. The decision of the Court of Appeal

¹ The expression derives from the employees' compensation legislation (Employees' Compensation Ordinance (sch 1)) which requires an assessment of the percentage of disability in order to determine how much compensation an injured employee is to receive. In other contexts it is, to my mind, rather offensive; I would suggest that it should not be used other than where specifically necessary to assess the degree of loss of earning capacity. No living person should be described as 100% disabled, especially one suffering from a disability like cerebral palsy (spasticity) where intelligence may be unimpaired though the control over the body may be disastrously affected, as in this case.

² Strictly speaking 'several' rather than 'joint' would be appropriate, but it is usual these days to just refer to joint tortfeasors.

³ [1997] 2 HKC 396.

⁴ *Ibid*, p 399 per Godfrey JA.

⁵ In such circumstances the court in *Favier* (note 35 below) thought that evidence might be admitted.

rejects the argument that the parent is liable in tort to the child, though I shall maintain that the court's view may in fact be wrong as the law stands, and that certainly the discussion on this point is superficial. At least this aspect of the decision does not open the way to the family unit losing damages which may be awarded against the hospital by virtue of parental negligence. On the other hand, the court does point the way to a mitigation argument which, practically speaking, would have a similar effect.

Leaving aside what would undoubtedly have been difficult problems of proof had these matters come to trial — such as what reasonable parents would have done for their child in those circumstances — a number of issues can be isolated:⁶

- 1 What is the relationship between mitigation of damages, contributory negligence, novus actus interveniens, and liability as between joint tortfeasors?
- 2 Is it true that parents would not be liable in negligence for failing to secure 'optimal treatment'?
- 3 If the failure to mitigate is the result of decisions made by a child's parents, is the child to be held affected by those decisions, ie is the child bound, as it were, by the decisions of its parents?
- 4 Could this be regarded as a causation issue — and the parents' behaviour as a novus actus interveniens?
- 5 Is it in fact true that one can isolate the two elements of the plaintiff's injuries: that if the total injury can be identified as X, and the parents could have secured treatment for the child which would have reduced X amount by Y, then there is a discrete amount left (X-Y) for which alone the hospital would be liable?

In the Court of Appeal, (2) was specifically addressed, albeit arguably obiter, while (5) was the topic of the ratio decidendi. (3) was assumed by the court, as was an answer to some aspects of (1). (4) was not raised.⁷

What is the relationship between the mitigation of damages, contributory negligence, novus actus interveniens, and liability as between joint tortfeasors?

If I am injured by the defendant's negligence and by my own failure to take due care for my safety I have contributed to the accident, or to the existence or the

⁶ In the discussion which follows I shall, for the sake of simplicity, write as though the defendant hospital were liable in negligence, but this, I should make clear, had not been established at the preliminary stage of the litigation which is here discussed.

⁷ (4) was suggested by my colleague Richard Glofcheski.

severity of my injuries, I can be held to have been contributorily negligent and my damages against the defendant will be reduced to reflect the degree of my fault, the causative effect of my own carelessness, and the justice and fairness of the situation (damages 'shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage').⁸

If I suffer injury in an accident through someone else's negligence, and am not initially at fault, but subsequently fail to take reasonable steps to reduce the impact, physical or financial, of my injuries, I am liable to be found to have failed to mitigate, and will therefore lose the damages representing the amount of 'unnecessary' suffering that I have caused myself.⁹ If my injuries are exacerbated by my own act or the act of another, the court may need to ask whether the additional injury was too remote as caused by a *novus actus interveniens*.

Though one can express these ideas separately, some of them overlap a good deal. Each of them presupposes an injured plaintiff, a negligent defendant, and injuries which, it is argued, are greater than they would have been had it not been for some act or omission of the plaintiff or a third person. The distinctions between the three are not always clearly made, indeed they sometimes cannot be clearly made, and occasionally there is a legitimate difference of opinion about the appropriate analysis. As *McGregor on Damages* points out: where '[a] person, run down by a negligent motorist, unreasonably fails or refuses to enter hospital for treatment' the situation is likely to be categorised 'as contributory negligence, remoteness, or failure to mitigate.'¹⁰ And in Hong Kong, we find Penlington JA describing the (unsuccessful) argument on behalf of a defendant thus: 'the plaintiff had failed to mitigate his loss and his decision to retire from the police force was a *novus actus interveniens*.'¹¹

This is not to say there are no differences between the various situations. There is a difference as to burden of proof: causation is a matter for the plaintiff to prove, while mitigation and defences such as contributory negligence require proof by the defendant.¹² Second, contributory negligence involves a decision that both parties caused the same damage, and responsibility for it is shared by dividing the damage in percentage terms, which takes into account fault as well as causative force.

