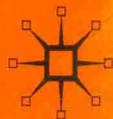


**MICHAEL F. JAMES**

# **CONSTRUCTION LAW**

liability for the construction  
of defective buildings

second edition



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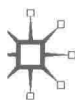
## **Liability for the Construction of Defective Buildings**

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**Second Edition**

palgrave



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# Preface to the First Edition

The term 'Construction Law' is used in three senses:

- (i) the principles which govern the duties and liabilities of the parties involved in the construction process and which arise out of that process;
- (ii) the law which affects the construction industry; and
- (iii) the rules governing the administration of a construction contract.

It is only the first of these senses which is Construction Law proper. Under this definition, Construction Law is that body of law which governs civil liability for the construction of defective buildings. The second two senses are not Construction Law properly defined. Thus, (ii) above would cover a range of subjects going beyond the scope of Construction Law in the first sense; it would, for example, include torts affecting the use of land, employment law and health and safety law. (iii) above is concerned with the application of the standard form contracts, such as the JCT and the ICE, to the running of a construction project and the resolution of disputes which may arise out of the project. This, in my view, is more properly referred to as 'construction contract administration' and is essentially a matter for quantity surveyors rather than lawyers.

This book is concerned with Construction Law in the first of the senses defined above. Essentially it examines three questions:

- (1) Who can be sued if a building is defectively constructed?
- (2) Who can sue – building owner, tenant, subsequent owner, etc.?
- (3) What damages are recoverable?

This book is not, therefore, concerned with liability for matters which may arise *in the course* of building works. Rather it examines the position *after* the work is complete, and the building has been taken over.

There are, I think, three reasons why Construction Law thus defined is worthy of study as a separate branch of the law. In the first place, construction and building cases have been, and continue to be, a source of important developments in the common law. The famous (or infamous) advance and retreat of the tort of negligence and economic loss have involved largely this category of case. Secondly, liability for buildings is an important matter for the individual consumer. For the most part, buildings liability is looked on as of import for construction companies or their professional advisers. Indeed it is, but it is too often forgotten that the victim of defective building works or of unsound advice in relation thereto is an individual. To this

extent, Construction Law is an aspect of consumer law. Thus, the recent retreat in the law of negligence has had particularly serious effects for the consumer; it is contract which is now the major source of liability for defective buildings, but in many cases concerning domestic buildings the purchaser will not have a contract with the builder or designer. Thirdly, many recent and forthcoming developments in Construction Law now emanate from the EC. These developments have as their aims the promotion of competition throughout the Community and the protection of the consumer.

The major sources of the general law of construction are common law, statute, private law (i.e., the provisions of any of the standard form building and engineering contracts which may apply to a particular contractual relationship) and, as mentioned in the previous paragraph, EC law. There is no shortage of books on the standard form building and engineering contracts and no independent chapters are devoted to that aspect of Construction Law. Instead, attention is devoted to the relationship between contract and tort and the effect of changes in that relationship upon liabilities in the construction industry and its related professions. Thus, a separate chapter is devoted to collateral warranties and buildings insurance as a result of the impact of the decision in *Murphy v. Brentwood DC*. Throughout the book the need for the law to find a balance between professional and consumer interests in the area of civil liability for defective buildings is kept uppermost in mind.

The parameters to Construction Law, as in other areas of law, are set by the appellate courts in the landmark cases. But how those parameters are applied falls usually to the judges at first instance. In the field of Construction Law these judges are known as Official Referees. They are High Court judges with a specialist knowledge of this subject, and it is one of the purposes of this book to examine carefully their most important decisions.

One final point by way of introduction needs to be made. This is not intended to be a book for a beginner. It is intended principally for use by students reading Construction Law as a specialist subject in the later stages of their degree. As such, it assumes a knowledge of the principles of contract and tort. (It is worth stressing at this point the importance of mastering these subjects, without which more specialist areas of law cannot hope to be understood. Not for nothing are contract and tort among the 'core' legal subjects demanded by the Law Society and the Bar Council!) Nor is this intended to be a practitioner's work, though it is hoped that some practitioners will find in it stimulation to debate further the problematical issues raised by this subject.

The law is as stated at 1 March 1994.

M.F.J.

Swansea/University of Surrey

# Preface to the Second Edition

My aim in writing this second edition is the same as in writing the first: it is to set out the principles which govern the duties and liabilities of the parties involved in the construction process and which arise out of that process. It is, in essence, a work on liability for the construction of defective building works *after* their completion and as such it is an applied work on the law of obligations.

