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John B. Saunders

of Lincoln's Inn, Barrister-at-Law

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AUSTRALIA

Dr. G. de Q. WALKER, LL.B., S.J.D.
Barrister-at-Law

CANADA

GERALD D. SANAGAN, Q.C., M.A.
of the Ontario Bar

NEW ZEALAND

CLARENCE NOEL IRVINE, LL.B.
Barrister of the Supreme Court of New Zealand

Managing Editor

C. C. BANWELL

D

DAILY

"I cannot doubt that, according to their natural meaning and their *prima facie* meaning, the words 'make daily such number of tests' [in s. 7 of the Gaslight and Coke and Other Gas Companies Acts Amendment Act 1880] mean every day inclusive of Sunday." *London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A., *per* Vaughan Williams, L.J., at p. 81.

"My personal opinion is that 'daily labourer' means a man who, by the terms of his engagement or the course of his labour, is not only a labourer, but one who works every weekday and day by day. . . . In the English language the word 'daily' has a well-known meaning, consecrated by long use in the sentence, 'Give us each day our daily bread.' That does not mean 'once in every forty-eight hours,' but every day. So, in my opinion, a daily labourer is one who goes out to his work every day." *McDonald* v. *Brown* (1918), 87 L. J. K. B., 1119, D. C., *per* Darling, J., at p. 1121.

Australia. — "'Daily' is an adjective, the precise meaning of which is to be ascertained from the context in which it is used and particularly the substantive which it qualifies. The dictionaries show that 'daily' may mean every week day and Sunday or every week day. . . . When a journal is spoken of as a 'daily newspaper' the phrase is used to describe a publication which is published day by day, rather than periodically, for example, at intervals of a week or a month." *Foster* v. *Howard*, [1949] V. L. R. 311, *per* Barry, J., at p. 312.

See, generally, 37 Halsbury's Laws (3rd Edn.) 84, 92.

DAIRY

The expression "dairy"—

(i) includes any farm, cowshed, milking house, milk store, milk shop or other premises from which milk is supplied on or for sale, or in which milk is kept or used for purposes of sale or for the purposes of manufacture into butter, cheese, dried milk or condensed milk for sale, or in which vessels used for the sale of milk are kept, but

(ii) does not include a shop from which milk is supplied only in the properly closed and unopened vessels in which it is delivered to the shop, or a shop or other place in which milk is sold for consumption on the premises only (Food and Drugs Act 1955, s. 28 (1) (a)).

Dairy farm

The expression "dairy farm"—

(i) means any premises (being a dairy) on which milk is produced from cows, but

(ii) does not include any part of any such premises on which milk is manufactured into other products unless the milk produced on the premises forms a substantial part of the milk so manufactured (Food and Drugs Act 1955, s. 28 (1) (b)).

Dairy farmer

The expression "dairy farmer" means a dairyman who produces milk from cows (Food and Drugs Act 1955, s. 28 (1) (c)).

Dairyman

The expression "dairyman" includes an occupier of a dairy, a cowkeeper, and a purveyor of milk (Food and Drugs Act 1955, s. 28 (1) (d)).

DAM. *See also* BANK (Embankment); FISHING MILL DAM

The expression "dam" includes any weir or other fixed obstruction used for the purpose of damming up water (Salmon and Freshwater Fisheries Act 1923, s. 92 (1)).

The expression "dam" includes a lock, weir or other structure affecting the flow of water in any watercourse (Agriculture (Miscellaneous War Provisions) Act 1940, s. 22).

DAMAGE. *See also* INJURY

"Damage" includes destruction, and references to damaging shall be construed accordingly (Army Act 1955, s. 225 (1); Air Force Act 1955, s. 223 (1)).

[Section 135 of the Metropolis Management Act 1855 (repealed) enabled the Metropolitan Board of Works to construct sewers on making compensation for any "damage" done.] "Although the words of s. 135 are large, I do not think they extend to a case of consequential damage like this. This damage is said to have arisen by reason of the erection of the hoarding necessary for repairing the sewer in a public street rendering the access to the appellant's premises inconvenient. . . . The word 'damage' must necessarily receive a more limited construction. It must be confined to something like actual damage to property." *Herring* v.

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Metropolitan Board of Works (1865), 19 C. B. N. S. 510, *per* Montague Smith, J., at pp. 525, 526.

"Neither in common parlance nor in legal phraseology is the word 'damage' used as applicable to injuries done to the person, but solely as applicable to mischief done to property. Still less is this term applicable to loss of life, or injury resulting therefrom to a widow or surviving relative. We speak, indeed, of damages as compensation for injury done to the person; but the term 'damage' is not employed interchangeably with the term 'injury' with reference to mischief wrongfully occasioned to the person." *Smith* v. *Brown* (1871), L. R. 6 Q. B. 729, *per cur.*, at pp. 731–733.

"Is the loss within the exception [in a bill of lading] as to insurance—'the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance'? I do not agree that 'damage' is limited . . . to partial damage or injury, as distinguished from a total destruction of the thing; if goods were so much damaged as to be totally destroyed, that would be damage within the clause. But I think that it must be confined to cases where the goods receive damage from some peril which may be insured against; and that it does not extend to the case of a loss which is occasioned not by any damage or injury, but by the total bodily abstraction of the thing." *Taylor* v. *Liverpool & Great Western Steam Co.* (1874), L. R. 9 Q. B. 546, *per* Lush, J., at p. 550.

"The two clauses upon which the claimants have relied are the 6th and 16th clauses of the Railways Clauses Consolidation Act 1845. The first of those clauses provides for the payment to the class of claimants . . . 'for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith vested in the company." In my opinion those words relate to damage sustained at or before the date of the claim, or at the latest, the date of the inquisition, and do not relate to future injury resulting in future damage. I substitute the word 'injury' for 'damage', because it appears to me that the word 'damage' is used in the section of the statute which I have read for 'injury'; and that although future injury cannot be claimed for . . . yet nevertheless future damage resulting from a past injury would be the subject of a claim for compensation." *R.* v. *Poulter* (1887), 20 Q. B. D. 132, C. A., *per* Fry, L.J., at p. 138.

[Section 23 of the Highways and Locomotives (Amendment) Act 1878, s. 23 (repealed; see now s. 62 of the Highways Act 1959), enabled a highway authority to recover extraordinary expenses incurred by it in repairing a road by reason of the "damage" caused by excessive weight or other extraordinary traffic.] "I do not think 'damage' means fair wear and tear. I think 'damage' means that the road has been injured because I associate with the terms 'excessive weight' and 'extraordinary traffic' the idea of something more than the road was intended normally to bear. . . . The more a road is used the more it justifies its position as a communally upkept road, and I do not think that in such a context you can say that the ordinary traffic of a road causes damage to it." *Billericay Rural Council* v. *Poplar Union & Keeling*, [1911] 2 K. B. 801, C. A., *per* Fletcher Moulton, L.J., at p. 813.