⁸ Law Amendment and Reform (Consolidation) Ordinance, s 21. The two factors in deciding what was just and equitable — the 'blameworthiness' and the 'causation' aspects — were spelled out by Lord Reid in *Stapley v Gypsum Mines* [1953] AC 663, 682, quoted in *World Wide Stationery Manufacturing Co Ltd v Fong Chi-leung* [1994] 2 HKC 449, 456 (CA, Mortimer J).

⁹ *McAuley v London Transport Executive* [1957] 2 Ll Rep 500 is a leading case cited in *Lee Fai*.

¹⁰ (London: Sweet & Maxwell, 16th ed 1997), para 120.



¹¹ *AG v Chun Yat-nam* [1995] 1 HKC 218, 237.

¹² On mitigation the view I have expressed in the text is that of *McGregor* (note 10 above), and of Winfield and Jolowicz, *Tort* (London: Sweet & Maxwell, 14th ed 1994), p 167. Percy and Walton, *Charlesworth on Negligence* (London: Sweet & Maxwell, 9th ed 1996), p 325, unlike the other two works, suggest that *Selvanayagam v University of the West Indies* [1983] 1 WLR 585 was correctly decided.

On the other hand novus actus and, under English law, mitigation are treated as being related only to causation. Though the effect of the defendant's negligence remains — if the defendant had not been negligent the plaintiff would have suffered no injury at all, in other words 'but for' or factual causation is satisfied — once novus actus or failure to mitigate has been found to exist, the liability of the defendant ceases. Legally, as opposed to factually, the defendant ceases to be a cause of the injury. Where intervening acts or failure to mitigate are concerned, no comparing of fault takes place. McGregor remarks:

it has never been suggested, where a plaintiff, run down by a negligent defendant, has unreasonably failed or refused to enter hospital for treatment, that the court should make an apportionment as between plaintiff and defendant, in respect of the loss which the plaintiff, acting reasonably, could have avoided.¹³

This is in fact not true. In his classic study *Joint Torts and Contributory Negligence*,¹⁴ Glanville Williams argued:¹⁵ 'The two doctrines ought to be regarded as governed by a single underlying idea; the detailed rules applicable to them ought to be the same; and the Contributory Negligence Act ought to apply to both.' And in the Republic of Ireland, under the apportionment legislation based on the English Act,¹⁶ failure to mitigate is in fact treated in the same way as contributory negligence.¹⁷

It is possible to represent the differences between these various approaches in pictorial form. In the following pair of diagrams the complete circle represents the total injury to the child and it is assumed that the parents, if responsible for anything, would have been responsible for about 25 per cent of the child's condition. Lines in this direction:  represent the hospital's responsibility and those in this direction:  that of the parents. Where they cross both would be held liable, though it would be left to the court to decide what share each would bear:

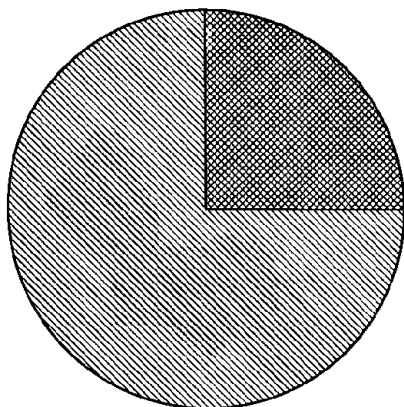
¹³ Note 10 above, para 122.

¹⁴ Subtitled *A Study of Concurrent Fault in Great Britain, Ireland, and the Common-law Dominions* (London: Stevens & Sons, 1951).

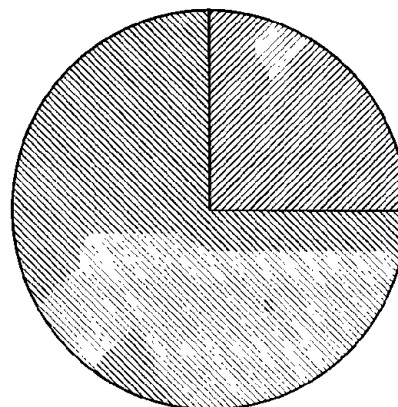
¹⁵ *Ibid*, pp 292-4; the quotation is at p 291.

