LANDMARK CASES IN THE LAW OF TORT

Edited by Charles Mitchell and Paul Mitchell

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Preface

Landmark Cases in the Law of Tort is the third volume in our series of collected essays on leading cases in the common law. The present volume uses the same techniques as the two earlier volumes (on restitution and contract). Each author was given a free choice of case and method of approach. The essays were presented and discussed at a symposium at King's College London in April 2009, and subsequently revised in the light of that discussion. We are grateful to all the symposium participants for their contributions, and to the King's Law School for supporting the event.

As with our previous volumes, there were no competing demands from authors to write on the same case—which reflects both the sheer number of important decisions in the law of obligations and the differences of scholarly emphasis.

Readers will doubtless have their own views about which authorities should be dealt with in a collection of this kind, and perhaps will be disappointed to find a personal favourite overlooked. However, we should make it clear that none of these volumes ever set out to define the most important cases in a particular area. That would be an extremely difficult, and ultimately rather pointless, task—rather like compiling a list of the ten greatest novels of all time. Rather, the aim has always been to cast new light on some of the many important cases that make up the law of obligations.

Among the thirteen cases dealt with here, readers of the earlier collections will recognise certain familiar themes. If it is true, as Lord Goff once said, that judicial work is 'an educated reflex to facts',[1] then both the facts and the nature of the judge's reflex to them can be profoundly influential. Investigation may reveal that the facts are more nuanced, or more extreme, than the bare, laconic accounts in the law reports suggest. Furthermore, the contemporary context—which very rarely appears in the reports—can give those facts a resonance which is appreciated by the judge, but missed by later readers of his judgment. Conversely, legal principles may compel judges to deal with situations in a deliberately stylised way, where important contextual material is excluded. In such situations the legal process provides an inadequate method for resolving social conflicts. The essays on *Burón v Denman*, *Goldman v Hargrave* and *Hunter v Canary Wharf Ltd* offer powerful illustrations of the importance of a full appreciation of the facts to which the judge is responding.

The facts are, of course, only the starting point. The nature of the 'educated reflex' turns on many other factors. One of the most powerful is

[1] R Goff, 'Judge, Jurist and Legislature' [1987] *Denning Law Journal* 79, 82.

the judge's conception of his own role. In some cases judges have felt obliged, or inclined, to go beyond the immediate facts, so as to lay down broad principles for the future. The essay on *Alcock* (among others) explores some of the motivations behind such expansiveness, and the limits which judges feel themselves bound by. The nature of the response may also be coloured by what legal materials are perceived as relevant. As the essay on *Fairchild* demonstrates, the judges' request in that case to hear argument about the position in European jurisdictions produced an original and distinctive analysis, with a hint that future harmonisation would be welcome. The essay on *Smith v Littlewoods*, by contrast, highlights the delicate issues involved in actually bringing about a convergence of the Scots and English law on liability for the acts of a third party. A further factor influencing the 'educated reflex' may even be the judge's own education (see the essay on *Hedley Byrne*).

The part of a judge's educated reflex that will be furthest removed from the facts involves the use of legal theory. The decision in *Tate & Lyle*, it is argued, made a far-sighted use of the concept of rights, which was ahead of its time. *George v Skivington*, both as decided and as subsequently interpreted by courts and textbook writers, was capable of being understood in a variety of ways, which all raised fundamental questions about the limits of negligence liability. Perhaps most strikingly, several of the cases reveal concerns about legal categories: what should the role of the law of negligence be in relation to the law of nuisance or the law of contract, and what should the role of tort be in relation to a wider regulatory scheme? More broadly, there is an engagement with the question, what is the law of tort for? We believe that the essays collected here illuminate the process of judicial law making generally, and also cast some light on these broader questions.

Charles Mitchell and Paul Mitchell
August 2009

Contributors

Richard Baker is a barrister at 7 Bedford Row Chambers, London.

Steve Banks is a Lecturer in Law at the University of Reading.

Jonathan Garton is a Senior Lecturer in Law at King's College London.

David Ibbetson is Regius Professor of Civil Law at the University of Cambridge.

Maria Lee is a Professor of Law at University College London.

Michael Lobban is Professor of Legal History at Queen Mary University of London.

Mark Lunney is an Associate Professor of Law at the University of New England.

Charles Mitchell is a Fellow and Tutor in Law at Jesus College, Oxford, and a Professor of Law at the University of Oxford.

Paul Mitchell is a Reader in Law at King's College London.

Jason W Neyers is an Associate Professor of Law and Cassels Brock LLP Faculty Fellow in Contract Law at the University of Western Ontario.

Donal Nolan is a Fellow and Tutor in Law at Worcester College, Oxford, and a CUF Lecturer in Law at the University of Oxford.

Ken Oliphant is Director of the Institute for European Tort Law in the Austrian Academy of Sciences, Vienna and Professor of Tort Law at the University of Bristol.