"The words 'damages' and 'damage' in law have more than one meaning, and great care has to be exercised in examining the context in which they severally appear. 'Damage' may mean injury; 'damage,' and 'damages' especially, may mean sums paid under the order of the Court for compensation for a breach of contract or a wrong." *Swansea Corpn.* v. *Harpur*, [1912] 3 K. B. 493, C. A., *per* Fletcher Moulton, L.J., at p. 505.

"I shall try to distinguish between 'damage' and 'injury', following the stricter diction, derived from the civil law, which more especially prevails in Scottish jurisprudence. So used, 'injury' is limited to actionable wrong, while 'damage,' in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not." *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch*, [1942] A. C. 435, H. L., *per* Lord Simon, L.C., at p. 442.

[Under the Landlord and Tenant (Requisitioned Land) Act 1944, s. 1 (1), no remedy for breach of any repairing covenant contained in the lease shall be enforced, whether by action or otherwise, in respect of any "damage" to the land occurring during the period of requisitioning.] "In my view, under the Act of 1944, and under the Compensation (Defence) Act 1939, to which reference is made in the Act of 1944, both war damage and matters for which compensation is given are matters of physical damage to the property and the words 'any damage to the land' in s. 1 (1) of the Act of 1944 means damage of a physical nature, actual structural damage or damage to decorations, all of a nature which injures the land, the building, the decorations to the building, or the fitments, and not something in the nature of a breach of obligation by the lessee to the lessor." *Smiley* v. *Townshend*, [1949] 2 All E. R. 817, *per* Lynskey, J., at p. 821; *affd.*, [1950] K. B. 311, C. A.

[Section 9 of the Manchester Ship Canal Act 1897, limits the liability of shipowners for "damage" to a certain portion of the canal.] "The whole context points to physical damage to physical things. I do not understand what otherwise is meant by injury or damage to a portion of a canal. It is clearly something widely different from a loss suffered by undertakers in respect of their undertaking in consequence of such damage." *The Stonedale No. 1, Abel (Richard) & Sons, Ltd.*, v. *Manchester Ship Canal Co.*, [1955] 2 All E. R. 689, H. L., *per* Viscount Simonds, at p. 694; see also [1956] A. C. 1.

Canada. — "The words 'damage' and 'injury' are given as synonyms for each other. The first is generally used in respect to property and the second in relation to persons. . . . 'Damage' has, I think, a more restricted meaning than 'injury' as the latter word may mean a wrong which 'damage' never does. The word 'damage' includes 'injury' when the latter word is used to denote physical harm to persons." *Provincial Secretary-Treasurer* v. *York* (1957), 16 D. L. R. (2d) 198, *per* Bridges, J., at pp. 204, 205.

Caused by ship

"The section [s. 7 of the Admiralty Court Act 1861 (repealed; see now Administration of Justice Act 1956, s. 1 (1) d)] indeed seems to me to intend by the words 'jurisdiction over any claim', to give a jurisdiction over any claim in the nature of an action on the case for damage done by any ship, or in other words, over a case in which a ship was the active cause, the damage being physically caused by the ship. I do not say that damage need be confined to damage to property, it may be damage to person, as if a man were injured by the bowsprit of a ship. But the section does not apply to a case when physical injury is not done by a ship." *The Vera Cruz* (No. 2) (1884), 9 P. D. 96, C. A., *per* Brett, M.R., at p. 99.

"'Done by a ship' means done by those in charge of a ship with the ship as the noxious instrument." *Ibid.*, *per* Bowen, L.J., at p. 101.

"The question turns on the words in the Admiralty Court Act [1861 (repealed; see *supra*)] 'damage done by any ship.' I see no reason to doubt that the word 'damage' is as applicable to damage done to a person as to damage done to property. It would be doing great violence to the ordinary meaning of the word to limit it to damage to property. . . . I must hold that the words 'damage done by any ship' include damage to persons. Whilst, however, giving this meaning to the word 'damage', I cannot think that the present case falls within the provisions of the Act of Parliament. Damage done by a ship is, I think, applicable only to those cases where, in the words of the Master of the Rolls in the *Vera Cruz* [*supra*], the ship is the 'active cause' of the damage. . . . In this case, to put it at the highest, those in charge of the ship so placed a tarpaulin over the hatchway as to make a trap into which the plaintiff fell, whilst lawfully crossing the deck of the ship to reach his own vessel. The ship cannot be said to have been the active cause of the damage. The damage was done on board the ship, but was not, I think, within the meaning of the Act, done by the ship." *The Theta*, [1894] P. 280, *per* Bruce, J., at pp. 283, 284.

[The following terms were contained in a contract of towage: "The Company will not be liable for any damage or loss to or occasioned by the vessel in tow . . . or any damage or loss to any person or property whatsoever, although such damage or loss may be caused or contributed to by the acts or defaults of the master or crew of the tugboat." During the voyage, the tow rope parted, and the vessel being towed, the *Refrigerant*, was left helpless, until some time later the tug returned to take her into harbour.] "As to the words in the rest of the clause, 'The Company will not be liable for any damage or loss' (leaving out the unimportant words), I do not think that it is 'damage or loss' to the vessel when she has been left to get salvage assistance to bring her out of her difficulties. In my opinion that is not damage or loss to the vessel, nor do I think it is 'damage to any person or property whatsoever' within the meaning of this clause." *The Refrigerant*, [1925] P. 130, *per* Bateson, J., at p. 141.

[The Supreme Court of Judicature (Consolidation) Act 1925, s. 22 (1) (a) (iv) (repealed; see now s. 1 (1) (*d*) of the Administration of Justice Act 1956) gave the High Court jurisdiction in Admiralty matters to hear and determine any claim for "damage" done by a ship.] "It is clear that the plaintiffs' case is that the *New Perseverance* received damage to her deck and her elevator by the negligence of the defendants' servants in handling and using the gear of their ship *Minerva*. It also seems clear that the damage to the *New Perseverance* was done by the faulty gear of the *Minerva*, that is, by a part of the *Minerva* herself. The dropping of the elevator by the gear, and the dropping of the elevator and the gear together, did damage to the *New Perseverance*, her deck and her elevator. . . . I think the claim can be put under sub-s. 4 as damage done by a ship. . . . I think the damage here may be said to be done by the derrick and its load falling on the *New Perseverance*. That is damage done by the defendants' ship. If part of the ship does the damage I think that is enough—*e.g.* if it were done by an anchor or by a propellor."