¹⁶ The Law Reform (Contributory Negligence) Act 1945.

¹⁷ Civil Liability Act 1961, s 34(2)(b).



Model 1:
The Contributory
Negligence/Concurrent Tortfeasor
(and Irish Failure to Mitigate) Model



Model 2:
The Novus Actus
and English or Hong Kong
Failure to Mitigate Model

In *Lee Fai* the choice expressed was between mitigation and joint liability. If I am injured through the combined fault of more than one person, not including myself, those persons may be held liable in proportion to the degrees of their fault, the causative effect of their carelessness, and the justice and fairness of the situation, on a basis similar to that for contributory negligence.¹⁸ A joint tortfeasor situation inevitably involves at least three parties (one plaintiff and at least two tortfeasors). A mitigation situation involves, one would expect, two people — the tortfeasor and the plaintiff, who fails to mitigate. In this respect it is similar to contributory negligence.

No-one argued that the infant plaintiff in this case was contributorily negligent — it is self-evident that a child who has just been born could not be considered to have any capacity to act negligently.¹⁹ It was held that the issue here was a failure to mitigate. Before discussing mitigation, we shall look at the issue of parental liability in tort.

Is it true that parents would not be liable in tort for failing to secure 'optimal treatment'?

Godfrey JA said:

It may be that, one day, a court will hold that parents are liable to their child for failure to procure optimal treatment for that child, but that is not, it

¹⁸ '... such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question': Civil Liability (Contribution) Ordinance, s 4(1). The closeness of the relationship between this and contributory negligence is also made clear by the theme of Glanville Williams' book (note 14 above).

¹⁹ As Huggins JA said in *Ho Kwai-loy v Leung Tin-hong* [1978] HKLR 72, 74: 'a child must be of such an age that he can be expected to take precautions in the circumstances.'

seems to me, a proposition which represents the common law at its present state of development.²⁰

Precisely what was it that led to the doubt as to the existence of liability (other than the absence of authority)? Godfrey JA does not expand further on this, but I suggest there might be three focuses of doubt. First, is the problem that of 'optimal treatment'? According to normal negligence principles, there would never be a duty framed in terms of securing what is objectively the best treatment for a person to whom one had an obligation: the test would be that of reasonableness, which requires a consideration of the circumstances. This would have had to be decided at trial had the parent been joined as third party in this action, but should not have been enough to rule out an action against the parents at this stage.

Second, perhaps the Court of Appeal was unconvinced that a parent could ever be liable in tort to a child. Seagroatt J commented that '[o]f course, parents have a duty of care towards injured children to save them from further injury or aggravation of existing injury,'²¹ though he then went on to discuss mitigation. It would be difficult to maintain, in a case in which the point was fully argued, that a parent cannot owe a duty of care in negligence towards his or her children. It is true that some courts in the United States have developed a rule which excludes parents from liability, even for positive acts, which would be imposed on any other person.²² In a few states this rule has been modified or abrogated by judicial decision or statute, sometimes only in contexts where the parents would be insured.²³ However, no Commonwealth jurisdictions appear to have emulated those states of the USA which have developed a general immunity for parents.²⁴ There are clear authorities holding parents liable in negligence from several countries, including New Zealand,²⁵ Canada,²⁶ and England.²⁷ It is not that there is a duty on parents as such: *any* person who assumes responsibility for a child's welfare would have a duty.²⁸ In Hong Kong, s 22B of the Law Amendment and Reform (Consolidation) Ordinance assumes that parents may be liable in tort to their children.²⁹

²⁰ See *Lee Fai* (note 3 above), p 399.

²¹ *Ibid*, p 398.

²² The cases are reviewed in an Annotation by Eclavea, 'Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence - Modern Cases' (1981) 6 ALR 4th 1066; recent cases to this effect (see Supplement) include *Squeglia v Squeglia* (1994) 644 A 2d 398.

²³ *Ibid*.

²⁴ A point made by McCarthy J in *McCallion v Dodd* [1966] NZLR 710, 728.

²⁵ *McCallion v Dodd* [1966] NZLR 710 (CA).

²⁶ *Gambina v DiLeo* (1971) 2 OR 131.

²⁷ *Surtees v Kingston-upon-Thames Borough Council* [1991] 1 Fam LR 559 (CA).