Elspeth Reid is a Senior Lecturer in Law at the University of Edinburgh.

Charlotte Smith is a Lecturer in Law at the University of Reading.

Leslie Turano is a Lecturer in Law at King's College London.

Mark Wilde is a Lecturer in Law at the University of Reading.

Table of Cases

Australia

Chester v Waverley Corporation (1939) 62 CLR 1 284
Gardner v Northern Territory of Australia [2004] NTCA 14 222
Goldman v Hargrave [1964] WAR 93; [1967] AC 645, affirming (1963) 110 CLR 40 . . . . . v, 199, 201, 212, 214, 217–26, 263, 350
Hargrave v Goldman [1963] WAR 102 . . . . . 201–2, 209, 211, 213
Hazelwood v Webber (1934) 52 CLR 268 207
Jaensch v Coffey (1984) 155 CLR 549 . . . . . 283, 285–86, 300, 305
McWhirter v Emerson–Elliot (No 2) [1962] WAR 162 207
Modbury Triangle Shopping Centre v Anzil (2001) 205 CLR 254 224
Mount Isa Mines v Pusey (1970) 125 CLR 383 284–85
Spark v Osborne (1908) 7 CLR 51 211
Stevens v Brodriff Sawmilling Co Pty Ltd (1986) 160 CLR 16 124
Stockwell v State of Victoria [2001] VSC 497 222
Tame v New South Wales (2002) 211 CLR 317 306

Canada

Bow Valley Huskey (Bermuda) Ltd v Saint John Shipbuilding Ltd [1997] 3 SCR 1210 248
CNR Co v Norsk Pacific Steamship Co [1992] 1 SCR 1021 . . . . . 240, 248
Cook v Lewis [1951] SCR 830 339
Cooper v Hobart [2001] 3 SCR 537 235
Dobson (Litigation Guardian of) v Dobson [1999] 2 SCR 753 240
Loring v Brightwood Golf & Country Club (1972) 7 NSR (2d) 501 222
Montreal Tramways Co v Léveillé [1933] SCR 456 240
Nor–Video Services Ltd v Ontario Hydro (1978) 84 DLR (3d) 221 238
Odhavji Estate v Woodhouse [2003] 3 SCR 263 235
Stretton v Holmes et al (1890) 19 Ont R 286 88
Winnipeg Child and Family Services (Northwest Area) v G (DF) [1997] 3 SCR 925 240
Zbarsky v Lukashuk (1991) 8 BCAC 151 222

European Court of Human Rights

Khatun and 180 others v UK (1998) 26 EHRR CD 212 . . . . . 321, 331

France

Litzinger v Kintzler, Cass civ 2e, 5 June 1957, D 1957 Jur 493 338

Germany

BGHZ, 11 May 1971 348
BGHZ 25, 1st October 1957 271 341
BGHZ 124, 9 November 1993 (Sixth Civil Senate) 351

Netherlands

B v Bayer Nederland BV, Hoge Raad, 9 October 1992, NJ 1994, 535 339

Norway

RG 1969, 285 339

South Africa

Silva's Fishing Corp Ltd v Maweza 1957 (2) SA 256 ..... 254, 269

United Kingdom

A v B Plc [2001] 1 WLR 2341; [2002] EWCA Civ 337, [2003] QB 195 ..... 352, 358
A v National Blood Authority [2001] 3 All ER 289 ..... 343, 356, 358
A–G v Doughty (1752) 2 Ven Sen 453, 28 ER 290 239
A–G v Nissan [1970] AC 179 ..... 64–65, 67
AG v Gaslight & Coke Co (1877) 7 Ch D 217 21
Alcock v Chief Constable of South Yorkshire [1991] 2 WLR 814; [1992] 1 AC 310 ..... vi, 227, 273–74, 283–85, 287–96, 298–308
Aldridge v Great Western Railway Co (1841) 3 Man & G 514, 133 ER 1246 .. 24
Aliakmon (The). See *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd*
Alker v Collingwood Housing Association [2007] EWCA Civ 343, [2007] 1 WLR 2230 165
Allen v Gulf Oil Refining Ltd [1980] QB 156; [1981] AC 1001 ..... 31, 233, 322
Allied Marine Transport v Vale do Rio Doce Navegacao SA (The Leonidas D) [1985] 1 WLR 925 193