The Minerva, [1933] P. 224, *per* Bateson, J., at pp. 228, 229.

See, generally, 35 Halsbury's Laws (3rd Edn.) pp. 718–720.

"Loss or damage" in ticket condition

[A condition in a passenger ticket stated that the defendant steamship company would not be responsible for (*inter alia*) any "loss or damage" arising from the perils of the sea, etc., or from any act, neglect, or default whatsoever of the pilot, master, or mariner. A passenger lost his life through the negligence of the defendants' servants.] "Excluding the words which are not applicable to the present case, the stipulation would read thus—The company will not be responsible for any loss or damage arising from any act, neglect, or default whatsoever of the pilot, master or mariner. It was suggested that the word 'damage' is not the correct word to apply to 'personal injury.' It is hardly usual to say that a man is damaged, but rather that he is hurt. 'Personal injury' is not 'loss', because a limb may be broken without being lost. The word 'injury' would certainly have been more apt, but the word 'damage' can certainly mean personal injury. Here the word occurs in a sentence which seems to be solely applicable to passengers personally. Therefore, upon consideration, we are unable to say that we think that injury to the person is not covered by the words of the stipulation." *Haigh* v. *Royal Mail Steam Packet Co., Ltd.* (1883), 52 L. J. Q. B. 640, C. A., *per cur.*, at p. 643.

DAMAGE FEASANT. *See* DISTRESS DAMAGE FEASANT

DAMAGES. *See also* COMPENSATION

Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or a tort; or, put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him (11 Halsbury's Laws (3rd Edn.) 216).

Damages [are] given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and judgement is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum (2 Bl. Com. 438).

Where a plaintiff proves actual loss by reason of a breach of contract, he can recover such damages as will be fair compensation for the loss he has actually sustained thereby. But a plaintiff is not necessarily entitled to be compensated for all the loss he can trace to the breach of contract. He is only entitled to such damages as come within one or other of the following descriptions, as laid down in . . . *Hadley* v. *Baxendale* [(1854), 9 Exch. 341]:

(i) Such damages as may fairly and reasonably be considered as *arising naturally*, i.e., according to the usual course of things, from the breach of contract itself;

(ii) Such damages as may reasonably be supposed to have been *in the contemplation of both parties*, at the time when they made the contract, as the probable result of the breach.

He is also under a duty to take reasonable steps to mitigate the loss which he suffers (Sutton and Shannon on Contracts (6th Edn.) 378).

"Now, with respect to damages in general, they are of three kinds. First, nominal damages; which occur in cases where the judge is bound to tell the jury only to give such; as, for instance, where the seller brings an action for the non-acceptance of goods, the price of which has risen since the contract was made. The second kind is general damages, and their nature is clearly stated by Cresswell, J., in *Rolin* v. *Steward* [(1854), 14 C. B. 595, at p. 605]. They are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man. Thirdly, special damages are given in respect of any consequences reasonably or probably arising from the breach complained of." *Prehn* v. *Royal Bank of Liverpool* (1870), L. R. 5 Exch. 92, *per* Martin, B., at pp. 99, 100.

[The plaintiffs collected information as to transactions during the day on the Stock Exchange and supplied it on payment to their subscribers. The defendant surreptitiously and meanly invaded the plaintiffs' right of property in such information.] "A man who does such a wrongful act as the defendant has done lays himself open to be told by the tribunal before whom he appears, 'You have damaged the plaintiff. You have done a contemptible and fraudulent act against him, and have invaded his common law right, and therefore you must have damaged him.' In such a case the jury may give any damages. It is not necessary to give proof of specific damages. The damages are damages at large." *Exchange Telegraph Co., Ltd.* v. *Gregory & Co.*, [1896] 1 Q. B. 147, C. A., *per* Lord Esher, M.R., at p. 153.

"'Damages' to an English lawyer imports this idea, that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation,

whether that duty or obligation is imposed by contract, by the general law, or legislation." *Hall Brothers S.S. Co., Ltd.* v. *Young*, [1939] 1 K. B. 748, C. A., *per* Greene, M.R., at p. 756.

"Compensatory damages in a case in which they are at large may include several different kinds of compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include natural injury to his feelings; the natural grief and distress which he may feel in being spoken of in defamatory terms; and, if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering which is caused by the defamation and which may constitute injury to the plaintiff's pride and self-confidence, those are proper elements to be taken into account in a case where the damages are at large." *McCarey* v. *Associated Newspapers, Ltd.*, [1964] 3 All E. R. 947, C. A., *per* Pearson, L.J., at p. 957; also reported [1965] 2 Q. B. 86.

Australia. — "Damages may be either compensatory or exemplary. Compensatory damages are awarded as compensation for and are measured by the material loss suffered by the plaintiffs. Exemplary damages are given only in cases of conscious wrongdoing in contumelious disregard of another's rights." *Whitfield* v. *De Lauret & Co. Ltd.* (1920), 29 C. L. R. 71, *per* Knox, C.J., at p. 77.

"Damages are, in their fundamental character, compensatory. Whether the matter complained of be a breach of contract or a tort, the primary theoretical notion is to place the plaintiff in as good a position, so far as money can do it, as if the matter complained of had not occurred. . . . This primary notion is controlled and limited by various considerations, but the central idea is compensation, or, as Blackstone (Vol. 2, p. 438, see *supra*) says—'compensation and satisfaction'." *Ibid.*, *per* Isaacs, J., at p. 80.

Australia. — "I think the word 'damages' in that undertaking [an undertaking as to damages included in an order granting an interim injunction] is to be given a very general meaning, and is not necessarily to be given the same meaning as the word 'damages' when used in connection with breaches of contracts. 'Damages' in this case seems to me to mean real harm, rather than to have any strictly defined meaning." *Victorian Onion & Potato Growers Assocn.* v. *Furnijan*, [1922] V. L. R. 819, *per* Cussen, J., at p. 822.

Exemplary damages

Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of *restitutio in integrum* no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer. Such damages are said to be "at large" and, further, have been called exemplary, vindictive, penal, punitive, aggravated, or retributory (11 Halsbury's Laws (3rd Edn.) 223).

[The award of exemplary damages was considered in *Rookes* v. *Barnard*, [1964] 1 All E. R. 367, H. L., where, at pp. 410, 411, Lord Devlin stated that in his view there are two categories of cases in which exemplary damages are awarded, viz. (i) where there has been oppressive, arbitrary, or unconstitutional action by the servants of the government, and (ii) where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff. Note, however, that *Rookes* v. *Barnard* was not followed in Australia; see headnote to *Australian Consolidated Press, Ltd.* v. *Uren*, [1967] 3 All E. R. 523, P. C. See also the Trade Disputes Act 1965, which altered the law following the decision in *Rookes* v. *Barnard*.]