It is now seven years since the first edition of this book was published. During that time a number of developments have occurred in the general law of contract and tort which have an important bearing on Construction Law. In addition, several reports have been published proposing reforms which would affect key areas of this subject.

In the first place, the appeal courts in Canada, New Zealand and Australia have declined to follow the exclusionary rule governing negligence and economic loss laid down by the House of Lords in *D & F Estates v. Church Commissioners for England* [1988] 2 All ER 992 and *Murphy v. Brentwood District Council* [1990] 2 All ER 908. These Commonwealth decisions highlight the problematical nature of this area and the importance of the policy considerations which underly it. The New Zealand case in point, *Invercargill City Council v. Hamlin* [1994] 3 NZLR 513 went to the Privy Council, who refused to overturn the decision of the New Zealand Court of Appeal.

In the UK, there have been a number of decisions of the House of Lords governing professional negligence and concurrent liability in contract and tort. The decisions in *Henderson v. Merrett Syndicates* [1995] 2 AC 145, *Spring v. Guardian Assurance* [1995] 2 AC 296, and *White v. Jones* [1995] 2 AC 267 have given a new lease of life to *Hedley Byrne v. Heller* liability, and they have important implications for the liability of construction professionals, though they leave intact the exclusionary rule in relation to third party liability in negligence.

In the area of contract law, further decisions on the reasonableness test in the Unfair Contract Terms Act 1977 and the decision of the House of Lords in *Ruxley Electronics v. Forsyth* [1995] 3 All ER 268 on the extent of the damages recoverable by a building owner for defective building have meant an expanded discussion of the contractual obligations of the building contractor.

The advent of the Unfair Terms in Consumer Contracts Regulations 1994/99, based on the EU Directive of this name, has led me to introduce a

new chapter into this work. These Regulations affect standard form contracts made between businesses and consumers. The novel concepts of unfairness and good faith introduced into our law by these Regulations are so radical that I believe they merit their own chapter. They cannot be dismissed as outside the realm of Construction Law.

Since publication of the first edition, the Law Commission has produced its report on privity of contract (*Privity of Contract: Contracts for the Benefit of Third Parties*, Law Com. No. 242, Cmd. 3329, 1996). The proposals contained in this report have now been incorporated into law by the Contracts (Rights of Third Parties) Act 1999. No area of law more than Construction Law has been so dramatically affected by this reform and I have remodelled and renamed the chapter on collateral warranties as a consequence. As well as statutory reform, there have been several reported cases on the issue of whether the employer can recover substantial damages from the contractor for loss sustained by a third party, most notably *Alfred McAlpine Construction Ltd v. Panatown Ltd* [2000] 4 All ER 97.

In the field of professional negligence, there have been a number of reported decisions on the *Bolam* standard. However, the most important decision for valuers is that of the House of Lords in *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd* AC 191 [1997], which determines the extent of liability of negligent valuers acting for lenders. Construction professionals frequently act as adjudicators or arbitrators in the resolution of disputes in the construction industry. Their role in this respect is likely to be much affected by the Human Rights Act 1998. In incorporating these developments I have taken the opportunity to expand the chapters on design professionals and surveyors.

The steady, if not relentless, flow of judicial authority and legislation since publication of the first edition has not stayed pressure for reform. The report of Sir Michael Latham (*Constructing the Team*, HMSO, 1994) contains proposals for reform of joint liability, limitation of action and latent defects insurance. The Law Commission has produced a recent consultation paper on limitations of actions (Law Commission Consultation Paper No. 151, 1998) and in 1996 the DTI published an investigation of joint and several liability by the Common Law Team of the Law Commission. These proposals, together with the passing of the Contracts (Rights of Third Parties) Act 1999, have meant a major overhaul of the chapter on reform.

There has been little progress of late on the proposals emanating from the European Union for the harmonisation of construction liability and the proposal for a Directive on the liability of suppliers of services has been dropped. As a consequence, there is no longer a separate section of the book devoted to European Construction Law. Instead, the harmonisation proposals have been incorporated into the chapter on reform and there is a separate chapter on construction products liability.

