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CASES JUDICIALLY CONSIDERED

	PAGE
A/B Helsingfors Steamship Company Ltd. v. Rederiaktiebolaget Rex (The <i>White Rose</i>) — <i>Explained</i> .	[1969] 2 Lloyd's Rep. 52; [1969] 1 W.L.R. 1098 ... 200
Albert v. Motor Insurers' Bureau — <i>Followed</i> .	[1971] 2 Lloyd's Rep. 229 ... 251
Alderslade v. Hendon Laundry Ltd. — <i>Distinguished</i> .	[1945] K.B. 189 ... 521
Anneliese, The — <i>Approved</i>	[1970] 1 Lloyd's Rep. 355 ... 290
Assunzione, The — <i>Applied</i>	[1954] P. 150; [1953] 2 Lloyd's Rep. 716 ... 390
Beaulieu v. Finglam — <i>Applied</i>	(1401) 2 Hen. 4, 18, pl. 6 ... 36
Canada Rice Mills Ltd. v. Union Marine and General Insurance Company Ltd. — <i>Applied</i> .	[1941] A.C. 55; (1940) 67 Ll.L.Rep. 549 ... 1
Canada Steamship Lines Ltd. v. The King — <i>Applied</i> .	[1952] A.C. 192; [1952] 1 Lloyd's Rep. 1 ... 521
Carlill v. Carbolic Smoke Ball Company — <i>Applied</i> .	[1892] 2 Q.B. 484; (C.A.) [1893] 1 Q.B. 256 ... 399
Compania Naviera Maropan S/A v. Bowaters Lloyd Pulp and Paper Mills Ltd. — <i>Applied</i> .	[1955] 2 Q.B. 68; [1955] 1 Lloyd's Rep. 349 ... 200
Connell v. Motor Insurers' Bureau — <i>Doubted</i> .	[1969] 2 Q.B. 474; [1969] 2 Lloyd's Rep. 1 ... 229
Coward v. Motor Insurers' Bureau — <i>Disapproved</i> .	[1963] 1 Q.B. 259; [1962] 1 Lloyd's Rep. 1 ... 229
Darbishire v. Warran — <i>Distinguished</i> ...	[1963] 2 Lloyd's Rep. 187 ... 359
Davies v. Swan Motor Company (Swansea) Ltd. — <i>Distinguished</i> .	[1949] 2 K.B. 291 ... 354
Dawson v. Euxine Shipping Company Ltd. — <i>Considered</i> .	[1953] 1 Lloyd's Rep. 1; [1953] 1 All E.R. 299 ... 269
Drinkwater v. Joseph Lucas (Electrical) Ltd. — <i>Considered</i> .	[1970] 3 All E.R. 769 ... 151
Duncan v. Köster (The <i>Teutonia</i>) — <i>Applied</i> .	(1872) L.R. 4 P.C. 171 ... 200
Goulandris Brothers Ltd. v. B. Goldman & Sons Ltd. — <i>Considered</i> .	[1958] 1 Q.B. 74; [1957] 2 Lloyd's Rep. 207 ... 494
Grover v. Matthews — <i>Considered</i>	(1910) 15 Com. Cas. 249 ... 171
Gurtner v. Circuit and Another — <i>Distinguished</i> .	[1968] 2 Q.B. 587; [1968] 1 Lloyd's Rep. 171 ... 256

CASES JUDICIALLY CONSIDERED—*continued*

PAGE

Halcyon Steamship Company Ltd. v. Continental Grain Company — <i>Applied</i> .	(1943) 75 Ll.L.Rep. 80	...	...	42
Hanson v. Marco Engineering (Australia) Pty. Ltd. — <i>Considered</i> .	[1948] V.L.R. 198	...	...	332
Hardwick Game Farm v. S.A.P.P.A. — <i>Applied</i> .	[1969] 2 A.C. 31; [1968] 1 Lloyd's Rep. 547	...	...	521
Harris (Harella) Ltd. v. Continental Express Ltd. and Burn Transit Ltd. — <i>Not followed</i> .	[1961] 1 Lloyd's Rep. 251	...	...	521
Haseldine v. Hosken — <i>Distinguished</i> .	[1933] 1 K.B. 822	...	...	1
Hilder v. Associated Portland Cement Manufacturers Ltd. — <i>Distinguished</i> .	[1961] 1 W.L.R. 1434	...	...	354
Inland Revenue v. Cadwalader — <i>Applied</i> .	(1904) 7 F. (Sess. Cas.) 146	...	...	196
Jahn (Trading as C. F. Otto Weber) v. Turnbull Scott Shipping Company Ltd. and Nigerian National Line Ltd. (The <i>Flowergate</i>) — <i>Distinguished</i> .	[1967] 1 Lloyd's Rep. 1	...	...	207
James v. British General Insurance Company Ltd. — <i>Distinguished</i> .	[1927] 2 K.B. 311; (1927) 27 Ll.L.Rep. 328	...	...	1
James v. Livox Quarries Ltd. — <i>Applied</i> .	[1952] 2 Q.B. 608	...	...	354
Jefford and Another v. Gee — <i>Applied</i> .	[1970] 1 Lloyd's Rep. 107	...	...	49
Jefford and Jefford v. Gee — <i>Considered and applied</i> .	[1970] 2 Q.B. 130; [1970] 1 Lloyd's Rep. 107	...	...	375
Leonis Steamship Company Ltd. v. Rank Ltd. — <i>Considered</i> .	[1908] 1 K.B. 499	...	...	96
Leyland Shipping Company Ltd. v. Norwich Union Fire Insurance Society Ltd. — <i>Applied</i> .	[1918] A.C. 350	...	...	1
Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd. — <i>Applied</i> .	[1967] 2 Q.B. 86; [1967] 1 Lloyd's Rep. 302	...	...	494
Marles v. Philip Trant & Sons Ltd. Mackinnon, Third Party — <i>Distinguished</i> .	[1954] 1 Q.B. 29	...	...	1
Martin v. Turner — <i>Followed</i> .	[1969] 2 Lloyd's Rep. 551	...	...	367
Milburn & Co. v. Jamaica Fruit Importing and Trading Company of London — <i>Considered</i> .	[1900] 2 Q.B. 540	...	...	494
Nebel Towing Co. Inc. v. Olympic Towing Corp. — <i>Distinguished</i> .	(1970) 397 U.S. 989; [1971] A.M.C. 815	...	...	426
Newton v. Cammell Laird & Co. (Shipbuilders and Engineers) Ltd. — <i>Considered</i> .	[1969] 1 W.L.R. 415	...	...	151
Orduna, The — <i>Applied</i> .	[1921] A.C. 250; (1920) 5 Ll.L.Rep. 241	...	...	277
Panchaud Freres S.A. v. Etablissements General Grain Company — <i>Considered</i> .	[1970] 1 Lloyd's Rep. 53	...	...	494
Pickles, <i>In re</i> . v. National Coal Board — <i>Considered</i> .	[1968] 1 W.L.R. 997	...	...	151