General damages

General damages are compensation for general damage. General damage is the kind of damage which the law presumes, when a contract is broken or a tort is committed, to flow from the wrong complained of and to be its natural or probable consequence. Thus general damages are those which the law implies in every breach of contract and in every violation of a legal right (11 Halsbury's Laws (3rd Edn.) 217).

"'General damages', as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of." *Ströms Bruks Akt.* v. *Hutchison*, [1905] A. C. 515, H. L., *per* Lord Macnaghten, at p. 525.

Liquidated damages

By the term "liquidated damages" is meant, in the first place, a sum assessed by the parties to a contract and agreed upon by them to be paid as damages by the party who is in default. The term is also applied to sums expressly made recoverable as liquidated damages under a statute (11 Halsbury's Laws (3rd Edn.) 219, 220).

Liquidated damages and penalty distinguished

"The hinge on which the decision in every particular case turns, is the intention of the parties, to be collected from the language they have used. The mere use of the term 'penalty', or the term 'liquidated damages', does not determine that intention, but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards the arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all, or any of them, was intended to be a penalty, and not in the way of liquidated damages." *Dimech* v. *Corlett* (1858), 12 Moo. P. C. C. 199, P. C., *per cur.*, at pp. 229, 230.

"Here there are a number of covenants . . . in respect of the breach of which it is said that £5,000 shall be liquidated damages. Now in what cases have the Courts said that in those circumstances you shall construe the words 'liquidated damages', not as what they mean—as a sum assessed between the parties—but only as a penal sum, leaving the real damages to be ascertained? Undoubtedly the authorities do say this, that when a stipulation applies to a breach of a number of covenants, and one of those is a covenant for the payment of a sum of money where the damage for the breach of it is according to English law capable of being actually defined, then where a sum is said to be liquidated damages the stipulation applies not distributively to the different covenants but equally to all, and you must hold that the sum cannot be damages assessed by the parties as in the case of a particular covenant with respect to which damages are incapable of being ascertained and are by law fixed in a different way; but you must look upon it as a mere penalty, and ascertain when the breach occurs what is the damage sustained in respect of the particular breach." *Wallis* v. *Smith* (1882), 21 Ch. D. 243, C. A., *per* Cotton, L.J., at p. 268.

"I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative: 1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found *passim* in nearly every case. 2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering & Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* [[1905] A. C. 6]). 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Comr.* v. *Hills* [[1906] A. C. 368, P. C.])." *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage & Motor Co., Ltd.*, [1915] A. C. 79, *per* Lord Dunedin, at pp. 86, 87.

Nominal damages

Where (1) a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom or fails to prove that he has; or (2) although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or (3) the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal (11 Halsbury's Laws (3rd Edn.) 220).

A judgment for nominal damages means that the plaintiff has not suffered any loss or any real damage, but the giving of nominal damages affirms that there has been an infringement of legal right by the breach of contract. Nominal damages are not the same as small damages. If a plaintiff suffers actual damage to the extent of a few pence, he recovers that sum as substantial damages. If he proves no actual damage, he recovers some small sum, say one shilling, as nominal damages. It occasionally happens that in that special class of contract actions known as actions for breach of promise of marriage, "contemptuous" damages, usually one farthing, are awarded in order to show that, although the plaintiff has technically succeeded the circumstances are such that the action ought never to have been brought. The award of contemptuous or nominal damages is sometimes made a ground for depriving the plaintiff of costs (Sutton and Shannon on Contracts (6th Edn.) 375).

"The question for consideration is, whether, where a sum of money is due upon simple contract, and the creditor is entitled to claim nominal damages for its detention, the debtor is discharged by the creditor's acceptance, before action brought, of the amount of the debt, or whether the former may afterwards sue for such nominal damages. I apprehend he cannot. Nominal damages are a mere peg on which to hang costs. . . . Nominal damages, in fact, mean a sum of money that may be

spoken of, but that has no existence in point of quantity." *Beaumont* v. *Greathead* (1846), 2 C. B. 494, *per* Maule, J., at p. 499.

"'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term 'nominal damages' does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages." *Mediana* (*Owners*) v. *Comet* (*Owners, etc.*), *The Mediana*, [1900] A. C. 113, *per* Lord Halsbury, L.C., at p. 116.

Pecuniary damages

New Zealand. — [Section 2 (1) of the Judicature Amendment Act 1936 (N. Z.) (repealed; see now s. 2 (1) of the Judicature Amendment Act (No. 2) 1955) applied to actions in which the only relief claimed was payment of a debt or "pecuniary damages" or the recovery of chattels. Section 3 provided for the trial of actions by a judge without a jury.] "It is contended on behalf of the respondent that the sum of money claimed is not 'pecuniary damages', because it is claimed by virtue of a statutory indemnity under s. 50 of the Workers' Compensation Act 1922 [N. Z.]. I do not accept this view. I respectfully adopt the view expressed in the following language used by Ostler, J., in *John Cobbe and Co., Ltd.* v. *Viles* (*N. I. M. U. Insurance Co., Third Party* [[1939] N. Z. L. R. 377, 379]: 'In this case, although a statutory right to be indemnified is given by s. 50 of the Workers' Compensation Act, if that section had never been enacted, in my opinion the plaintiff company would, in the circumstances of this case, have had a claim for damages against the defendant for the amount they had lost in paying compensation to their servant by reason of the defendant's negligence. This claim is in substance and in fact a claim for damages. It is a claim to be indemnified —i.e., to be put in the same position by a money payment as the plaintiff company would have been in if the defendant had not acted negligently. That is exactly what a claim for damages is.' Ostler, J.'s, decision was the subject of an appeal reported as *N. I. M. U. Insurance Co., Ltd* (*Third Party*) v. *Viles* [[1939] N. Z. L. R. 981]. All the members of the Court of Appeal were of opinion that the appeal should be dismissed. . . . This is not a proceeding for contribution, and, in my opinion, what is sought here is not an equitable remedy. An action by A against B alleging that B's negligence has compelled A to pay C a sum of money which A therefore seeks to recover from B is, in my opinion, an action for damages. Nor are there here any statutory provisions as to procedure which indicate that the Legislature intended such a claim to come before a judge alone. Indeed, the tasks facing a tribunal which has to adjudicate upon a claim for contribution differ substantially from the tasks which will confront the tribunal which tries this petition of right. Section 17 of the Law Reform Act 1936 [N. Z.], casts upon the Court the duty of determining what amount of contribution is just and equitable for a party to pay, having regard to his responsibility for the damage, and empowers the Court to exempt a party altogether, or to direct a party to make complete indemnity. On the hearing of this petition, there will be no such questions, nor will any assessment of unliquidated damages be necessary. The questions for determination will be what really happened on the wharf when this worker was killed; and who, if any one, was to blame for what happened. It is not, I think, irrelevant to the interpretation of the words 'pecuniary damages' in s. 2 of the Judicature Amendment Act 1936 [N. Z.], to remark that these are questions of just such a kind as it appears to be the policy of the Legislature, as disclosed by that Act, to entrust to the determination of a jury. I conclude, therefore, that this is a claim for 'pecuniary damages', and that the case comes within s. 2 of the Judicature Amendment Act 1936." *Richardson & Co., Ltd.* v. *R.*, [1942] N. Z. L. R. 211, *per* Callan, J., at pp. 212–214; also reported [1942] G. L. R. 149, at p. 150.