The one aspect of Construction Law to remain unchanged since publication of the first edition is the exclusionary rule in relation to third party liability for economic loss resulting from negligence. Essentially, this area of law rests upon policy rather than legal rationale, a point recognised by the commentary on the Canadian decision of *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.* in the Building Law Reports:

Most developed societies are mobile. Therefore a purely contractual liability for defective work is always likely to be of limited utility. Most societies identify a community. Therefore the interest of the community in a well-constructed housing stock is a legitimate policy aim. Most societies value prevention of danger. Therefore the costs of rectifying a dangerous defect which has not yet caused harm should be recoverable. (1995) 74 BLR 5

As with the first edition, special thanks are due to Roy and Valerie Anthony for their word processing. Their patience and skill with a chaotic manuscript have not declined with the years and Roy's attention to detail (including footnote numbering!) has been invaluable.

This edition is dedicated to the memory of our cat, Toby (1982–2000).

The law is stated on the basis of materials available to me on 31 January 2001.

M.F.J.

*Swansea*

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# Abbreviations

AC	Law Reports, Appeal Cases
ACE	Association of Civil Engineers
All ER	All England Reports
ALR	Australian Law Reports
Bing.	Bingham's Court of Common Pleas Reports, 1822–34
BLM	Building Law Monthly
BLR	Building Law Reports
CBNS	Common Bench Reports, New Series, 20 vols, 1856–65
Ch.	The Law Reports, Chancery Division
CILL	Construction Industry Law Letter
Cl&F	Clark and Fennelly's Reports, House of Lords, 12 vols, 1831–46
CLJ	Cambridge Law Journal
CLY	Current Law Year Book
Cmnd/Cmd	Command Paper
Co Litt	Coke on Littleton (1 Inst)
Con. LR	Construction Law Reports
Const. LJ	Construction Law Journal
DC	District Council
DoE	Department of the Environment
DTI	Department of Trade and Industry
EC	European Community (sometimes referred to as the EEC – European Economic Community)
EG	Estates Gazette
EGCS	Estates Gazette Case Summaries
EGLR	Estates Gazette Law Reports
EU	European Union (formerly European Community)
ICE	Institution of Civil Engineers
J	Justice
JCT	Joint Contracts Tribunal
KB	The Law Reports, King's Bench Division
Law Com.	Law Commission Report
LBC	London Borough Council
LJ & LJ	Lord Justice, Lord Justices
LQR	Law Quarterly Review
LR Ex	Law Reports, Exchequer Division, 5 vols, 1875–80
MBC	Metropolitan Borough Council
MLR	Modern Law Review

MR	Master of the Rolls
M&W	Meeson and Welsby's Reports, Exchequer, 16 vols, 1836–47
NLJ	New Law Journal
NZLJ	New Zealand Law Journal
OJ	Official Journal of the European Communities
OJC	Official Journal of the European Communities: Information and Notices
OJL	Official Journal of the European Communities: Legislation
PII	Professional Indemnity Insurance
PN	Professional Negligence
QB	The Law Reports, Queen's Bench Division, 1952–
RIBA	Royal Institute of British Architects
RICS	Royal Institution of Chartered Surveyors
SI	Statutory Instrument
SLT	Scots Law Times
Stark	Starkie's Reports, Nisi Prius, 3 vols, 1814–23
Term Rep.	Term Reports, King's Bench, 1785–1800
UDC	Urban District Council
US	United States Reports
WLR	The Weekly Law Reports

# Table of Cases

Addis v. Gramophone Company Limited [1909] AC 488	37
Alexander v. Mercouris [1979] 1 WLR 1270	106,107
Alfred McAlpine Construction Ltd v. Panatown Ltd [2000] 4 All ER 97	xi,234,236,244
Andrews v. Hopkinson [1957] 1 QB 299	246
Andrews v. Schooling [1991] 3 All ER 723	107
Anns v. Merton LBC [1978] AC 728	78,104,114,142,175,225,238,252
Applegate v. Moss [1971] 2 All ER 747	33,46,261
Arenson v. Cason Beckman Rutley & Co. [1977] AC 405	176
Aswan Engineering Establishment Co. v. Lupdine Ltd [1987] 1 All ER 135	101
G.W. Atkins Limited v. Scott (1992) Const. LJ 215	33
Balfour Beatty Civil Engineering Ltd v. Docklands Light Railway Ltd [1996] 78 BLR 42	60
Banque Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd [1994] 2 EGLR 108; [1995] QB 375, CA; [1997] AC 191	xi,210,211
Barclays Bank v. Fairclough [1996] 76 BLR 1	134,168
Batty v. Metropolitan Property Realisations Ltd [1978] QB 554; [1978] 2 All ER 445	79,142,219,254
Baxter v. F.W. Gapp & Co. Ltd [1934] 2 KB 271	210,211
Beaton v. Nationwide Building Society [1991] 2 EGLR 145; <i>The Times</i> , October 8, 1990	220
Beaufort Developments (N.I.) Ltd v. Gilbert Ash N.I. Ltd [1999] 1 AC 266	171
Beaumont v. Humberts [1990] 2 EGLR 166	189,190,194,205
Bellefield Computer Services Ltd v. E. Turner & Sons Ltd [2000] BLR 97	95
Berrisforde v. Chesterfield District Council [1989] 39 EG 176	220
Beswick v. Beswick [1968] AC 58	247
Bevan Investments Ltd v. Blackhall and Struthers (No. 2) [1973] 2 NZLR 45	151
Bliss v. South East Thames Regional Health Authority [1987] 1 CR 700	37,38
Bolam v. Friern Barnet Hospital Management Committee [1957] 2 All ER 118	149,196
Bolitho (Dec'd) v. City and Hackney Health Authority [1998] AC 232	205