²⁸ See eg Barwick CJ in the High Court of Australia in *Hahn v Conley* (1971) 126 CLR 276, 283.

²⁹ The purpose of this provision was to remove any obstacle that might be thought to exist to a child suing, after having been born alive, for injuries inflicted before birth. It takes care to exclude the possibility of the child suing its own mother, a precaution which assumes that otherwise the action would lie against the mother, presumably leaving it possible for the child to sue its father.

Third, it is possible that the Court of Appeal's doubt centred on the question of 'positive duty.' Generally there is no duty to take positive steps, as opposed to the duty in negligence to *avoid* positive acts that may foreseeably injure the plaintiff; but as Winfield and Jolowicz state: 'Certain factors seem to point towards a duty of affirmative action. One is that the plaintiff is in the care and control of the defendant.'³⁰ Children are an obvious example. However some courts in Australia have been somewhat reluctant to impose positive duties on parents — in *Robertson v Swincer*, Legoe J in the Supreme Court of South Australia said:

The policy of the law ... is such as to limit that scope of the duty owed by any person including parents, to circumstances where those parents have demonstrated some conscious act or omission which, in the circumstances, gives rise to foreseeable harm to a child or children in their care.³¹

And on this basis the court held that parents, whose four-year-old son had crossed a busy road while they were standing at the door of a friend's house prior to taking the child home, were not liable for injury to the child. But generally it seems likely that Commonwealth jurisdictions would hold that there is a duty to take reasonable steps for the health of a totally dependent child, thereby taking an approach similar to at least one US case, where it was held that parents (by virtue of their care, and not by virtue of the relationship) were liable for failing to get proper treatment for a very sick child because it was contrary to their religious beliefs to do so.³²

This line of argument leads to the conclusion that, properly advised, a Hong Kong court would be likely to hold that a parent could be liable in tort to his or her child. Does one avoid this result by characterising the situation as one of mitigation instead of negligence? Lee Fai's parents were confronted with a situation; how it arose is surely irrelevant to how they ought to have behaved next, other than as a question of fact — how they would have reacted, how much they would have relied on the advice of others, and so on. Just as the failure of an individual to mitigate his damages flowing from personal injury might in some circumstances be characterised, as McGregor points out, as contributory negligence, so the failure of parents to take reasonable steps to minimise an injury to their child could be characterised as tortious. Indeed, I would suggest that it is inappropriate to characterise the behaviour of any person other than the plaintiff himself or herself as a failure to mitigate — if it is to have a legal consequence at all, it should be as a tort. But the question must be asked: is there any authority on this issue of parental failure to mitigate?

³⁰ Note 12 above, p 103. Also see text to note 43 below.

³¹ (1989) 52 SASR 356. The quotation is taken from (1889) Aust Torts Reps 80-271 at p 68 887.

³² *Lundman v McKown* 530 NW 2d 807; 1995 Minn App LEXIS 462 (Court of Appeal of Minnesota).

If there is a failure to mitigate which is the result of decisions made by a child's parents, will the child be held to be affected by those decisions?

Elementary principles of the law of tort³³ hold that someone injured by another's tort is supposed to mitigate the loss, which means one should take reasonable steps to reduce that loss.

However, the point was made earlier that there are similarities between contributory negligence and a failure to mitigate. The position where a child is in the charge of an adult, and that adult fails to take due care for the child's safety and the child is injured by a negligent third party, is clear: the negligence of the adult will not be attributed to the child. The doctrine of identification, which held that the child would be so affected, was abandoned as long ago as 1933.³⁴ For example, if a negligent driver runs over a child, the child would not suffer reduced damages because of any negligence of the parent which contributed to the injury.

Should the same principle be applied to mitigation of damages? The Supreme Court of New York State held in 1992 that parents' failure to mitigate their child's injury should not be imputed to the child.³⁵ They said:

With respect to infants, General Obligations Law s 3-111 provides 'in an action brought by an infant to recover damages for personal injury the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant.' This statute recognizes the strong public policy in New York against imputing a parent's negligence to an infant plaintiff.^[36] Inasmuch as the effect of contributory or comparative negligence is to reduce the amount of damages ultimately awarded by a jury a policy of not imputing the negligence of the parent serves to accomplish the same goal as not allowing a claim of mitigation of damages, namely: preserving the infant's claim undiminished by parental activity. This is readily seen by an examination of the two concepts. In the first, the entitlement of the infant is reduced by the act of the parent which may be said to be partly responsible

³³ Seagroatt J said: 'This principle is observed by the courts on a daily basis': quoted at [1997] 2 HKC 398. See also text to note 10 above.