Prospective damages

The term "prospective damages" is applied to the damages which are awarded to a plaintiff, not as compensation for the ascertained loss which he has sustained at the time of commencing his action, but in respect of loss which it may reasonably be anticipated he will suffer thereafter in consequence of the defendant's act or omission. In some cases such damages are considered too remote (11 Halsbury's Laws (3rd Edn.) 222, 223).

Special damages

Special damages are compensation for special damage which is not presumed by law to be the natural and probable or direct consequence of the act or omission complained of but which does in fact result in the circumstances of the particular case and of the injured party's claim to be compensated. In contrast to general damages special damages must be claimed

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specifically and proved strictly, and are recoverable only where they can be included in the appropriate measure of damages and are not too remote (11 Halsbury's Laws (3rd Edn.) 218).

Apart from general damages for injury to reputation, special damages in the strict sense of the term may be awarded, if expressly claimed, in respect of any material temporal injury proved to have been suffered as the natural result of the defamatory publication complained of. Special damage is the loss of some material temporal advantage, pecuniary or capable of being estimated in money, which flows directly and in the ordinary course of things from the act of the defendant or an act for which he is responsible (24 Halsbury's Laws (3rd Edn.) 119).

"The term 'special damage,' which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right : see *Ashby* v. *White* [(1703), 2 Ld. Raym. 936]. In all such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage) which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression 'special damage' when used of this damage, denotes the actual and temporal loss which has, in fact occurred. . . . The term 'special damage' has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or highway, to denote that actual and particular loss which the plaintiff must allege and prove beyond what is sustained by the general public." *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., *per cur.*, at pp. 528, 529.

"'Special damages' . . . are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly. In cases of contract, special or exceptional damages cannot be claimed unless such damages were within the contemplation of both parties at the time of the contract." *Ströms Bruks Akt. Bolag* v. *Hutchison*, [1905] A. C. 515, *per* Lord Macnaghten, at pp. 525, 526.

Statutory damages

The term "statutory damages" is one of common usage but has, it seems, no precise accepted meaning. Thus it is used loosely in reference to damages for breach of a duty imposed by statute, and in this sense the most common example is the action for damages for personal injuries due to a breach of statutory duty, which is an action in tort.

The term "statutory damages" is more appropriate in cases where the right to claim damages is conferred by statute, or where the damages are regulated or limited by statute (11 Halsbury's Laws (3rd Edn.) 221).

Unliquidated damages

Damages are termed unliquidated when they have not been assessed beforehand by the parties or some statute, in which case the jury are at liberty, subject to the rules governing the measure of damages, to award such damages as they think appropriate to the injury which the plaintiff has sustained (11 Halsbury's Laws (3rd Edn.) 220).

DAMNUM. *See* NUISANCE

DANGER. *See also* ENDANGER

"Danger" means danger of bodily harm or injury or danger to property (Gas Act 1965, s. 28).

Danger building

. . . Every building in which any process of the manufacture [of gunpowder] is carried on or in which gunpowder or any ingredients thereof, either mixed or partially mixed, are kept, or in the course of manufacture are liable to be (in this Act referred to as a danger building). . . (Explosives Act 1875, s. 10 (2)).

In coal mine

[Section 1 (2) of the Coal Mines Regulation Act 1908, provides that no contravention of the provisions of s. 1 (1) shall be deemed to take place in the case of a workman who is below ground for the purpose of rendering assistance in the event of accident, or for meeting any "danger" or apprehended danger, or for dealing with any emergency or work uncompleted through unforeseen circumstances which requires to be dealt with without interruption in order to avoid serious interference with ordinary work in the mine.] "There is, in the first place, the ordinary attention bestowed on the pit by repairers and brushers, whose business it is—always a more or less dangerous

one—to keep the ways and works of the pit in a safe condition. Things are constantly occurring which, although slight at the moment, may, if not attended to, ultimately become dangerous, and it is the regular and ordinary work of the skilled repairer to detect and deal with these occurrences. In the second place, in such pits there are frequent occurrences which are more serious, and which obviously amount to danger or apprehended danger, distinguishable from these ordinary occurrences to which I have referre l. Looking at the words of the clause of excep' ons in s. 1 (2) of the Act and the context in which they occur, I think they do not refer to the danger which will always be present in a pit if it is not looked after, but to some abnormal and exceptionally serious occurrence." *Thorneycroft* v. *Archibald*, [1913] S. C. (J.) 45, *per* the Lord Justice-Clerk (Sir John MacDonald) at p. 49.

See, generally, 26 Halsbury's Laws (3rd Edn.) 618.

Of seas or navigation

[A cargo of cheese was shipped under a bill of lading containing the ordinary exception clause—"The Act of God, the Queen's enemies, fire and all and every other danger and accident of the seas, rivers and navigation" etc. At the end of the voyage, the cheese was found to have been eaten and damaged by rats.] "We agree . . . that the true question is, whether damage by rats falls within the exception, and we are clearly of opinion that it does not. The only part of the exception under which it possibly could be contended to fall is, as 'a danger or accident of the sea and navigation'; but this we think includes only a danger or accident of the sea or navigation, properly so called, viz.: one caused by the violence of the wind and waves (a *vis major*) acting upon a seaworthy and substantial ship, and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea." *Laveroni* v. *Drury* (1852), 8 Exch. 166, *per cur.*, at pp. 170, 171.