Ancona v Marks (1862) 7 H & N 686, 158 ER 645 62
Anns v Merton London Borough [1978] 1 AC 728 . 159, 161, 227, 230, 235, 259, 264, 288, 303, 306
Anon (1535) YB 27 Hen 8 3
Anon (1575) 110 Seld Soc 457 72
Anon (1586) Godb 109, 78 ER 67 63
Appleby v London & North Western Railway Co, The Times, 22 August 1861 107
Arnot v Biscoe (1743) 1 Ves Sen 95, 27 ER 914 63
Attia v British Gas [1988] 1 QB 304 . . . . . 283–84, 305
Balfe v West (1853) 13 CB 466, 138 ER 1281 193–94
Ball v London County Council [1949] 2 KB 159 158
Bamford v Turnley (1860) 3 B & S 62, 122 ER 27 (Exch Ch); (1862) 7 H & N 160, 158 ER 433 . . . . . 28, 313
Barker v Braham (1773) 3 Wils KB 268, 95 ER 1104 63
Barker v Corus UK plc [2006] UKHL 20, [2006] 2 AC 572 . . . . . 338, 341
Barrett v Ministry of Defence [1995] 1 WLR 1217 171
Bartonshill Coal Co v Reid (1858) 3 Macq 266 135
Bates v Batey & Co Ltd [1913] 3 KB 351 (KB) 93
Batty v Metropolitan Property Realisations Ltd [1978] QB 554 161–62
Baxter v London Borough of Camden [2001] QB 1 158
Beattie v Lord Ebury (1874) LR 7 HL 102 85
Becquet v MacCarthy (1831) 2 B & Ad 951, 109 ER 1396 342
Bell v Harrison (unreported, 1835) 24
Bennett v Bayes (1860) 5 H & N 391, 157 ER 1233 63
Bici v Ministry of Defence [2004] EWHC 786 68
Berkeley v Secretary of State for the Environment and another [2001] 2 AC 603 329
Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH [2008] EWCA Civ 1257, [2009] Bus LR 696 124
Billings (AC) & Sons v Riden [1958] AC 240 158
Bird v Brown (1850) 19 LJ (NS) Ex 154, 4 Ex 786, 154 ER 1433, 14 Jur 132 . . . . . 62, 64
Blacker v Lake and Elliot (1912) 106 LT 533 92–93
Bloxam v Metropolitan Railway Co (1868) LR 3 Ch App 337 100
Blyth v Birmingham Waterworks (1856) 11 Ex 781, 156 ER 1047 254
Boardman v Sanderson [1964] 1 WLR 1317 278
Boldack v East Lindsey DCC (1999) 31 HLR 41 159–60
Bolton v Stone [1951] AC 850 262
Bolton Partners v Lambert (1889) 41 Ch D 295 62
Booth v Ratté (1890) 15 App Cas 188 232
Bottomley v Bannister [1932] 1 KB 458 157

Bottomley v Todmorden Cricket Club [2003] EWCA 1575, [2004] PIQR 18 . . 124
Bourhill v Young [1943] AC 92 . . . . . 255, 258–59, 276–78, 304, 306
Bower v Peate [1876] 1 QBD 321 119–21
Bradford (Mayor of) v Pickles [1895] AC 587 . . . . . 236–37, 239
Brashford v Buckingham (1608) Cro Jac 77, 79 ER 65 72
Brass v Maitland (1856) 6 El & l 470, 119 ER 940 90
Brice v Brown [1984] 1 All ER 997 284
Bridges v North London Railway Co 138
Brown v Boorman (1844) 11 Cl & Fin 1, 8 ER 1003, affirming (1842) 3 QB 525, 114 ER 603 . . . . . 71, 76
Buchanan v Alexandra Golf Club 1916 1 SLT 353 253
Buchanan v Glasgow Corporation 1919 SC 515 253
Buckley v Collier (1692) 1 Salk 114, 91 ER 105 72
Bukton v Townsend (1348) YB 22 Lib Ass p 41 188–89
Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate [1965] AC 75 66
Burnett v Grampian Fire & Rescue Services 2007 SLT 61 . . . . . 252, 268
Burón v Denman (1847) 9 LT (OS) 104; (1848) 2 Ex 167, 154 ER 450, 6 St Tr NS 525 . . . . . v, 33–34, 43, 58, 60–63, 65, 67–68
Burrowes v Lock (1805) 10 Ves 470, 32 ER 927 . . . . . 79, 179
Burton v Islington Health Authority [1993] QB 204 240
Butler v Hunter (1862) 7 H & N 826, 158 ER 702 109
Butte Gas & Oil Co v Hammer (No 3) [1982] AC 888 65
Butts v Penny (1793) 2 Lev 201, 83 ER 518 33
C v S [1988] 1 QB 135 240
Campbell v MGN Ltd [2002] EWCA Civ 1373, [2003] QB 633 . . . . . 343–44, 352, 358
Candler v Crane, Christmas & Co [1951] 2 KB 164 . . . . . 175, 177, 182–84, 186
Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd (The Mineral Transporter) [1986] AC 1 . . . . . 244, 289
Cann v Willson (1888) 39 Ch D 39 . . . . . 85–86, 179–80
Caparo Industries plc v Dickman [1990] 2 AC 605 . 159, 166–69, 172, 235, 268–70, 288–89, 297
Card v Case (1848) 5 CB 622, 136 ER 1022 342
Carlin v Helical Bar Ltd (1970) 9 KIR 154 279
Carr-Glynn v Frearsons [1997] PNLR 343 . . . . . 353, 358
Carty v Croydon LBC [2005] EWCA Civ 19, [2005] 1 WLR 2312 . . . . . 344, 352, 358
Cattle v Stockton Waterworks Co (1875) LR 10 QB 453 244
Cavalier v Pope [1905] 2 KB 757; [1906] AC 428 . . . . . 92, 153, 155–67, 169
Chadwick v British Transport Commission [1967] 1 WLR 912 . . . . . 279, 285, 299
Chagos Islanders v AG [2004] EWCA Civ 997, *The Times*, 21 September 2004 . . . . . 351, 358
Chamberlain v Harvey (1792) 1 Ld Raym 146; 91 ER 994 33
Chandelor v Lopus (1607) Cro Jac 4, 79 ER 3 189
Chasemore v Richards (1859) 7 HL Cas 349 237