CASES JUDICIALLY CONSIDERED—*continued*

PAGE

Reardon Smith Line Ltd. v. Australian Wheat Board — <i>Applied</i> .	[1954] 2 Lloyd's Rep. 148	200
<i>Regina</i> v. Cashmore — <i>Applied</i>	Unreported, July 28, 1959	1
<i>Rex</i> v. Larkin — <i>Applied</i>	(1943) 28 Cr. App. R. 58	1
Rylands and Horrocks v. Fletcher — <i>Applied</i> .	(1868) L.R. 3 H.L. 330	36
Sea and Land Securities Ltd. v. William Dickinson & Co. Ltd. — <i>Applied</i> .	[1942] 2 K.B. 65	42
Sellers v. London Counties Newspaper — <i>Applied</i> .	[1951] 1 All E.R. 544	164
Scotson and Others v. Pegg — <i>Followed</i> ...	(1861) 6 H. & N. 295; 152 E.R. 12 ...	399
Scruttons Ltd. v. Midland Silicones Ltd. — <i>Considered and applied</i> .	[1962] A.C. 446; [1961] 2 Lloyd's Rep. 365	399
Skingsley v. Cape Asbestos Company Ltd. — <i>Considered</i> .	[1968] 2 Lloyd's Rep. 201	151
Sociedad Financiera de Raices S.A. v. Agrimpex Hungarian Trading Company for Agricultural Products et e contra (The <i>Aello</i>) — <i>Applied</i> .	[1961] A.C. 135; [1960] 1 Lloyd's Rep. 623	96
Tankexpress A/S v. Compagnie Financière Belge des Pétroles S.A. — <i>Considered</i> .	[1949] A.C. 76; (1948) 82 L.L.Rep. 43	42
Thompson v. Adams — <i>Considered</i>	(1889) 23 Q.B.D. 361	171
Tinline v. White Cross Insurance Association Ltd. — <i>Distinguished</i> .	[1921] 3 K.B. 327	1
Vandervell Trustees Ltd. v. White and Others — <i>Applied</i> .	[1970] 3 W.L.R. 452	256
Vanvalkenburg v. Northern Navigation Company — <i>Overruled</i> .	(1913) 30 O.L.R. 142	410
Videan v. British Transport Commission — <i>Applied</i> .	[1963] 2 Q.B. 650	410
Wheat v. E. Lacon & Co. Ltd. — <i>Applied</i> .	[1966] A.C. 552	36
Yorkshire Insurance Company Ltd. v. Crane — <i>Considered</i> .	[1922] 2 A.C. 541; (1922) 12 L.L.Rep. 399	332

STATUTES CONSIDERED

	PAGE
UNITED KINGDOM—	
ADMINISTRATION OF JUSTICE ACT, 1969	
Sect. 22	49, 322, 375
ARBITRATION ACT, 1950	
Sect. 21 (1) (a)	505
Sect. 27	494
BRITISH TRANSPORT DOCKS ACT, 1964	
Sect. 3 (1)	439
Sect. 28	439
CARRIAGE OF GOODS BY SEA ACT, 1924	399
CUSTOMS (IMPORT DEPOSITS) ACT, 1968	
Sect. 1	298
DOCKS AND HARBOURS ACT, 1966	
Sect. 1	20
Sect. 13 (1)	144
DOCK WORKERS (REGULATION OF EMPLOYMENT) ACT, 1946	
Sect. 6	20
LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945	
Sect. 1 (1)	354
LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934	
Sect. 3 (1)	49, 322, 375
LEE NAVIGATION ACT, 1767	
Sect. 3	183
LIMITATION ACT, 1963	
Sect. 1 (3)	151
Sect. 7 (3), (4), 8	151
OCCUPIERS' LIABILITY ACT, 1957	179
PILOTAGE ACT, 1913	
Sect. 11	383
Sect. 30 (1), (3)	383
Sect. 32	383
ROAD SAFETY ACT, 1967	
Sect. 14	196
ROAD TRAFFIC ACT, 1960	
Sect. 74 (5)	354
TRANSPORT ACT, 1962	
Sect. 10	183
CANADA—	
ONTARIO FATAL ACCIDENTS ACT, 1960	410
SHIPPING ACT, R.S.C., 1952	410
WATER CARRIAGE OF GOODS ACT, R.S.C., 1952	
SCHEDULE—	
Art. III, r. 2	207
Art. IV, r. 2	207
UNITED STATES—	
CARRIAGE OF GOODS BY SEA ACT, 1936	
Sect. 3 (1) (2)	78
Sect. 4 (2) (c)	78
Sect. 4 (5)	476
LOUISIANA DIRECT ACTION STATUTE	426