³⁴ *Oliver v Birmingham Omnibus Co* [1933] 1 KB 35. Interestingly, in *Ho Kwai-loy* (note 19 above) this might have been an issue, since the plaintiff was in the charge of an elder sister, but it had not been argued, and did not need to be decided since the six-year-old plaintiff was held to have been contributorily negligent. *Oliver* was distinguished in *Chan Shiu-nin v Tang Kam-ho* [1974] HKLR 1, where the plaintiff was a blind man and the contributory negligence had been that of his wife who was escorting him across a road, on the basis that the wife was the agent of the plaintiff. In *May Ngai Gloves Factory Ltd v Nam Kam-lan* [1980] HKC 175 (not cited by the court in *Lee Fai*), it had been argued that the infant plaintiff's mother had been negligent — and she had been joined as third party. In the event it was held that she had not been negligent, but the case demonstrates some confusion between contributory negligence, 'primary' — defendant's — negligence, and joint tortfeasors, for the court speaks of her owing a duty to other road users to control the child.

³⁵ *Favier v Winnick* 151 Misc 2d 910, 583 NYS 2d 907 (1992) (LEXIS).

³⁶ Citing *Searles v Dardani* 75 Misc 2d 279, 347 NYS 2d 662 (1973).

for causing the injury. In the second, defendant alleges the failure to mitigate damages has, in effect, caused a continuation or prohibited the elimination or reduction of the injury. Both are paths to the same result.³⁷

The principle contained in the New York law is precisely the same as the common law in *Oliver*,³⁸ so the reasoning of the New York court could well be used here.

If the child is not to be affected by the parents' failure to mitigate, then he would be entitled to the complete damages, and the defendant would be liable to pay them.

Could this be regarded as a causation issue — and the parents' behaviour as a novus actus interveniens?

The defendants might have argued that, to the extent that care which might reasonably have been available to the plaintiff would have reduced the severity of the consequences of the brain damage, the defendant should not have been held to have caused those consequences. Obviously in one sense they did cause them — had they not been negligent in connection with the child's birth he would not have suffered these consequences. The principle of novus actus enables the court to make what one might view at bottom as a policy decision, or at least one that owes as much to common sense and a sense of justice as to logic: that some other act has 'taken over' the causality to the extent that it, rather than the original event, should be treated as the cause. Winfield and Jolowicz state, in the context of the liability of a defendant who causes injury which is later exacerbated by negligent medical treatment: '[I]t is suggested that the better view is that the original injury should be regarded as carrying the risk of medical error, including negligence, so that it should not necessarily be treated as a novus actus interveniens.'³⁹ This statement indicates that that intervening negligence may in some circumstances be so treated, however, and the authorities from various jurisdictions, or even within jurisdictions, are not easy to reconcile.⁴⁰

Common sense here suggests that the act of the parents in failing to seek the assistance of experts, if that is indeed the case, should not be treated as so

³⁷ Among the cases they cited is *Wheatley v Heideman* 251 Iowa 695, 102 NW 2d 343 (1960) where the court said: 'Appellee was a boy fourteen years of age, confined to his bed with a broken leg, and could only be required to do what was reasonable to expect of him under all the facts and circumstances. He could not be held responsible for the failure of some members of his family to follow some instruction with reference to his diet prescribed by the doctor in charge, of which he had no knowledge or means of complying therewith even had he known of it.'

³⁸ See note 34 above.

³⁹ Note 12 above, p 171.

⁴⁰ For another discussion, see Waddams, *The Law of Damages* (Toronto: Canadian Law Book Co, 3rd ed 1997), p 593. See also the reference to Hart & Honoré (note 41 below).

powerful a causative event as to supersede the negligence of the defendants. It should also be noted that here there was no hope that the parents' actions could have cured the child — brain damage is permanent; nor can it be said that they had positively exacerbated the child's condition.

My conclusion on this point, which was not in fact argued in these terms before the court, is therefore to the effect that the defendant ought not to have been allowed to escape any element of liability on the basis of *novus actus*. But this is not the end of the causation issue. It is possible to decide that, even though a new cause, such as the negligence of the parents, did begin to have an impact, the initial cause, the negligence of the hospital, continued to operate. In other words, the child's condition, though having its origin in the hospital's negligence, was also caused to some extent by the actions of its parents (a Model 1 situation).