Chastey v Ackland [1895] 2 Ch 389 239
Clarke v Army & Navy Co-operative Society [1903] 1 KB 155 91–92
Clarke v Holmes (1862) 7 H & N 937, 158 ER 751 . . . . . 135–36, 143, 147
Cobb v Great Western Railway Co [1894] AC 419 253
Coggs v Barnard (1703) 2 Ld Raym 909, 92 ER 107 (sub nom *Coggs v Bernard*) 71, 81, 190, 192, 195–96
Collett v London & North Western Railway (1851) 16 QB 984, 117 ER 158 81
Colour Quest Ltd v Total Downstream UK plc [2009] EWHC 540 (Comm) . . 224
Comber v Anderson (1808) 1 Camp 523, 170 ER 1044 193
Commercial & Estates Company of Egypt v Board of Trade [1925] 1 KB 271 . . 66
Consolidated Co v Curtis & Son [1892] 1 QB 495 63
Cook v Sprigg [1899] AC 572 65
Cornfoot v Fowke (1840) 6 M & W 358, 151 ER 450 79
Corporation of Glasgow v Muir [1943] AC 448 125
Crow v Rogers (1724) 1 Stra 592, 93 ER 719 72
Cunnington v Great Northern Railway (1883) 49 LT 392 87
Customs & Excise Commissioners v Barclays Bank plc [2004] EWHC 122 (Comm), [2004] 1 WLR 2027; [2004] EWCA Civ 1555, [2005] 1 WLR 2082; [2006] UHKL 28, [2007] 1 AC 181 172
D v East Berkshire Community Health NHS Trust [2005] UKHL 23, [2005] 2 AC 373 . . . . . 343, 349–50, 354, 356–57
D v Home Office [2005] EWCA Civ 38, [2006] 1 WLR 1003 67
Dalton v Angus & Co (1881) 6 App Cas 740 . . . . . 120–21, 239
Daniel v Metropolitan Railway Co (1868) LR 3 CP 216, 591; (1871) LR 5 HL 45 . . . . . 112–15, 117–18, 121–24
Dartnall v Howard (1825) 4 B & C 345, 107 ER 1088 192
Davey v Harrow Corporation [1958] 1 QB 60 213
Davis v Foots [1940] 1 KB 116 . . . . . 158, 194
De Lassalle v Guildford [1901] 2 KB 215 189
Degan v Dundee Corporation 1940 SC 457 253
Delany v Stoddart (1785) 1 TR 22, 99 ER 950 193
Dennis v Ministry of Defence [2003] EWHC 793, [2003] 2 EGLR 121 . . . . . 313, 332
Derbishire v Home (1853) 5 De G M & G 80, 43 ER 32 34
Derry v Peek (1889) 14 App Cas 337 . . . . . 86, 177–81, 184, 190
See also *Peek v Derry*
Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners [2006] UKHL 49, [2007] 1 AC 558 266
Deyong v Shenburn [1946] KB 227 243
Dingle v Associated Newspapers Ltd [1964] AC 371 185
Divall v Harrison [1992] 2 EGLR 64 64
Dixon v Bell (1816) 5 M & S 198, 105 ER 1023 90