Bolton v. Stone [1951] AC 850	221
Bottomley v. Bannister [1932] 1 KB 458	75,77,78,79
Bowen v. Paramount Builders (Hamilton) Ltd [1975] 2 NZLR 546	89,101
BP Exploration Co. (Libya) Ltd v. Hunt (No. 2) [1982] 1 All ER 925	47
Brickfield Properties v. Newton [1971] 1 WLR 862	154,183
Brunswick Construction Ltd v. Nowlan (1974) 21 BLR 27	18,19
Bryan v. Maloney (1995) 128 ALR 163	90,288
Candler v. Crane, Christmas & Co. [1951] 2 KB 164; [1989] 2 All ER 514 (as part of consolidated appeal to the House of Lords)	190,193,220
Cann v. Willson (1888) Ch.D.39; [1989] 2 All ER 514 (as part of consolidated appeal to the House of Lords)	190,193
Caparo Industries plc v. Dickman [1989] 1 All ER 798; [1990] 1 All ER 568	100,142,193,220
Cartledge v. E. Jopling & Sons Ltd [1963] AC 758	251
Cattle v. Stockton Waterworks (1871) LR 10 QB 453	100
Cavalier v. Pope [1906] AC 428	75,79
Cehave NV v. Bremer Handelgesellschaft MbH, The Hansa Nord [1976] QB 44	45
Chambers v. Goldthorpe [1901] 1 KB 624	171
Clay v. A.J. Crump (Contractors) Ltd and Others (1977) 4 BLR 80; [1964] 1 QB 533	174,179
Clayton v. Woodman & Son (Builders) Ltd (1977) 4 BLR 103	174
Corfield v. Grant (1992) 29 Con. LR 58	160
Craneheath Securities v. York Montague Ltd [1996] 1 EGLR 130	197
Cross v. David Martin & Mortimer [1989] 1 EGLR 154	202
Curran v. Northern Ireland Co-ownership Housing Association Ltd (1986) 8 NILR 1	189
Cutter v. Powell (1795) 6 Term Rep. 320	47
Czarnikow Ltd v. Koufos, The Heron II [1967] 3 All ER 686	31,184
D & C Builders v. Rees [1966] 2 QB 617	59,60
D & F Estates v. Church Commissioners for England [1988] 2 All ER 992; [1989] AC 177	x,84,133,225,283,286
Dakin (H) & Co. Ltd v. Lee [1916] 1 KB 566	47
Darlington Borough Council v. Wiltshier Northern Ltd [1995] 1 WLR 68	223,234
Davies v. Parry [1988] 20 EG 92	192
Davis Contractors Ltd v. Fareham UDC [1956] AC 696	40
De Lassalle v. Guildford [1901] 2 KB 215	246
Department of National Heritage v. Stienenson Varming Mulcahy, <i>Building</i> , 30 October 1998	19
Department of the Environment v. Thomas Bates & Son Ltd [1990] 2 All ER 943	84,86,185,225