Is it in fact true that one can isolate the two elements of the plaintiff's injuries?

The last possibility, however, was rejected in this case. Both courts held that the defendant and the third party, if joined, would not be responsible for the same damage. Was the court right to take the view that the negligence of the hospital had ceased to be the effective cause of the injury — in other words to opt for a Model 2 rather than a Model 1 analysis?

In a situation where proper medical or other care would result in the cure of a condition it would perhaps be appropriate to think in terms of the first cause having come to an end. But where the condition is one of permanent brain damage it is hard to see how a court could ever hold that the initial defendant's causal relationship with the injury had come to an end. Let us imagine a slightly different scenario: the initial injury is caused by one doctor, but the plaintiff is then placed in the hands of another doctor who negligently fails to take steps to cure him. It is likely that at least some courts would decide that unless the negligence was gross or 'extravagant'⁴¹ the second negligent act would not be held to relieve the first doctor of liability. In other words, returning to the above models, the first doctor would be liable for the whole circle.

But suppose the first defendant had disappeared or was deemed not worth suing, the plaintiff must surely be able to sue the second doctor for the injury which he caused — the failure to cure. That doctor would be held liable for the smaller segment of the circle. We then have a situation in which both doctors could be held liable, to some extent, for the same damage. If the plaintiff had sued both doctors he would have got damages from the first for the large

⁴¹ To use Hart and Honore's word, *Causation in the Law* (Oxford: Oxford University Press, 2nd ed 1985), p 184. Waddams (note 40 above) cites *Price v Milawski* (1977) 82 DLR 130 as a case in which the actionable negligence of a doctor was held to break the chain of causation.

segment of the circle, but both doctors would have been liable for the smaller segment, thus, responsibility would be shared — Model 1. If this were so, the first doctor could have taken the initiative to bring the second into the litigation as someone who had, to some extent, caused the same damage.

Hart and Honoré posit a hypothetical which is somewhat similar to my own:

If a young child is drowned and a suit is brought against X for negligence in maintaining his pond and against Y, a childminder, for failing in breach of her duty to try to rescue the child when she could easily have done so, it may be that, in an apportionment under a tortfeasor's statute the fact that, though both X and Y were guilty of mere negligence, Y's act is more morally reprehensible than S's should be taken into account.⁴²

And so the whole problem comes back to the inappropriate characterisation by the court of the situation as one of mitigation. In effect, without using this language, the court seems to have treated the case as one of remoteness, or novus actus. But had the argument been articulated in these terms, instead of in mitigation terms, and the relevant cases been adduced, it seems highly likely that the court would have held that the chain of causation beginning with the hospital's negligence had not been broken by the failure of the parents to act appropriately.

Comment

This discussion does not seem to be moving towards the desirable conclusion that I had earlier indicated. To argue, as I have done, that the child is not affected by the parents' 'failure to mitigate' is to restore the hope of full damages to the child. To argue that novus actus would not apply does not alter this conclusion. To argue, as I have also done, that parents' 'failure to mitigate' could more appropriately be characterised as a tort towards the child almost brings the situation back to square one: *almost*, because to treat the case as one of joint tortfeasors would give rise to the necessity of an apportionment exercise, bringing into play issues of comparative fault and justice, whereas apportionment would not apply to damage that could have been mitigated.

In mitigation cases the causation aspect is decisive of the amount that the plaintiff loses by way of damages: the only flexibility the court has is in deciding whether the plaintiff was unreasonable. The causative effect of the parents' neglect, if any, would be the same whether one characterises it as non-mitigation or as a tort; the relative blameworthiness element (ignored in cases of failure to mitigate) would surely tell far more against the hospital than the

⁴² Ibid, p 234.

parents. So even if the parents were to be held responsible, the child might lose less by way of damages if that responsibility were characterised as tortious than if it were characterised as a failure to mitigate.