Dixon v Farrer (1886) 18 QBD 43 60
Doe d Lyster v Goldwin (1841) 2 QB 143, 114 ER 57 64
Doe d Mann v Walters (1830) 10 B & C 626, 109 ER 583 64
Doe d Rhodes v Robinson (1837) 3 Bing NC 677, 132 ER 571 64
Donoghue v Stevenson [1932] AC 562.. 69, 84, 89, 93, 121, 153, 158–59, 161, 164, 167, 169, 175–76, 184–86, 197, 242, 251–53, 255, 258–59
Dooley v Cammell Laird & Co Ltd [1951] 1 Lloyd's Rep 271 277, 279, 285, 296–97, 299, 305
Dorset Yacht Co Ltd v Home Office. See *Home Office v Dorset Yacht*
Douglas v Hello! Ltd (No 1) [2001] QB 967 ..... 346, 358
Douglas v Hello! Ltd (No 6) [2005] EWCA Civ 595, [2006] QB 125, rev'd sub nom *OBG Ltd v Allen* [2007] UKHL 21, [2008] 1 AC 1.. 343, 352, 358
Duff v Highland & Islands Fire Board 1995 SLT 1362 252
Dulieu v White [1901] 2 KB 669 ..... 275–76, 299
Dunlop v Lambert (1839) 6 Cl & F 600, 7 ER 824 74
Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 248
Dynen v Leach (1857) 26 LJ Ex 221 ..... 132, 134–35
Eaglesfield v Marquis of Londonderry (1876) 4 Ch D 693 63
Earl v Lubbock [1905] 1 KB 253 92
East Suffolk Rivers Catchment Board v Kent [1941] AC 74 223
Eastern Counties Railway Co v Broom (1851) 6 Ex 314, 155 ER 562 62
Edwards v Railway Executive [1952] AC 737 210
Ellis v Sheffield Gas Consumers Co (1852) 2 E & B 767, 118 ER 955 109
Elsee v Gatward (1793) 5 TR 143, 101 ER 82 ..... 192, 194
Emmerton v Mathews (1862) 7 H & N 586, 158 ER 604, 31 LJ Ex 139 78
Entick v Carrington (1765) 19 St Tr 1030 64
Evans v Glasgow DC 1978 SLT 17 262–63
Fairchild v Glenhaven Funeral Services Ltd and Others [2001] All ER (D) 12; [2001] EWCA Civ 1881, [2002] 1 WLR 1052; [2002] UKHL 22, [2003] 1 AC 32 ..... vi, 335–37, 341–47, 349, 354, 356–57
Farrant v Barnes (1862) 11 CBNS 553, 142 ER 912 90
Fearns v Scottish Homes 2007 SCLR 632 266
Feather v R (1865) 6 B & S 257, 122 ER 1191 ..... 64, 66
Fishmongers' Co v East India Co (1752) 1 Dick 163, 21 ER 232 239
Fitzgerald v Lane [1987] QB 781 339
Fleet v Perrins (1869) LR 4 QB 500 72
Fletcher v Rylands (1866) LR 1 Ex 265 ..... 26, 207
Fomin v Oswell (1813) 3 Camp 357, 170 ER 1410 193
Forbes v Cochrane (1824) 2 B & C 448, 107 ER 450 33
Foster v Bates (1843) 12 M & W 226, 152 ER 1180 62
Fountain v Smith (1659) 2 Sid 128, 82 ER 1293 72
Francis v Cockrell (1870) LR 5 QB 184, 501 ..... 85, 110
Fraser v Caledonian Railway Co (1902) 5 F 41 253
Freeman v Rosher (1849) 13 QB 780, 116 ER 1462 62
Frost v Chief Constable of South Yorkshire Police [1997] 1 All ER 540 277