CONTENTS

NOTE—These Reports should be cited as
“[1971] 2 Lloyd's Rep.”

	COURT	PAGE
Acme Shipping Corporation:—Nippon Yusen Kaisha v. ...	[Q.B. (Com. Ct.)]	42
Aktiebolaget Gotaverken v. Westminster Corporation of Monrovia and Another	[Q.B. (Com. Ct.)]	505
Albert v. Motor Insurers' Bureau	[H.L.]	229
Alcoa Steamship Company Inc. v. Charles Ferran & Co. Inc. and Glens Falls Insurance Company and Excess Underwriters	[U.S. Ct.]	426
<i>Alexandra I</i> , The	[Q.B. (Com. Ct.)]	469
Allsopp:—Paxton v.	[C.A.]	367
Alma Shipping Corporation v. Union of India and Another (The <i>Astraea</i>)	[Q.B. (Com. Ct.)]	494
<i>Almizar</i> , The	[H.L.]	290
Altco Ltd. v. Sutherland	[Q.B.]	515
American Hoesch Inc. and Riblet Products Inc. v. Steamship <i>Aubade</i> etc. and Maritime Commercial Corp. Inc. ...	[U.S. Ct.]	423
Arab:—National Shipping Corporation v.	[C.A.]	363
Arbuckle, Smith & Co. Ltd.:—Marston Excelsior Ltd. v. ...	[C.A.]	306
<i>Astraea</i> , The	[Q.B. (Com. Ct.)]	494
Attorney-General:—Bright v.	[C.A.]	68
<i>Aubade</i> and Maritime Commercial Corp. Inc.:—American Hoesch Inc. and Riblet Products Inc. v.	[U.S. Ct.]	423
<i>Aubade</i> , The	[U.S. Ct.]	423
Babbs v. Press	[Q.B. (Div. Ct.)]	383
Barr:—Gray and Another v.	[C.A.]	1
Ben Line Steamers Ltd.:—Watson v.	[Q.B.]	269
Bland & Co. Ltd. and Others:—National Dock Labour Board v.	[H.L.]	20
Boal Quay Wharfingers Ltd. v. King's Lynn Conservancy Board	[C.A.]	144

CONTENTS—*continued*

	COURT	PAGE
Boxes Ltd. v. British Waterways Board	[C.A.]	183
<i>Bremen</i> , The, and Others:—Zapata Off-Shore Company v.	[U.S. Ct.]	348
Bright v. Attorney-General	[C.A.]	68
British Road Services Ltd. and Seabourne Shipping Company Ltd. v. Wurzal	[Q.B. (Div. Ct.)]	196
British Steel Corporation v. National Dock Labour Board ...	[C.A.]	439
British Steel Corporation:—National Dock Labour Board v.	[C.A.]	439
British Waterways Board:—Boxes Ltd. v.	[C.A.]	183
Cabot Corporation <i>et al.</i> v. The <i>Mormacscan</i> , Moore- McCormack Lines Inc. and John W. McGrath Corporation	[U.S. Ct.]	351
Canadian General Electric Company Ltd. v. The <i>Lake Bosomtwe</i> and Pickford & Black Ltd. (The <i>Lake Bosomtwe</i> (No. 2))	[Canada Ct.]	343
Casco Terminals Ltd.:—Mansfield Importers and Distributors Ltd. v.	[Canada Ct.]	73
Central Asbestos Company Ltd. and Another:—Smith and Others v.	[C.A.]	151
Chadwick v. Parsons	[Q.B.]	49
.....	[C.A.]	322
<i>Chaparral</i> , The	[U.S. Ct.]	348
.....	[Q.B.]	
<i>Charalambos N. Pateras</i> , The	(Com. Ct.)	42
.....	[Q.B.]	
Coast Lines Ltd. v. Hudig and Veder Chartering N.V. ...	(Com. Ct.)	390
Commissioners of Customs and Excise:—Rockwell Machine Tool Co. Ltd. v.	[C.A.]	298
Commissioners of Customs and Excise and Handley Page:— Rockwell Machine Tool Co. Ltd. v.	[C.A.]	298
Commissioners of Customs and Excise and Rockwell Machine Tool Co.:—Handley Page Ltd. v.	[C.A.]	298
Corporation of Preston:—Elliott v.	[C.A.]	328
Crackshott Steamshipping Co. Ltd. and Gracechurch Line Shipping Ltd.:—Crawley v.	[Q.B.]	179
Crawley v. Gracechurch Line Shipping Ltd. and Crackshott Steamshipping Co. Ltd.	[Q.B.]	179
Crippen and Associates Ltd. v. Vancouver Tug Boat Company Ltd.	[Canada Ct.]	207
Dawnays Ltd. v. F. G. Minter Ltd. and Trollope & Colls Ltd.	[C.A.]	192
DER Ltd.:—Moore and Moore v.	[C.A.]	359