One can go further and say that if defendants like those in the *Lee Fai* case succeed in arguing that the parents of a plaintiff child are liable in tort for failing to ensure appropriate treatment, the benefits of the *Oliver* decision would be substantially lost — children would be potentially identified with their parents' negligence, which is precisely what the *Oliver* case held should not happen.⁴³ Of course the situation is not so dire because courts would presumably be reluctant, as the English Court of Appeal emphasised in the *Surtees* case,⁴⁴ to impose any liability on parents. Nor should one forget that the clock was not put back totally to the pre-*Oliver* situation because to hold that a child was affected by the contributory negligence of its parent was to hold that there was no cause of action at all, as contributory negligence was a complete defence until 1945. At least now there would be apportionment. On the other hand, even if the courts in 1933 had thought of the possibility of parents being held liable in tort to their children, they might not have imagined the scenario I have painted, because of the limitations on the right to claim contribution from other tortfeasors before the passing of the Married Women and Tortfeasors Act of 1935.⁴⁵

Judges have been conscious of the implications of decisions as to the liability of parents. In *McCallion v Dodd* one judge suggested that the doctrine of identification ought perhaps to be revived so that the child would get reduced damages (and remain able to sue the father if appropriate), which the judge seemed to think was less problematic for the family finances than a separate action brought by the defendant against the father's assets.⁴⁶ Another judge in the same case agreed, but remarked: 'so long as liability in these areas remains dominated by the old juristic tie to fault, consequences such as these are bound to ensue.'⁴⁷ On the other hand, in that case the hands of the court were somewhat tied by the jury's conclusion that the father was in fact at fault, a scenario which would not arise in Hong Kong where such cases would not be tried by jury.

Some of the problems arise from the fact that very often a child will be living in a nuclear family with its parents and, at least if the family is a cohesive

⁴³ This point is also made by Winfield and Jolowicz (note 12 above), p 183 and by Srivastava and Tennekone, *The Law of Tort in Hong Kong* (Hong Kong: Butterworths, 1995), p 231. For the *Oliver* case, see note 34 above.

⁴⁴ Note 27 above, p 583 per Browne-Wilkinson LJ.

⁴⁵ It could be argued that the restriction on this, under the case of *Merryweather v Nixon* (1799) 8 TR 186, 101 ER 1337 did not apply to a non-intentional tort like negligence (see Glanville Williams (note 14 above), for a discussion). Of course 1933 was only one year after *Donoghue v Stevenson* [1932] AC 562 which established what we now see as an independent tort of negligence.

⁴⁶ [1966] NZLR 727 per Turner J.

⁴⁷ *Ibid*, p 730 per McCarthy J. In 1974, New Zealand moved away from the tie to fault with its 'no fault' compensation scheme.

financial unit, to hold the parents responsible — whether one characterises this as contributory negligence, failure to mitigate, novus actus, or joint tortfeasors — has the effect of depriving the child of compensation for something which was not its fault. There is little point in requiring a parent to pay out of his or her pocket compensation to a child under the same roof.

Of course the situation would be different if the parent is insured, and in this case there would seem little harm in holding that the parents could be liable in tort. But it is not feasible for the courts (as opposed to the legislature) to hold that a parent is liable in negligence to a child for motor accidents, the only relevant situation which has compulsory insurance, and not in any other situation. If the parent abandons the child to the care of relatives or the public purse, then parental liability for injuries could serve a valuable purpose: the parent is made to carry the financial responsibility for the injury that his or her fault has caused, and the child is possibly better off than if reliant solely on the resources of a relative or the state. It is unlikely that many Hong Kong households, or households elsewhere, would have insurance which would cover injury to other members of the household, except in driving situations; in uninsured situations, the most likely scenario is the one that occurred in this case — that a third party seeks to pass some of the financial responsibility on to the parent, which in effect is likely to mean to the family as a whole.

It is hard to see how this dilemma will be solved by the courts. It may actually be that the current approach of the Hong Kong courts, critical as I have been of it, or, at least by implication, critical of the arguments made before those courts, may come close to achieving the preferable outcome which I suggested earlier. The courts have ruled out any possibility of the parents being joined as third parties. It may be that if the case comes to trial, although reasonableness in the mitigation context is in theory judged in the same way as in any other context, the court may take a generous view for, as has been observed by McGregor,⁴⁸ the defendant has by definition been negligent — and courts often do not impose a high requirement of care upon plaintiffs. It would presumably still be open to the plaintiff to argue as I have done that mitigation is not the issue at all and that the New York court in *Flavier* was right, since it may be suggested that what the court said in *Lee Fai* on this was obiter.