Derry v. Peek [1889] 14 App. Cas. 337	190
Director General of Fair Trading v. First National Bank plc [2000] 2 All ER 759	62
Dodd Properties (Kent) Ltd v. Canterbury County Council [1980] 1 All ER 928, CA	46
Donoghue v. Stevenson [1932] AC 562	9,75,77,78,79,81,82,93, 94,99,133,186,190,192,265
Duncan v. Blundell (1820) 3 Stark 6	18
Dunlop v. Lambert (1839) 6 Cl&F 600, 7 ER 824	235,237
Dunlop Pneumatic Tyre Co. Ltd v. New Garage and Motor Co. Ltd [1915] AC 79	39
Dutton v. Bognor Regis UDC [1972] 1 QJB 373	78,92,100,104,142, 175,252
Eames London Estates Ltd v. North Hertfordshire District (1980) 259 EG 491	160,253
East Ham Corporation v. Bernard Sunley & Sons Ltd [1966] AC 406	46,184
Eckersley v. Binnie (1988) 18 Con. LR 1	158
Edgeworth Construction Ltd v. N.D. Lea and Associates (1991) 54 BLR 11	184
Edmund Murray Ltd v. BSP International Foundations Ltd (1993) 33 Con. LR 1	28
Equitable Debenture Assets Corporation Ltd (EDAC) v. William Moss Corp. Ltd (1984) 2 Con. LR 1	19,126
Eric S. Smith v. Bush [1989] 2 All ER 514	101
Esso Petroleum Co. Ltd v. Mardon [1976] QB 801	163,253
Farley v. Skinner, <i>The Times</i> , April 14, 2000	209
First Energy (UK) Ltd v. Hungarian International Bank Ltd [1993] 2 Lloyd's Rep. 194	61
Forster v. Outred & Co. [1982] 2 All ER 753	255
Frost v. Aylesbury Dairy Co. [1905] 1 KB 608	45
George Hawkins v. Chrysler (UK) Ltd and Burne Associates (1986) 38 BLR 36	7,157,158,161
George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd [1983] 2 AC 803	26
Gloucestershire County Council v. Richardson [1968] 2 All ER 1181	8,139,140
Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd [1984] 3 All ER 529	83,122
Grant v. Australian Knitting Mills [1936] AC 85	100
Gray v. T.P. Bennett & Sons (1987) 43 BLR 63	263
Greater Nottingham Co-operative Society Ltd v. Cementation Piling and Foundations Ltd [1988] 2 All ER 971	130,165,220

Greaves & Co. (Contractors) Ltd v. Baynham Meikle and Partners	
[1975] 3 All ER 99	6,155,181,307
Gremdean Properties v. Nash (1977) 244 EG 547	213
Groom v. Crocker [1939] 1 KB 194	163,164
Hadley v. Baxendale (1854) 9 Ex. 341	31,184
Halifax Building Society v. Edell [1992] 3 All ER 389	220
Hancock v. B.W. Brazier (Anerley) Ltd [1966]	
1 WLR 1317; [1996] 2 All ER 901	9,44,307
Harmer v. Cornelius (1858) 5 CBNS 236	6
Harris v. Wyre Forest District Council [1989] 2 All ER 514	
(see also Smith v. Eric S. Bush)	187,189,192,212,307
Haseldine v. Daw & Son Ltd [1941] 2 KB 343	100
Hayes v. James and Charles Dodd [1990] 2 All ER 815	37,38,209
Hedley Byrne & Co. Ltd v. Heller & Partners [1964] AC 465	
x,86,93,96,98,128,163,168,185,186,190,193,213,220,225,254,259,287,304	
Heilbut Symons & Co. v. Buckleton [1913] AC 30	226,246
Helston Securities Ltd v. Hertfordshire County Council [1978]	
3 All ER 262	247
Henderson and Others v. Merrett Syndicates Ltd [1994]	
3 All ER 506; [1995] 2 AC 145	x,97,132,134,162,165,167,186,195,225, 257,287,288,304,306,307
Holland Hannen and Cubitts (Northern) Ltd v. Welsh Health Technical	
Services Organisation (WHTSO) (1981) 35 BLR 1	150,151,161
Holt v. Payne Skillington and De Groot Collis, <i>The Times</i> , December 22, 1995; [1996] PNLR 179; (1996) 77 BLR 51; (1996)	
49 Con. LR 99	134,186
Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd	
[1962] 1 All ER 474	45
Hunter v. Hanley (1955) SLT 213	196
Independent Broadcasting Authority v. EMI Electronics Ltd and	
BICC Construction Ltd (1980) 14 BLR 1	6,7,140,149,156,181
Instone v. Schroeder Music Publishing Co. Ltd [1974]	
1 WLR 1308	50
Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd	
[1989] QB 433	57
Invercargill City Council v. Hamlin [1994] NZLR 513;	
[1996] AC 624	x,88,260
Investors in Industry Commercial Properties Ltd v. South	
Bedfordshire DC [1986] 1 All ER 787	122,160
Iron Trades Mutual Insurance & Others v. J.K. Buckenham [1990]	
1 All ER 808	257
Izzard and Another v. Field Palmer (a firm) and Others (2000)	
1 EGLR 177	204