"The words in the bills of lading—'dangers of the seas'—must, of course, be taken in the sense in which they are used in a policy of insurance. It is a settled rule of the law of insurance, not to go into distinct causes, but to look exclusively to the immediate and proximate cause of the loss. . . . Their Lordships . . . are of opinion, that the conclusion proper to be drawn from the evidence is this, that from the nature and collocation of this cargo of animal, vegetable, and (to some extent) putrescible matter, sea damage was done to a portion of the cargo; that by the packing and cramming of the ship so as to prevent any circulation of air, and the closing of the hatches, the atmosphere in the ship's hold became heated, damp and vitiated, without means of escape; and that this atmosphere was the proximate cause of the damage to the oil-cake which is the subject of this suit. This proximate cause cannot be brought within the legal import of the exception of dangers of the seas." *The Freedom* (1871), L. R. 3 P. C. 594, *per cur.*, at pp. 601–603.

[A charterparty contained the following clause: "The freight to be paid on unloading and right delivery of the cargo . . . (the act of God, the Queen's enemies, restraint of princes and rulers, fire and all and every other dangers and accidents of the seas, rivers and navigation always excepted)."] "The charter party here in question, like many others, contains in addition to the exception of perils of the sea the expression 'all dangers or accidents of navigation'. What is the true construction of that expression? Must it be construed as identical with 'perils of the sea'; or must some further effect be given to those additional words? . . . The question which the Court has to determine, having regard to its knowledge of what happens at sea, is whether a loss of which the moving and direct cause is a collision caused by the negligence of another ship is not caused by a 'danger or accident of navigation' within the meaning of those words in the charter, notwithstanding that such collision has been held not to be a peril of the sea. A peril of the sea is a peril caused by some action of the elements, but what is a peril of navigation? Navigation is the act of navigating ships. . . . One class of dangers which would most readily occur to the minds of persons accustomed to the sea would be the dangers caused by the negligent navigation of other ships. There are other dangers, but this is perhaps the principal and most obvious kind of danger which may happen at sea other than those included in the expression 'perils of the sea'. . . . Is such a danger then within the words 'dangers of navigation'? I should say that it most certainly is. Though not a peril of the sea it is in my opinion clearly a danger of navigation. If the loss were occasioned by the negligent navigation of the ship carrying the cargo, I do not think that would be a danger of navigation within the words; that would be a loss brought about by the act or default of the shipowner's servants for which he would be liable. It would be a danger, not of navigation, but caused by his employing inefficient servants." *Garston Sailing Ship Co., Ltd.* v. *Hickie, Borman & Co.* (1886), 18 Q. B. D. 17, C. A., *per* Lord Esher, M.R., at pp. 21, 22.

"It may be asked, why should the expression 'danger of navigation' cover a loss occasioned

by negligence of the other ship, when the expression 'peril of the sea' does not? The answer appears to me to be that the one expression properly refers to dangers caused by the elements and beyond human control; whereas navigation is a process subject to human control, and that dangers caused by the negligent navigation of other ships are therefore properly within the meaning of the term 'dangers of navigation', but not within the term 'perils of the sea'." *Ibid.*, *per* Lopes, L.J., at p. 24.

"I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay—you would know that it must decay; and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas." *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 57 L. J. Q. B. 24, *per* Lord Halsbury, L.C., at pp. 26, 27.

"It seems to me that the accident which caused the damage was one of the excepted perils or accidents. . . . It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care. I agree, therefore, with the judgment of Lopes, L.J. [in *Pandorf & Co.* v. *Hamilton, Fraser & Co.* (1885), 16 Q. B. D. 629]. I do not think the case could be summed-up better than it was by him in the words . . . 'Sea damage occurring at sea and nobody's fault'." *Ibid.*, *per* Lord Macnaghten, at p. 30.

See, generally, 22 Halsbury's Laws (3rd Edn.) 74, 75; 35 *Ibid.*, 292, 293.

DANGEROUS

"Anything, in a manner of speaking, is dangerous if, either owing to negligence, or owing to the fact that it is impossible for everybody on every occasion, however carefully they may conduct themselves, to avoid some mischance of hand or eye, injury may be caused. . . . Almost everything is dangerous from one point of view, but one has to see whether the danger should be reasonably anticipated from the use of things without protection." *Kinder* v. *Camberwell Borough Council*, [1944] 2 All E. R. 315, *per* Lord Caldecote, C.J., at pp. 316, 317.

Australia. — "What chattels are dangerous in themselves? 'The doctrine of dangerous things is one that I do not think I have ever fully grasped': *Beckett* v. *Newalls Insulation Co. Ltd.*, [1953] 1 All E. R. 250; [1953] 1 W. L. R. 8, *per* Stable, J., at p. 12. I humbly place myself beside the learned judge. Fullagar, J., in extra-judicial statement expressed the view that the distinction between things dangerous in themselves and things not dangerous in themselves must surely now be regarded as abolished (25 A. L. J. 278, at p. 287). Since the extension of the liability of a manufacturer in respect of defective manufacture since *Donoghue (or McAlister)* v. *Stevenson*, [1932] A. C. 562; [1932] All E. R. Rep. 1, to a class of persons much wider than was previously thought to be the object of obligation, the necessity for the distinction has abated. The distinction originally served the purpose of extending the range of duty so as to include persons who would not otherwise be within the range. Nevertheless the distinction continues and, if in the case of goods dangerous in themselves no knowledge of the danger is necessary in the distributor but in the case of goods not dangerous in themselves knowledge, actual or imputed, is necessary before a distributor can be made liable in negligence, then the distinction would seem to be a lively one. However, one can reach no conclusion on the necessity or otherwise of the ingredient of knowledge of the danger until one has analysed what is meant by a thing dangerous in itself. An analysis of the cases on things dangerous in themselves with all the variety and variation which appear in those cases leads me to the conclusion that a thing is dangerous in itself when the danger of such a thing is of such public notoriety that a defendant will not be heard to say that he in particular did not know of the danger. The notorious danger may arise spontaneously or only when the thing is used in some way in which it may reasonably be foreseen that it may be used, but in any case the danger must be publicly notorious." *Imperial Furniture Pty Ltd.* v. *Automatic Fire Sprinklers Pty. Ltd.*, [1967] 1 N. S. W. R. 29, *per* Jacobs, J. A., at p. 38.

DANGEROUS BUSINESS

"Dangerous business" means the business of the manufacture of matches or of other substances liable to sudden explosion, inflammation or ignition or of turpentine, naphtha, varnish, tar, resin or Brunswick black or any other manufacture dangerous on account of the liability of the substances employed therein to cause sudden fire or explosion (London Building Act 1930 s. 5).