CONTENTS—*continued*

	COURT	PAGE
E. L. Oldendorff & Co. G.m.b.H. v. Tradax Export S.A. (The <i>Johanna Oldendorff</i>)	[Q.B. (Com. Ct.)]	96
Eagle Star Insurance Company Ltd. v. Spratt	[C.A.]	116
Edm. Van Meerbeeck & Co. S.A.:—Salamis Shipping (Panama) S.A. v.	[C.A.]	29
Egyptian General Petroleum Corporation:—Vardinoyannis v.	[Q.B. (Com. Ct.)]	200
Elliott v. Corporation of Preston	[C.A.]	354
Emanuel Ltd. v. Greater London Council and King	[C.A.]	36
Eurymedon, The	[N.Z. Ct.]	399
Evangelos Th., The	[Q.B. (Com. Ct.)]	200
Excess Insurance Company Ltd. and Gilbert-Smith:—Jaglom v.	[Q.B. (Com. Ct.)]	171
F.M.C. (Meat) Ltd. v. Fairfield Cold Stores Ltd.	[Q.B. (Com. Ct.)]	221
Fairfield Cold Stores Ltd.:—F.M.C (Meat) Ltd. v.	[Q.B. (Com. Ct.)]	221
Ferran & Co. Inc. and Glens Falls Insurance Company and Excess Underwriters:—Alcoa Steamship Company Inc. v.	[U.S. Ct.]	426
Furness Withy & Co. Ltd. and John Wright & Son (Blackwall) Ltd.:—Hudson v.	[C.A.]	135
Gawtry v. Waltons Wharfingers & Storage Ltd.	[C.A.]	494
Gerber & Co. Inc. v. <i>Sabine Hawaldt</i> and Another	[U.S. Ct.]	78
Glens Falls Insurance Company and Charles Ferran & Co. Inc. and Excess Underwriters:—Alcoa Steamship Company Inc. v.	[U.S. Ct.]	426
Gilbert-Smith and Excess Insurance Company Ltd.:— Jaglom v.	[Q.B. (Com. Ct.)]	171
Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd. Rennie Hogg Ltd. (Third Party)	[Q.B.]	521
Gold v. Life Assurance Company of Pennsylvania	[Q.B.]	164
Gracechurch Line Shipping Ltd. and Crackshott Steamship- ping Co. Ltd.:—Crawley v.	[Q.B.]	179
Gray and Another v. Barr; Prudential Assurance Company Ltd. (Third Party)	[C.A.]	1
Greater London Council and King:—H. & N. Emanuel Ltd. v.	[C.A.]	36
Hall Ltd.:—Schwarz & Co. (Grain) Ltd. v.	[C.A.]	319
Handley Page Ltd. v. Commissioners of Customs and Excise and Rockwell Machine Tool Co. Ltd.	[C.A.]	298

CONTENTS—*continued*

	COURT	PAGE
Handley Page and Commissioners of Customs and Excise:— Rockwell Machine Tool Co. Ltd. v.	[C.A.]	298
Horsley and Others v. Maclaren and Others (The <i>Ogopogo</i>)	[Canada Ct.]	410
Hudig and Veder Chartering N.V.:—Coast Lines Ltd. v. ...	[Q.B. (Com. Ct.)]	390
Hudson v. John Wright & Son (Blackwall) Ltd. and Furness Withy & Co. Ltd.	[C.A.]	135
Hughes and Jones:—Slater v.	[C.A.]	375
International Drilling Company N.V.:—Sayers v.	[C.A.]	105
J. Gerber & Co. Inc. v. The <i>Sabine Howaldt</i> and Howaldt & Co. Pan American Trade Development Corporation v. Same (The <i>Sabine Howaldt</i>)	[U.S. Ct.]	78
Jackson:—O'Connell v.	[C.A.]	354
Jaglom v. Excess Insurance Company Ltd. and Gilbert-Smith	[Q.B. (Com. Ct.)]	171
John W. McGrath and Others:—Cabot Corporation <i>et al.</i> v.	[U.S. Ct.]	351
Jones (Third Party) <i>see</i> Slater v. Hughes and Jones		
<i>Johanna Oldendorff</i> , The	[Q.B. (Com. Ct.)]	96
King and Greater London Council:—H. & N. Emanuel Ltd. v.	[C.A.]	36
King's Lynn Conservancy Board:—Boal Quay Wharfingers Ltd. v.	[C.A.]	144
<i>Lake Bosomtwe</i> (No. 2), The	[Canada Ct.]	343
Leather's Best Inc. v. The <i>Mormaclynx</i> , Moore-McCormack Lines Inc., Tidewater Terminal Inc. and Universal Ter- minal and Stevedoring Corporation (The <i>Mormaclynx</i>)	[U.S. Ct.]	476
Liberian Trans-Ocean Navigation Corp.:—Total Societa Italiana Per Azioni v.	[Q.B. (Com. Ct.)]	469
Life Assurance Company of Pennsylvania:—Gold v. ...	[Q.B.]	164
London Assurance, Guildhall Insurance Co. <i>et al.</i> :—Steam Tanker Padre Island Inc. and Pullman Bank & Trust Company v.	[U.S. Ct.]	431
London Transport Executive and Motor Insurers' Bureau:— White v.	[C.A.]	256
Lucy v. Mariehamns Rederi	[Q.B.]	314
Mansfield Importers and Distributors Ltd. v. Casco Terminals Ltd.	[Canada Ct.]	73
Maclaren and Others:—Horsley and Others v.	[Canada Ct.]	410
Marston Excelsior Ltd. v. Arbuckle, Smith & Co. Ltd. ...	[C.A.]	306