Fry's Metals v Durastic 1991 SLT 689 266
Fuller v Wilson (1842) 3 QB 58, 114 ER 429 79
Gelly v Cleve (1694) 1 Ld Raym 147n 33
General Accident Fire & Life Assurance Corporation v Tanter (The Zephyr) [1984] 1 Lloyd's Rep 58; [1985] 2 Lloyd's Rep 529 . . . . . 188, 191, 194
George v Skivington (1869) LR 5 Exch 1, [1869] WN 231, 21 LT 495, 39 LJ Ex 8, 18 WR 118; *The Times*, 16 November 1869; 1870 SJ 314 . . . . . vi, 69, 71–73, 76–80, 82–94
Giles v Walker (1890) 24 QBD 656 . . . . . 211–13, 224
Gillingham v Medway Docks [1993] QB 343 321
Gladwell v Steggall (1839) 5 Bing NC 733, 132 ER 1283, 8 Sc 60 81
Gomer v Pitt & Scott (1922) 10 Ll L Rep 668, (1922) 12 Ll L Rep 115 . . 191, 194
Graham (Thomas) & Co Ltd v Church of Scotland General Trs 1982 SLT (Sh Ct) 26 . . . . . 262, 264
Gray v Pullen (1864) 5 B & S 970, 122 ER 1091 109
Great Western Railway Co v Blake (1862) 7 H & N 987, 158 ER 773 . . . . . 110–11, 115
Greatorex v Greatorex [2000] 1 WLR 1970 . . . . . 348, 358
Green v Elgie (1843) 5 QB 99, 114 ER 1186 63
Greene v Chelsea Borough Council [1954] 3 WLR 127, [1954] 2 QB 127 . . . . . 153, 158–59, 161
Gregson v Gilbert (The Zong) (1783) 3 Doug 232, 99 ER 629 33
Hale v London Underground Ltd [1993] PIQR Q30 291
Hall (Arthur JS) & Co v Simons [2002] 1 AC 615 . . 343–44, 349, 353–54, 356–57
Hambrook v Stokes Bros [1925] 1 KB 141 . . . . . 275–78, 281, 305
Hannah Blumenthal (The). See *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal*
Hardaker v Idle District Council [1896] 1 QB 335 120
Harrisons & Crossfield Ltd v London & North Western Railway Co [1917] 2 KB 755 62
Haseldine v Daw [1941] 2 KB 343 122
Haseler v Lemoyne (1858) 5 CB (NS) 530, 141 ER 214 62
Heaven v Pender (1882) 9 QBD 302; (1883) 11 QBD 503 84–85, 87–89, 91–92, 121, 179
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1962] 1 QB 396; [1964] AC 465 . . vi, 159, 171–74, 176, 178, 180–89, 191, 195–97, 227, 246–47
Hegarty v EE Caledonia Ltd [1997] 2 Lloyd's Rep 259 291
Heilbut Symons & Co v Buckleton [1913] AC 30 189
Henderson v Merrett Syndicates Ltd (No 1) [1995] 2 AC 145 . . 171, 343, 350, 357
Herrington v British Railways Board [1972] AC 877 222
Hevican v Ruane [1991] 3 All ER 65 . . . . . 289, 297, 301
Hicks v Chief Constable of South Yorkshire Police [1992] 2 All ER 65 273
Higgins v Samels (1862) 2 J & H 460, 70 ER 1139 79
Hilbery v Hatton (1864) 2 H & C 822, 159 ER 341 62
Hill v Chief Constable of West Yorkshire [1989] AC 53 67

Hinz v Berry [1970] 2 QB 40 . . . . . 228, 279
Holbeck Hall Hotel Ltd v Scarborough Borough Council [2000] QB 836 222
Hole v Sittingbourne & Sheerness Railway Co (1861) 6 H & N 488, 158 ER 201 109
Holliday v National Telephone Co [1899] 2 QB 392. 121–22
Hollins v Fowler (1872) LR 7 HL 757 63
Home Office v Dorset Yacht Co Ltd [1970] AC 1004 . 159, 168, 225, 242, 253, 255, 258–61, 271
Honeywill & Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd [1934] 1 KB 191 123–25
Hughes v Percival (1883) 8 App Cas 443 120
Hull v Pickersgill (1819) 1 Brod 7 B 282, 129 ER 731 63
Hunter v British Coal Corp [1999] QB 140 306
Hunter and others v Canary Wharf Ltd; Hunter and Others v London Docklands Development Corporation [1997] AC 655 . . . . . v, 236, 238–40, 311–12, 318, 320–21, 323, 325–27, 331–33, 343–44, 346, 348, 353, 357
Hutchinson v York, Newcastle & Berwick Railway Co (1850) 5 Exch 343, 155 ER 150 . . . . . 132, 134, 136
Hutton v Secretary of State for War (1926) 43 TLR 106. 64
Ilkiw v Samuels [1963] 1 WLR 991 63
Illidge v Goodwin (1831) 5 C & P 190, 172, ER 934. 90
Indermauer v Dames (1866) LR 2 CP 311 . . . . . 122, 142–43
Inman v Reck (1867–69) LR 2 PC 25 253
Jackson v JH Property Investment Ltd [2008] EWHC 14, [2008] Env LR 30 158
Job Edwards Ltd v The Company of Proprietors of the Birmingham Navigations [1924] 1 KB 341 . . . . . 208, 211, 218
Johnstone v Pedlar [1921] 2 AC 262. 64
Jones v Festiniog Railway Co (1867–68) LR 3 QB 733 . . . . . 26–28, 30–31
Jones v Phipps (1868) LR 3 QB 567 64
Jones v Powell (1627) Palm 536, 81 ER 1208 4
Jones v Wright [1991] 3 All ER 88 . . . . . 283, 290, 296–97
Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520 . . . . . 161, 265
Kaye v Robertson [1991] FSR 62 . . . . . 343, 346, 358
Keighley Maxsted & Co v Durant [1901] AC 240, reversing [1900] 1 QB 629 . . . . . 62, 64
Kennedy v Glenbelle 1996 SC 95 270
Kent v Griffiths (No 2) [1999] PIQR P192 . . . . . 344, 352, 358
Khorasandjian v Bush [1993] QB 727. 320
King v David Allen & Sons, Billposting, Ltd [1916] 2 AC 54 232
King v Phillips [1953] 1 QB 429 . . . . . 277–78, 280, 305
Lamb v Camden LBC [1981] QB 625 . . . . . 258, 263
Lamb v Vice (1840) 6 M & W 467, 151 ER 495 74
Lane v Cox [1897] 1 QB 415 155