DANGEROUS DOG

"In this case the magistrates dismissed the summons, without having heard all the evidence that was tendered on behalf of the complainant, on the ground that to justify an order under s. 2 of the Dogs Act 1871 [which enables a court of summary jurisdiction to make an order directing a 'dangerous' dog to be destroyed], there must be evidence that the dog is dangerous, not only to animals, but also

to mankind. . . . I can see no reason why the word 'dangerous' in s. 2 of the Act of 1871 should be construed as meaning only 'dangerous to mankind'." *Williams* v. *Richards*, [1907] 2 K. B. 88, *per* Lord Alverstone, C.J., at p. 90.

"A dog with a disposition or propensity to bite small children or postmen, or any other class of persons, it seems to me, may well be dangerous though nobody could fairly describe the dog as ferocious; the disposition or propensity might spring from some uncertainty of temper, from some past unfortunate experience which it had suffered, or fear or nervousness, of something of that sort, and something quite different from actual savagery or ferocity of nature." *Keddle* v. *Payn*, [1964] 1 All E. R. 189, *per* Fenton Atkinson, J., at pp. 191, 192.

See, generally, 1 Halsbury's Laws (3rd Edn.) 693, 694.

DANGEROUS DRIVING. *See* DRIVE—DRIVER

DANGEROUS DRUGS. *See* DRUGS

DANGEROUS GOODS

For the purposes of this Part of this Act [Part V; Safety] the expression "dangerous goods" means aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitroglycerine, petroleum, any explosives within the meaning of the Explosives Act, 1875, and any other goods which are of a dangerous nature (Merchant Shipping Act 1894, s. 446 (3)). [As to the meaning of "Explosives" in the Explosives Act 1875, *see* EXPLOSIVES.]

DANGEROUS MACHINERY

The question whether a part of a machine is a dangerous part is one of fact in each case; but the question must also be decided according to the right principle of law, and in law a part of a machine is dangerous if it is a possible cause of injury to anybody acting in a way a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur, taking into account the possibility of inadvertent or indolent conduct (17 Halsbury's Laws (3rd Edn.) 74, 75).

"It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree." *Hindle* v. *Birtwistle*, [1897] 1 Q. B. 192, *per* Wills, J., at pp. 195, 196.

[A steam motor lorry was left on a highway. To start it, it was necessary to pull out a safety-pin, and manipulate three different levers. Two soldiers managed to send it in reverse into a shop-front. The question arose as to whether this was a case of a dangerous article being left about.] "'Dangerous' is not the word whereby to describe a machine which cannot move by mere accident, but only after a series of operations so complicated as to be beyond the power of a person unacquainted with the mechanism." *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 148, D. C., *per* Avory, J., at p. 153.

"It may be said that all moving parts of a machine—and indeed many parts which do not themselves move—are dangerous in the sense that they are capable of causing injury to workmen or other persons (careful or careless) who use the machine, or are brought into proximity to it; and in a literal sense the cutting or grinding parts of all machines designed to perform the operations of cutting or grinding may be said to be within the description of 'dangerous'." *Lauder* v. *Barr & Stroud*, [1927] S. C. (J.) 21, *per* the Lord Justice-Clerk, at pp. 24, 25.

"In considering whether machinery is dangerous you must not assume that everybody will always be careful . . . A part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur." *Walker* v. *Bletchley Flettons Ltd.*, [1937] 1 All E. R. 170, *per* du Parcq, J., at p. 175.

"The first question is, I think, correctly stated in the appellant's case in these words: 'Whether the words "every dangerous part" referred to in s. 14 of the Factories Act 1937 [repealed; see now s. 14 of the Factories Act 1961] refer only to parts which are directly dangerous by reason that the part itself is liable to cause injury so that such parts only are required to be fenced by the said section, or whether the said words "every dangerous part" includes parts which are indirectly dangerous in that they are liable to throw out material with such force that the material is liable to cause injury to the worker so that such parts also are required to be fenced by the said section.' My Lords, I have no doubt that this question should be answered by saying that the words 'every dangerous part' in their context refer only to parts which are directly dangerous

by reason that the part itself is liable to cause injury." *Nicholls* v. *Austin (F.) (Leyton), Ltd.*, [1946] A. C. 493, H. L., *per* Lord Simmonds, at p. 504.

"One has to have regard to the purpose of the Factories Act 1937 [repealed; see *supra*] and that purpose is to protect operatives from danger. If danger does exist from the operation of the machine and if a part becomes dangerous from the operation of the machine, it seems to me that that is a 'dangerous part' of the machinery, and the fact that it is not dangerous when no operation is taking place is quite irrelevant." *Hoare* v. *Grazebrook (M. & W.), Ltd.*, [1957] 1 All E. R. 470, *per* Lynskey, J., at p. 474.

"For my part, I am unable to see the distinction between parts of a machine which are dangerous because they eject pieces of material when the machine is in motion and parts of a machine which are dangerous because the operator may come in contact with them. If the section [s. 14 (1) of the Factories Act 1937 (repealed; see *supra*)] requires fencing against the one danger, it would be logical to suppose that fencing was required against the other." *Close* v. *Steel Co. of Wales. Ltd.*, [1961] 2 All E. R. 953, H. L., *per* Lord Guest, at p. 974.

"The construction of s. 14 of the Factories Act 1937 [repealed; see *supra*] has been considered in a number of cases, and three propositions, derived from the general subject-matter of the section and its detailed provisions, have been established, which are relevant for the present case. (i) A distinction is drawn between dangerous parts of machinery and materials or articles which are dangerous in motion in the machine. The dangerous parts of machinery are dealt with by s. 14 (1) and are, subject to certain exemptions, required to be fenced. The dangerous materials or articles (which are sometimes . . . conveniently referred to as 'components' because they are destined to become components of other machines) are not required by the section itself to be fenced, but there is a power under the concluding words of the section to make regulations requiring them to be fenced. No relevant regulations have been made, and one can see the difficulty of drafting general provisions for the fencing of things so variable as components. . . . (ii) The nature of the danger envisaged by s. 14 (1) is that a workman may suffer injury directly by coming into contact with a dangerous part of the machinery, and indirect causation is not envisaged. . . . (iii) As regards the degree of danger envisaged, a part of machinery is 'dangerous' within the meaning of the section if it is a reasonably foreseeable cause of injury to anybody acting in a way in which a human being may be expected to act in circumstances which may reasonably be expected to occur." *Eaves* v. *Morris Motors, Ltd.*, [1961] 3 All E. R. 233, C. A., *per* Pearson, L.J., at p. 241; also reported [1961] 2 Q. B. 385, at pp. 400, 401.