CONTENTS—*continued*

	COURT	PAGE
Maritime Commercial Corp. Inc. and Steamship <i>Aubade</i> etc.:—American Hoesch Inc. and Riblet Products Inc. v.	[U.S. Ct.]	423
Meanen:—Motor Insurers' Bureau v.	[H.L.]	251
Minter Ltd. and Trollope & Colls Ltd.:—Dawnays Ltd. v.	[C.A.]	192
Moore and Moore v. DER Ltd.	[C.A.]	359
Moore-McCormack Lines Inc. and Others:—Cabot Corporation <i>et al.</i> v.	[U.S. Ct.]	351
Moore-McCormack Lines Inc., The <i>Mormaclynx</i> , Tidewater Terminal Inc. and Universal Terminal and Stevedoring Corporation:—Leather's Best Inc. v.	[U.S. Ct.]	476
<i>Mormaclynx</i> , The	[U.S. Ct.]	476
<i>Mormacscan</i> , The, and Others:—Cabot Corporation <i>et al.</i> v.	[U.S. Ct.]	351
Motor Insurers' Bureau:—Albert v.	[H.L.]	229
————— and London Transport Executive:—		
White v.	[C.A.]	256
————— v. Meanen	[H.L.]	251
National Dock Labour Board v. British Steel Corporation ...	[C.A.]	439
—————:—British Steel Corporation v.	[C.A.]	439
National Dock Labour Board v. John Bland & Co. Ltd. and Others	[H.L.]	20
National Shipping Corporation v. Arab	[C.A.]	363
Newland v. Rye-Arc Ltd.	[Q.B.]	64
New Zealand Shipping Company Ltd.:—A. N. Satterthwaite & Co. Ltd. v.	[N.Z. Ct.]	399
Nippon Yusen Kaisha v. Acme Shipping Corporation (The <i>Charalambos N. Pateras</i>)	[Q.B. (Com. Ct.)]	42
<i>North King</i> , The	[Q.B. (Com. Ct.)]	460
O'Connell v. Jackson	[C.A.]	354
Oldendorff & Co. G.m.b.H. v. Tradax Export S.A.	[Q.B. (Com. Ct.)]	96
<i>Ogopogo</i> , The	[Canada Ct.]	410
<i>Onisilos</i> , The	[C.A.]	29
Pacific Carriers Corporation:—Tradax Export S.A. v. ...	[Q.B. (Com. Ct.)]	460
<i>Padre Island</i> , The	[U.S. Ct.]	431
Pan American Trade Development Corporation v. The <i>Sabine</i> <i>Howaldt</i> and Howaldt & Co.	[U.S. Ct.]	78
Parsons:—Chadwick v.	[Q.B.]	49
—————	[C.A.]	322
Paxton v. Allsopp	[C.A.]	367

CONTENTS—*continued*

	COURT	PAGE
Pickford & Black and Another:—Canadian General Electric Company Ltd. v.	[Canada Ct.]	343
Practice Direction	[C.A.]	489
Press:—Babbs v.	[Q.B. (Div. Ct.)]	383
Practice Direction	[Ch.]	543
Practice Note	[Ch.]	275
Prudential Assurance Company Ltd. (Third Party) <i>See</i> Gray and Another v. Barr		
Pullman Bank and Trust Company and Steam Tanker Padre Island Inc. v. London Assurance, Guildhall Insurance Co. et al.	[U.S. Ct.]	431
Rennie Hogg (Third Party). <i>See</i> Gillespie Bros. & Co. v. Roy Bowles Transport	[Q.B.]	521
Riblet Products Inc. and American Hoesch Inc. v. Steamship <i>Aubade</i> etc. and Maritime Commercial Corp. Inc. and Riblet Products Inc.	[U.S. Ct.]	423
Rockwell Machine Tool Company Ltd. v. Commissioners of Customs and Excise and Handley Page Ltd.	[C.A.]	298
Rockwell Machine Tool Company Ltd. and Commissions of Customs and Excise:—Handley Page Ltd. v.	[C.A.]	298
Roy Bowles Transport Ltd.:—Gillespie Bros. & Co. Ltd. v.	[Q.B.]	521
Royal Insurance Company Ltd.:—Soole v.	[Q.B.]	332
Rye-Arc Ltd.:—Newland v.	[Q.B.]	64
<i>Sabine Howaldt</i> , The	[U.S. Ct.]	78
<i>Sabine Howaldt</i> and Howaldt & Co.:—J. Gerber & Co. Inc. and Pan American Trade Development Corporation v.	[U.S. Ct.]	78
Salamis Shipping (Panama) S.A. v. Edm. Van Meerbeeck & Co. S.A. (The <i>Onisilos</i>)	[C.A.]	29
Satterthwaite & Co. Ltd. v. New Zealand Shipping Company Ltd. (The <i>Eurymedon</i>)	[N.Z. Ct.]	399
Sayers v. International Drilling Company N.V.	[C.A.]	105
Schwarz & Co. (Grain) Ltd. v. R. & H. Hall Ltd.	[C.A.]	319
Schwarz & Co. (Grain) Ltd.:—Michel Verseux S.a.r.L. v.	[C.A.]	319
Seabourne Shipping Company Ltd. and British Road Services Ltd. v. Wurzal	[Q.B. (Div. Ct.)]	196
Slater v. Hughes and Jones, Jones (Third Party)	[C.A.]	375
Smith and Others v. Central Asbestos Company Ltd. and Another	[C.A.]	151
Soole v. Royal Insurance Company	[Q.B.]	332
Spratt:—Eagle Star Insurance Company Ltd. v.	[C.A.]	116