Langridge v Levy (1837) 2 M & W 519, 150 ER 863; (1838) M & W 337, 150 ER 1458 ..... 77–80, 82–84, 86–90, 156
Lanphier v Phipos (1838) 8 C & P 475, 173 ER 581 81–82
Le Lievre v Gould [1893] 1 QB 491 ..... 178–79, 184
Le Louis (1817) 2 Dods 210, 165 ER 1464..... 42, 54–55, 59
Leakey v National Trust [1980] QB 485..... 222
Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon) [1986] AC 785 ..... 227, 244–47, 289
Leonidas D (The). See *Allied Marine Transport v Vale do Rio Doce Navegacao SA*
Lewis v Daily Telegraph Ltd [1964] AC 234..... 185
Lewis v Read (1845) 13 M & W 834, 153 ER 350 62
Lister v Hesley Hall Ltd [2002] 1 AC 215 63
Longmead v Holliday (1851) 6 Ex 762, 155 ER 752..... 78–80, 82, 88, 90
Lord Bellamont's Case (1795) 2 Salk 625, 91 ER 529 60
Low v Bouverie [1891] 3 Ch 82 178–79
Lumley v Gye.. (1853) 2 El & Bl 216, 118 ER 749; (1854) 3 El & Bl 114, 118 ER 1083 248
Lynch v Nurdin (1841) 1 QB 29, 113 ER 1041 90
M v Home Office [1994] AC 377..... 64
M'Dowall v Great Western Railway Co [1903] 2 KB 331..... 253
McFarlane v EE Caledonia Ltd [1994] 2 All ER 1 ..... 291, 300, 308
McFarlane v Taylor (1865) LR 1 HL (Sc) 245..... 78
McFarlane v Tayside Health Board [2000] 2 AC 59.... 343, 345–48, 354, 356–57
McGhee v National Coal Board [1973] 1 WLR 1..... 336, 338, 340
McGiffin v Palmer's Shipbuilding & Iron Co Ltd (1883) LR 10 QBD 5 165
McLoughlin v O'Brian [1981] QB 599; [1983] AC 410.... 274, 277–81, 283–85, 287–90, 293, 295–98, 301, 303–6
Madrazo v Willes (1830) 3 B & Ald 363, 106 ER 692 ..... 33, 42, 54, 58
Maloco v Littlewoods 1987 SC 37; [1987] AC 241 (*see* also *Smith v Littlewoods*) 252
Malone v Laskey [1907] 2 KB 141 158
Manchester Corporation v Farnworth [1930] AC 171..... 31
Mangan v Atterton (1866) LR 1 Ex 239..... 90
Manton v Brocklebank [1923] 2 KB 212 ..... 342, 352, 358
Marcic v Thames Water Utilities [2002] QB 929; [2004] 2 AC 42 331–32
Margate Pier and Harbour (Proprietors of) v Town Council of Margate (1869) 20 LT (NS) 564..... 221
Marshall v Caledonian Railway Co (1899) 1 F 1060..... 253
Marshall v York, Newcastle & Berwick Railway (1851) 11 CB 655, 138 ER 632 81
Matthews v Ministry of Defence [2003] UKHL 4, [2003] 1 AC 1163..... 67
Mellors v Shaw (1861) 1 B & S 437, 121 ER 778..... 135
Merrett v Babb [2001] QB 1174..... 172
Mill v Hawker (1875) LR 10 Ex 9 263