[Section 14 (1) of the Factories Act 1961 provides that every "dangerous" part of any "machinery", other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced. A workman was injured by the revolving body of a mobile crane.] "Sometimes one finds in the authorities references to dangerous machines; but that is not what the section says, and to ask the question—is this machine dangerous?—can easily lead to error. A vehicle is a dangerous machine in the sense that, if it is driven in a dangerous manner, it may run into someone and injure him. What, then, are the dangerous parts of the machine? It is not the parts of the machine which are dangerous but the machine as a whole; if one had to specify dangerous parts, presumably in the case of an ordinary motor car they would be the bumper, the mudguards and the grille or casing which in more modern cars is found in front of the radiator, but they are not parts of the machinery at all. Of course it would be impossible to fence against this kind of danger; but s. 14 is not dealing with this kind of danger; it is dealing with parts of machinery where danger arises from their not being fenced and is obviated by fencing. So it appears to me that the fact that vehicles in motion create a kind of danger which does not exist with stationary or fixed machinery is no reason for not requiring the fencing of parts of the machinery in vehicles which are dangerous whether the vehicle is in motion or not." *British Railways Board* v. *Liptrot*, [1967] 2 All E. R. 1072, H. L., *per* Lord Reid, at p. 1081.

Australia. — "In the majority of cases it would be unnecessary to insist upon a definition of danger in relation to machinery as the existence of danger is a question of fact and generally the circumstances surrounding the particular accident are ample in themselves to furnish a completely satisfactory answer to any contentions, one way or the other, that may be offered. As a guide, however, it has been said that machinery is dangerous when it is in such a condition that possibly it may injure anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may reasonably be expected to occur: *per* du Parc, J., *Walker* v. *Bletchley and Flettons, Ltd.* [*supra*]. Such a test should be adequate." *Inglis* v. *N.S.W. Fresh Food & Ice Co., Ltd.*, [1944] N. S. W. S. R. 87, *per* Davidson, J., at pp. 99, 100.

Australia. — "By definition a machine is dangerous if it exposes persons guilty of inadvertence, inattention, carelessness or folly to danger." *Bellia* v. *Colonial Sugar Refining Co., Ltd.*, [1961] S. R. (N. S. W.) 401, *per cur.*, at p. 406.

DANGEROUS PERFORMANCE

The expression "performance of a dangerous nature" includes all acrobatic performances as a contortionist (Children and Young Persons Act 1933, s. 30).

DARK SMOKE. *See* SMOKE

DARKNESS. *See* HOURS OF DARKNESS

DATE

". . . it has been pointed out by the Court, that in fact 'the date thereof' and 'the day of the date thereof' are synonymous, and that when a certain time is to begin to run from a particular date, the term begins to run from the day following." *Williams* v. *Nash* (1859), 28 L. J. Ch. 886, *per* Romilly, M.R., at p. 887.

[Under R. S. C. 1965, Ord. 6, r. 8 (1), a writ, for the purpose of service, is valid in the first instance for twelve months beginning with the "date" of its issue]. "It was suggested for the plaintiff that the word 'date' should be construed as meaning 'time', so that the twelve months ran from 3.5 p.m. on Sept. 10, 1965, to 3.5 p.m. on Sept. 10, 1966: and that the service was good as it was before that time. In support of this suggestion, reference was made to the Shorter Oxford Dictionary, which gives one of the meanings as 'the precise time at which anything takes place'. I cannot accept this suggestion. When we speak of the *date* on which anything is done, we mean the date by the calendar, such as: 'The *date* today is May 2, 1967.' We do not divide the *date* up into hours and minutes. We take no account of fractions of a *date*. If authority were needed for so obvious a proposition, it can be found in the judgment of Lord Mansfield, C.J., in *Pugh* v. *Duke of Leeds* [(1777), 2 Cowp. 714, at p. 720]. Speaking of the date of delivery of a deed, he said: 'For what is "the date"? The date is a memorandum of the day when the deed was delivered: in Latin it is "datum": and "datum tali die" is, delivered on such a day. Thus in point of law, there is no fraction of a day: it is an indivisible point . . . "Date" does not mean the hour or the minute, but the day of delivery: and in law there is no fraction of a day.' Applying these words, we must take no account of the time, 3.5 p.m. We must regard the writ as issued on Sept. 10, 1965, just as if that date were an indivisible point. The whole day of the date of issue must either be *included* or *excluded* in calculating the twelve months. If it is *included*, then, in point of fact, the period for service is less than twelve months by a few hours. If it is *excluded*, it is more than twelve months by a few hours. Which is it to be? I may add that a similar situation arises with the period of limitation. The 'date' on which the cause of action accrues is either *included* or *excluded* in the three years." *Trow* v. *Ind Coope* (*West Midlands*), *Ltd.*, [1967] 2 All E. R. 900, C.A., *per* Lord Denning, M.R., at p. 904.

"The law does not as a rule take account of fractions of the day unless there is some necessity for it, as for instance in the dog licence case (*Campbell* v. *Strangeways* [(1877), 3 C. P. D. 105]), and there is no such necessity here. That case turned on the fact that the dog licence was taken out during the day in question. It was therefore clear that during so much of that day as preceded the issue of the licence, the dog was not licensed. During the rest of the day the dog was licensed. It was therefore necessary to split the day into the period before and the period after the issue of the licence. To construe it otherwise would be to fly in the face of the facts because it was certainly true that during part of the day the dog was unlicensed and during the subsequent part of the day it was licensed. Accordingly, 'date' in that case must mean 'time', but in the absence of any such necessity, 'date' and 'time' are in contradistinction one from the other. 'Date' is the whole period of twenty-four hours and 'time' is the moment during that period which is critical." *Ibid.*, *per* Harman, L.J., at p. 908.

[It was held that "date" in Ord. 6, r. 8 (1) meant "day", and that the time of day when the writ was served was immaterial.]

DATE OF ACQUISITION. *See* ACQUISITION

DAUGHTER. *See also* SON

"The gift [in a will] is 'to each of the sons and daughters of his late cousin Thomas Holyoake.' There are sufficient persons alive to satisfy the word 'sons', for Thomas Holyoake had two legitimate sons. It is therefore impossible to say, that illegitimate sons are let in by these words. But he had no legitimate daughter, and I do not see how it is possible to exclude the illegitimate daughter, and though the word is 'daughters' in the plural, it does not alter the case. It is a gift to the legitimate sons and to the only daughter." *Edmunds* v. *Fessey* (1861), 29 Beav. 233, *per* Romilly, M.R., at pp. 234, 235.

"It has been contended on behalf of the defendants that the term daughter means 'female child.' As, however, in this case the testator left no female children in the legal sense of the word, there are no persons to

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