CONTENTS—continued

	COURT	PAGE
<i>Statue of Liberty</i> , The	[H.L.]	277
Steam Tanker Padre Island Inc. and Pullman Bank & Trust Company v. London Assurance, Guildhall Insurance Co. et al. (<i>The Padre Island</i>)	[U.S. Ct.]	431
Sutherland:—Altco Ltd. v.	[Q.B.]	515
Tidewater Terminal Inc., The <i>Mormaclynx</i> , Moore-McCormack Lines Inc. and Universal Terminal and Stevedoring Corporation:—Leather's Best Inc. v. ...	[U.S. Ct.]	476
<i>Timna</i> , The	[C.A.]	91
Total Societa Italiana Per Azioni v. Liberian Trans-Ocean Navigation Corp. (<i>The Alexandra I</i>)	[Q.B. (Com. Ct.)]	469
Tradax Export S.A.:—E. L. Oldendorff & Co. G.m.b.H. v. ...	[Q.B. (Com. Ct.)]	96
Tradax Export S.A.:—Pacific Carriers Corporation v. ...	[Q.B. (Com. Ct.)]	460
Tradax Export S.A.:—Zim Israel Navigation Company Ltd. v. ...	[C.A.]	91
Trollope & Colls Ltd. and F.G. Minter Ltd.: Dawnays Ltd. ...	[C.A.]	192
Union of India:—Alma Shipping Corporation v.	[Q.B. (Com. Ct.)]	494
Universal Terminal and Stevedoring Corporation, The <i>Mormaclynx</i> , Moore-McCormack Lines Inc. and Tidewater Terminal Inc.:—Leather's Best Inc. v.	[U.S. Ct.]	476
Unterweser Reederei G.m.b.H. and Another:—Zapata Off-Shore Company v.	[U.S. Ct.]	348
Vancouver Tug Boat Company Ltd.:—G. E. Crippen and Associates Ltd.	[Canada Ct.]	207
Vardinoyannis v. The Egyptian General Petroleum Corporation (<i>The Evaggelos Th.</i>)	[Q.B. (Com. Ct.)]	200
Verseux S.a.r.L. v. Schwarz & Co. (Grain) Ltd.	[C.A.]	319
Waltons Wharfingers & Storage Ltd.:—Gawtry v.	[C.A.]	489
Watson v. Ben Line Steamers Ltd.	[Q.B.]	269
Westminster Corporation of Monrovia and Another:—Aktiebolaget Gotaverken v.	[Q.B. (Com. Ct.)]	505
White v. London Transport Executive and Motor Insurers' Bureau	[C.A.]	256
Wright & Son (Blackwall) Ltd. and Furness Withy & Co.:—Hudson v.	[C.A.]	135
Wurzal:—British Road Services Ltd. and Seabourne Shipping Company Ltd. v.	[Q.B. (Div. Ct.)]	196

CONTENTS—*continued*

	COURT	PAGE
Zapata Off-Shore Company v. The <i>Bremen</i> and Unterweser Reederei G.m.b.H. (The <i>Chaparral</i>)	[U.S. Ct.]	348
Zim Israel Navigation Company Ltd. v. Tradax Export S.A. (The <i>Timna</i>)	[C.A.]	91

LLOYD'S LAW REPORTS

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[1971] VOL. 2]

Gray and Another v. Barr

PART 1

COURT OF APPEAL

Feb. 16, 17, 18, 19, 22, 23, 1971

GRAY AND ANOTHER v. BARR;
PRUDENTIAL ASSURANCE COMPANY
LTD. (THIRD PARTY)

Before Lord DENNING, M.R.,
Lord Justice SALMON and Lord
Justice PHILLIMORE

Insurance — Accident — Legal liability — Shotgun unintentionally fired by defendant causing fatal injuries to G. — Violence threatened by defendant to G. before fatal shot — Defendant acquitted of murder/manslaughter — Liability of defendant to G.'s estate — Whether shooting an "accident" and covered by personal liability insurance — Whether public policy barred recovery.

Damages — Fatal accident — Deceased husband living apart from family — Effect on dependency — Whether estate passing on intestacy should be deducted.