Jacobs v. Moreton & Partners (1994) 72 BLR 92	94,108
James McNaughten Paper Group Ltd v. Hicks Anderson & Co. [1991] 1 All ER 134	142
Jones v. Stroud District Council [1986] 1 WLR 1141	255
Junior Books Ltd v. Veitchi Co. Ltd [1983] 1 AC 520	81,126,128,305
Kettman v. Hansel Properties Ltd [1985] 1 All ER 352	255
Koufos v. Czarnekow, The Heron II [1969] 1 AC 350	183
Lambert v. Lewis [1982] AC 225	13
Lamphier v. Phipos (1838) 8 C & P 475	182
Lancashire and Cheshire Association of Baptist Churches Inc v. Howard Seddon Partnership [1993] 2 All ER 467	167
Latimer v. A.E.C. Ltd [1953] AC 643	221
Le Lievre v. Gould (1893) 1 QB 491	190
Lean Engineering and Construction Co. Ltd v. KA Duk Investment Co. Ltd (1989) 47 BLR 139	184
Lee v. Thompson [1989] 40 EG 89	165
Lee v. West [1989] EGCS 160	13
Lee v. York Coach & Marine [1977] RTR 308	12
Levison v. Patent Carpet Cleaning Co. [1977] 3 WLR 90	72
Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd [1993] 3 All ER 417	234
Lindenberg v. Canning (1992) <i>Construction Law Digest</i> , (May), p. 21; (1993) 62 BLR 147	19,20,113,126
Lloyd v. Butler [1990] 47 EG 56	203
London Borough of Merton v. Lowe (1981) 18 BLR 130	154
Luxmoore-May and Another v. Messenger May Baverstock [1990] 1 WLR 1009	196
Lynch v. Thorne [1956] 1 WLR 303	18,19,105
Maynard v. West Midlands Regional Health Authority [1984] 1 WLR 634	
McAlpine v. Panatown [2000] 4 All ER 97	196
McCrone v. Boots Farm Sales Ltd [1981] SLT 103	22
McCullagh v. Lane Fox & Partners Ltd [1996] 1 EGLR 35	213
Merivale Moore plc and Another v. Strutt & Parker, <i>The Times</i> , May 5, 1999	199
Michael Hyde and Associates Ltd v. J.D. Williams & Co. Ltd, <i>The Times</i> , August 4, 2000	198
Michael Salliss & Co. Ltd v. Calil and William F. Newman and Associates (1987) 13 Con. LR 68	177
Midland Bank Trust Co. Ltd v. Hett, Stubbs & Kemp [1978] 3 All ER 571; [1979] Ch 384	100,164,219,254

Miller v. South of Scotland Electricity Board [1958] SC (HL) 20, p. 39	179
Minscombe Properties v. Sir Alfred McAlpine & Sons (1986) 279 EG 759	32
Monarch Airlines Ltd v. London Luton Airport Ltd [1998] 1 Lloyd's Rep. 403	28
Money Penny v. Hartland (1824) 1 Car & P 315	160
Moresk Cleaners v. Hicks (1966) 14 BLR 50	154
Morgan Crucible Co. v. Hill Samuel [1990] 3 All ER 330	194
Muirhead v. Industrial Tank Specialties Ltd [1985] 3 All ER 705	84
Murphy v. Brentwood District Council [1990] 2 All ER 908; [1991] 1 AC 398	ix,x,84,100,104,115,129,175,185, 225,249,269,283,287,307
New Zealand Shipping Ltd v. A.M. Satterthwaite & Co. Ltd, The Eurymedon [1975] AC 154	243
Nitrogen Eireann Teoranta v. Inca Alloys Ltd [1992] 1 All ER 854	259
Northern Regional Health Authority v. Crouch [1984] 2 All ER 175	171
Norwich City Council v. Paul Clarke Harvey & Brigg Amasco Ltd (1988) 4 Const. LJ 217; [1989] WLR 828	130,247
Nye Saunders and Partners v. Alan E. Bristow (1987) 37 BLR 92	153,154
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