Miller v Jackson [1977] 1 QB 966 228
Mineral Transporter (The). See *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd*
Mitchell v Glasgow City Council [2009] UKHL 11, [2009] 2 WLR 481, 2009 SLT 247 ..... 168–69, 242–43, 253–54, 267–71
Moens v Heyworth (1842) 10 M & W 147, 152 ER 418 79
Moon v Towers (1860) 8 CB (NS) 611, 141 ER 1306 62
Muir v Glasgow Corporation 1943 SC 3 ..... 255, 260
Mulcahy v Ministry of Defence [1996] QB 732 67
Murphy v Brentwood DC [1991] 1 AC 398 ..... 166–67, 227, 244, 246, 306
Musgrave v Pulido (1879) 5 App Cas 102 64
Nabob of the Carnatic v East India Company (1793) 2 Ves Jun 56, 30 ER 521 . 65
Nelson v Liverpool Brewery Co (1877) 2 CPD 311 ..... 154, 157
Netz v Ede [1946] Ch 224 64
Nocton v Lord Ashburton [1914] AC 932 ..... 174, 179–80
O'Brien v Robinson [1973] AC 912 162
O'Rourke v Camden London Borough Council [1998] AC 188 167
OBG Ltd v Allen. See *Douglas v Hello! Ltd (No 6)*
Ormrod v Huth (1845) 14 M & W 651, 153 ER 636 79
Oscar Chess Ltd v Williams [1957] 1 WLR 370 189
Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2)) [1967] 1 AC 617 262–63
Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) [1961] AC 388 254
Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 AC 854 193
Page v Smith [1996] AC 155 273
Pasley v Freeman (1789) 3 TR 51, 100 ER 450 78
Paterson v Wallace & Co (1854) 1 Macq 748 134
Paton v British Pregnancy Advisory Services [1979] 1 QB 276 240
Payne v Rogers (1794) 2 H Bl 350, 126 ER 589 154
Pearson v British Midland Airways [1998] CLY 1530 291
Peek v Derry (1887) 37 Ch D 541 178–79
Penny v Wimbledon UDC [1898] 2 QB 212, [1899] 2 QB 72 121
Percy v Great Eastern Railway, The Times, 8 July 1865 108
Perkins v Smith (1752) 1 Wils KB 328, 95 ER 644 63
Perl (P) (Exporters) Ltd v Camden LBC [1984] QB 342 ..... 255–56, 258, 263
Phelps v Hillingdon London Borough Council [2001] 2 AC 619 171
Philliskirk v Pluckwell (1814) 2 M & S 393, 105 ER 427 71
Pickard v Smith (1861) 10 CB NS 470, 142 ER 535 ..... 109, 120–21
Piggot v Eastern Counties Railway Co (1846) 3 CB 228, 136 ER 92 24–25
Piggott v London Underground, Financial Times, 19 December 1990 291
Pippin v Sheppard (1822) 11 Price 400, 147, ER 512 81
Pitt v Yalden (1767) 4 Burr 2060, 98 ER 74 192
Playtex (UK) Ltd v Kelman (unreported, 12 February 1985) 260–61

Plean Precast Ltd v National Coal Board 1985 SC 77 270
Poland v John Parr & Sons [1927] 1 KB 236. 63
Post Office v Aquarius Properties Ltd [1987] 1 All ER 1055 165
Priestley v Fowler (1837) 3 M & W 1, 150 ER 1030 . . . . . 132, 134, 140
Pulsford v Richards (1853) 17 Beav 87, 51 ER 965 79
Quarman v Burnett (1840) 6 M & W 499, 151 ER 509. 109
Quick v Taff Ely BC [1986] QB 809. 165
R v Bailey (1867) 16 LT 859. 131
R v Bottrill, ex parte Kuechenmeister [1947] 1 KB 41. 64
R v Carr (1832) 6 C & P 163, 173 ER 443. 90
R v Crabbe (John), The Ipswich Journal, 25 March 1848 107
R v Jones (Margaret) [2006] UKHL 16, [2007] 1 AC 136. 65
R v Kenyon (James), The Times, 25 February 1856. 106
R v Pease (1832) 4 B & Ad 30, 110 ER 366. . . . . 2, 4–5, 19, 21–24, 26–27, 29–30
R v Russell (1827) 6 B & C 566, 108 ER 560. . . . . 4, 20, 30
R v Serva (1846) 2 Car & K 53, 175 ER 22 54
R (Al Jedda) v Secretary of State for Defence [2007] UKHL 58, [2008] 1 AC 153 65
R (Al Skeini) v Secretary of State for Defence [2007] UKHL 2, [2008] 1 AC 153 68
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61, [2009] 1 AC 453 68
R (Greenpeace) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin) 330
Raleigh v Goschen [1898] 1 Ch 73 64
Ralli Bros v Walford Lines Ltd (1922) 10 Ll L Rep 451, (1922) 13 Ll L Rep 223 . . . . . 191, 194–95
Ramson v Birkenhead, Lancashire & Cheshire Railway Co, The Times, 7 November 1859 107
Ravenscroft v Rederiaktiebølaget Transatlantic [1991] 3 All ER 73 . . 290, 297, 301, 305
Rawlins v Wickham (1858) 3 De G & J 304, 44 ER 1285 79
Rayner (JH) (Mincing Lane) Ltd v DTI [1990] 2 AC 418. 65
Readhead v Midland Railway Co (1869) LR 4 QB 379. . . . . 110, 115
Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52, [2004] 1 AC 309. . . . . 343, 346–47, 354, 356–57
Reese River Silver Mining Co Ltd v Smith (1869) LR 4 HL 64. 79
RHM Bakeries v Strathclyde Regional Council 1985 SLT 3, rev'd 1985 SC 17 . . . . . 252, 270
Richardson v Great Eastern Railway Co (1875) LR 10 CP 486, (1876) 1 CPD 342 119
Ridgway v Wharton (1857) 6 HLC 238, 10 ER 1287. 62
Right v Cuthell (1804) 5 East 491, 102 ER 1158 64
Rimmer v Liverpool City Council [1958] QB 1. . . . . 157, 159–61, 165
Robbins v Jones (1863) 15 CB (NS) 221, 143 ER 768 155