The defendant, suspecting that his wife was in G.'s house, took a loaded shotgun to the house and went in at the front door. According to the defendant, G. was standing at the top of the stairs and said that the defendant's wife was not in the house. The defendant walked up the stairs and said he would see for himself. He swung the muzzle of the gun up, telling G. to get out of the way, and fired into the ceiling. G. struggled with the defendant who fell down the stairs and unintentionally fired a second shot which killed G.

The defendant was acquitted in criminal proceedings of the charges of murder or manslaughter.

In an action by the plaintiff administrators of G.'s estate, the defendant claimed against the third party insurers for an indemnity under a "Hearth and Home" policy which provided (*inter alia*) that it would indemnify

the defendant against sums which the defendant should become legally liable to pay as damages in respect of bodily injury to any person caused by "accidents".

Held, by GEOFFREY LANE, J., that, on the evidence, G.'s death was the outcome of an unlawful assault involving a threat of violence by the defendant which the defendant must have realized was likely to result in some injury to G. (which was manslaughter); *further*, that in the circumstances, the defendant was guilty of gross negligence (and, therefore, liable to the plaintiffs);

that "accident" may mean something either done without negligence or something done without intention; that, in the context of the defendant's policy, "accident" must mean something done without intention; and that, therefore, the injury to G. was accidental;

but, on the grounds of public policy, where a person seeking indemnity was guilty of deliberate, intentional and unlawful violence or threats of violence and death resulted therefrom he could not claim indemnity;

and that, therefore, the defendant was not entitled to indemnity from the third party;

that, in the circumstances, G.'s dependants had only a 50 per cent. expectation of gross dependency of 15 years; and that £14,000 of G.'s estate of £16,500 should be deducted.

Judgment for the plaintiffs against the defendant for £6000; judgment for the third party against the defendant.

On appeal by the defendant and cross-appeal by the plaintiffs:

Held, by C.A. (Lord DENNING, M.R., SALMON and PHILLIMORE, L.JJ.), (1) that the *causa proxima* in insurance law is that which is the effective or dominant cause of the occurrence even if more remote in point of time; such cause to be determined by common-sense principles (*see p. 5, col. 1*).

Leyland Shipping Company Ltd. v. Norwich Union Fire Insurance Society Ltd., [1918] A.C. 350; *Canada Rice Mills Ltd. v. Union Marine and General Insurance Company Ltd.*, [1941] A.C. 55; (1940) 67 L.I.L. Rep. 549, applied.

[1971] VOL. 2]

Gray and Another v. Barr

that, accordingly, (2) (per Lord DENNING, M.R.) the dominant and effective cause of G.'s death was the defendant's first deliberate act of going upstairs with a loaded gun determined to view the bedroom. This loaded approach caused G. to grapple with the defendant causing him to fall and the gun accidentally to discharge. There was no intervening cause at all, therefore G.'s death was not an accident (*see* p. 5, col. 2); (per PHILLIMORE, L.J.) that the second shot could not be isolated from all that went before and the incident should be regarded as a whole (*see* p. 18, cols. 1 and 2); (per SALMON, L.J.) the incident was not the kind of accident intended to be covered under the policy (*see* p. 13, col. 2; p. 14, cols. 1 and 2);

Per Lord DENNING, M.R. (at p. 6): . . . In the category of manslaughter relating to an unlawful act the accused must do a dangerous act with the intention of frightening or harming someone, or with the realization that it is likely to frighten or harm someone and nevertheless do it regardless of the consequences. If the act does thereafter, in unbroken sequence cause the death of another the accused is guilty of manslaughter even if the fatal act is accidental.

—*R. v. Larkin*, (1943) 29 Cr. App. R. 58; *R. v. Terry Cashmore*, July 28, 1959, applied.

(3) further, that, as G.'s death was caused by a deliberate act, the threat of unlawful violence with a loaded gun, the defendant's claim was defeated, as it would be against public policy to allow him to be indemnified for its consequences (*see* p. 6, col. 2; p. 15, col. 1; p. 19, col. 2).

—*Tinline v. White Cross Insurance Association Ltd.*, [1921] 3 K.B. 327; *James v. British General Insurance Company Ltd.*, [1927] 2 K.B. 311; (1927) 27 Ll.L.Rep. 328; *Haseldine v. Hosken*, [1933] 1 K.B. 822; *Marles v. Philip Trant & Sons Ltd. Mackinnon, Third Party*, [1954] 1 Q.B. 29, distinguished.

(6) That the trial Judge was correct in his assessment of damages (*see* p. 8, col 1; p. 16, col. 1; p. 19, col. 2).

Appeal dismissed. Cross-appeal on damages dismissed. Appeal as to third party dismissed. Leave to appeal to House of Lords.