McGregor, as noted earlier, observes that it has never been argued that apportionment is applicable to the failure to mitigate, while Glanville Williams, and Hart and Honoré,⁴⁹ have suggested that it would be appropriate. If it has never been argued in court, it has never been decided and it would therefore be open to a court to hold that the words of the legislation are apt to apply to mitigation: to do by judicial interpretation what the Parliament of the Republic

⁴⁸ Note 10 above, para 322.

⁴⁹ Note 41 above, p 230n.

of Ireland has done by legislation. Such judicial adventurousness is unusual in Hong Kong. And in fact it would do little to help Lee Fai whose main hope now lies in the court finding that his parents were not unreasonable, or even, as I have suggested, that mitigation is not the issue at all.

For children more generally the situation might require statutory rather than judicial intervention. Legislation could provide that children in the care of their parents cannot bring civil actions against those parents, except in situations of compulsory insurance. (For the sake of clarity it ought also provide that the requirement to mitigate damages cannot be used to diminish the damages payable to children where the failure to mitigate is the act of the parent or someone else on whom the child is dependent.) This suggestion, however, would require further thought before one would advocate it without reservation.

Conclusion

Reflection on this case suggests a number of points:

- 1 Issues of contributory negligence, mitigation of damage, intervening acts, and joint tortfeasors while not identical do have a number of overlapping areas. Neither lawyers nor courts should allow justice or logic to be lost because of an emphasis on the form or categorisation of arguments.
- 2 Particularly, ought contributory negligence and the duty to mitigate be treated in very much the same way, and should Hong Kong adopt a similar approach to Ireland, either legislatively or judicially?
- 3 Under the law as it stands there is little reason why parents should not be liable for failing to ensure appropriate treatment for their sick, injured, or disabled children. This is not to say that the courts would readily impose such liability.
- 4 The possibility of a holding to this effect is not precluded by the decision in the *Lee Fai* case, which does not seem to have been fully argued.
- 5 A court, when the issue is properly argued, ought to hold that a child should not be identified with a parent or other person responsible for it for the purposes of mitigation any more than it should be for the purposes of contributory negligence.
- 6 In cases where the child is injured by a negligent third party, the existing law gives rise to some risk of family units being deprived of damages on the basis of the fault of the parent or responsible person, to the ultimate detriment of the child — a state of affairs which may require legislative correction.

- 7 In any case, if it reaches trial, the court may well be able to avoid depriving the child of damages on the basis of the alleged default of its parents — either by holding that they did not behave unreasonably, or by holding that parental behaviour does not constitute a failure to mitigate by the child. On the other hand, it would be unfortunate if the case is, or has been, settled to the detriment of the child on the basis of an erroneous conception of the law, as I have suggested.

Jill Cottrell*

Adverse Possession in the New Territories

Introduction

Over the years many people, without any legal right or title, entered upon parts of the New Territories and made homes there for themselves and their families. Sometimes they occupied larger pieces of land, which they used as small holdings or farms. Generally speaking, except for the claims to possessory rights in respect of New Territories land, adverse possession claims are rare in Hong Kong.¹ Yet in 1994, Godfrey JA in *Lam Island Development Co Ltd v Lai Moon-hung*² observed that:

It appears that there are many so-called 'squatters' living on plots of land in the New Territories whose expectations, built up over a period of 20 years or more, that their possession would not be disturbed by persons claiming to have a paper title to the land have turned out to be false. The social consequences may well be severe and undesirable. If that is so, it would clearly be desirable for these matters to be submitted for the consideration of the Court of Appeal and, possibly, the Privy Council.³

The issue of adverse possession in the New Territories caused widespread concern, as is evident from the large number of cases brought before the courts in the 1990s. Section 4(4) of the New Territories (Renewable Crown Leases)

* Senior Lecturer, University of Hong Kong. I am grateful to Richard Gföcheski for valuable comments on a draft of this paper, and to Janice Brabyn for stimulating discussion on the topic, and to the helpful comments of two anonymous referees, one of whom contributed part of the title.

¹ *Lai Ching-yue v Chau Shing* (1987) HCt, MP No 2206 of 1987.

² [1994] 1 HKC 613.

³ *Ibid*, p 616. When the case went to appeal, the Court of Appeal upheld the decision of the trial court and Perlington JA continued: 'Sympathetic as we must feel towards the appellants who, when these proceedings commenced had been in occupation of land for a total period of well over 20 years and for almost that period since a new lease was granted by statute in 1973 ...' [1994] 2 HKC 11, 15.