The following cases were referred to in the judgments:

Andrews v. Director of Public Prosecutions, [1937] A.C. 576;

Beresford v. Royal Insurance Company Ltd., [1938] A.C. 586;

Canada Rice Mills Ltd. v. Union Marine and General Insurance Company Ltd., [1941] A.C. 55; (1940) 67 Ll.L.Rep. 549;

Candler v. London and Lancashire Guarantee and Accident Company of Canada, (1963) 40 D.L.R. 408;

Crippen, In the Estate of, [1911] P. 108;

Hall, In the Estate of, (C.A.) [1914] P. 1; *Hardy v. Motor Insurers' Bureau*, (C.A.) [1964] 2 Q.B. 745; [1964] 1 Lloyd's Rep. 397;

Haseldine v. Hosken, (C.A.) [1933] 1 K.B. 822;

Ionides v. Universal Marine Insurance Company, (1863) 14 C.B. N.S. 259;

James v. British General Insurance Company Ltd., [1927] 2 K.B. 311; (1927) 27 Ll.L.Rep. 328;

Leyland Shipping Company Ltd. v. Norwich Union Fire Insurance Society Ltd., [1918] A.C. 350;

Marles v. Philip Trant & Sons Ltd. Mackinnon, Third Party, (C.A.) [1954] 1 Q.B. 29;

Regina v. Cashmore, (unreported) July 28, 1959 (*see* p. 8, *post*);

Regina v. Lamb, (C.A.) [1967] 2 Q.B. 981;

Regina v. St. George, (1840) 9 C. & P. 483;

Rex v. Baxter, (unreported) June 23, 1913 (*see* p. 8, *post*);

Rex v. Larkin, (C.C.A.) (1942) 29 Cr. App. R. 18;

Samuel & Co. Ltd. v. Dumas, (C.A.) [1923] 1 K.B. 592; (1922) 13 Ll.L.Rep. 503; (H.L.) [1924] A.C. 431; (1924) 18 Ll.L. Rep. 211;

Taylor v. O'Connor, [1970] 2 W.L.R. 432;

Tinline v. White Cross Insurance Association Ltd., [1921] 3 K.B. 327;

Trim Joint District School Board of Management v. Kelly, [1914] A.C. 667.

This was an appeal by the defendant, Mr. George William Barr, from a decision of Mr. Justice Geoffrey Lane ([1970] 2 Lloyd's Rep. 69), in third-party proceedings, that he was not entitled to an indemnity by the third party, Prudential Assurance Company Ltd., under the terms of a "Hearth and Home" accident policy for damages awarded against the defendant to the plaintiffs, the administrators of the estate of Mr. James Ian Gray, deceased.

Mr. Justice Geoffrey Lane held that Mr. Gray's death was the consequence of the defendant's unlawful assault and the defendant's claim for indemnity against the third party was barred by public policy.

The third party, by their respondent's notice, contended that, on the facts found by the Judge, (1) the sums adjudged to be paid by the defendant to the plaintiffs were not "sums which such insured could become legally liable to pay as damages in respect of bodily injury to any person caused by accidents" within the meaning of the policy; and (2) that it was against public policy that a person who had committed manslaughter

by gross negligence other than in the course of driving a motor vehicle should be entitled to be indemnified by another in respect of his liability arising from such manslaughter.

The plaintiffs cross-appealed against the Judge's assessment of damages on the ground that it was too low and the defendant gave notice of cross-appeal on the ground that damages were too high.

Mr. Murray Stuart-Smith, Q.C., and Mr. David Sullivan (instructed by Messrs. Kenneth Brown, Baker, Baker) for the plaintiffs; Mr. Raymond Kidwell, Q.C., and Mr. Bryan Anns (instructed by Messrs. Kingsley Napley & Co.) for the defendant; Mr. E. Machin and Mr. R. Cox (instructed by Mr. C. A. Rutland) for the third party.

JUDGMENT

Lord DENNING, M.R.: Mr. and Mrs. Barr have a prosperous business at Tooting in ladies' blouses, which they run together. In 1965 they bought a country home at Warlingham. About a quarter of a mile away there was a farmer and his wife, Mr. and Mrs. James Gray, of Farleigh Court Farm. The Barrs had three boys. The Grays had a boy and a girl. On Guy Fawkes day the Barrs had a bonfire party for the children and the Grays brought their children to it. The families became friends. But the results were disastrous. Mr. Gray and Mrs. Barr fell in love with one another. By May, 1966, Mr. Gray had become so infatuated with Mrs. Barr that he wanted to make his life with her. He left the farm and his wife and children—all without a word—and went out to New Zealand. He gave Mrs. Barr £240 to buy her ticket out to join him. But, before she went out there, Mr. Gray's father told him that he must come back for the sake of the farm. So in October, 1966, he returned to England and ran the farm. But he still kept seeing Mrs. Barr. So much so that Mrs. Gray could not stand it any longer. She separated from him. He bought her a house at Edenbridge, 15 miles away. She had the children there with her. Mr. Gray entered into a deed of maintenance providing for her and the children. He stayed on alone in the farmhouse, running the farm, but no doubt still seeing Mrs. Barr. In May, 1967, he took Mrs. Barr to Scotland for a week's holiday. When they came back Mrs. Barr went to her mother's for three days and then returned home to her husband. At first she told him that she wanted to stay with him, but also that she still loved Mr. Gray. But on Tuesday evening Mr. and Mrs. Barr went out

to dinner at the country club and then she told him to his great delight that she did not love Mr. Gray any more and was coming back to live with him, Mr. Barr. They went back to their home hand-in-hand.

Now comes a tragic sequence of events. Mr. Barr went into the kitchen of his house to make up the boiler, and afterwards to the lavatory. His wife, he thought, had gone upstairs. But when he went up to join her, she was gone. He looked everywhere for her, but could not find her. He thought that she must have gone back to Mr. Gray. He got out the car and drove first towards her mother's and then back to Mr. Gray's farm. He drove in the gates, but turned round and went back again to his own house. He asked his cousin who was there: "Have you found Ethel?" She said, "No". Mr. Barr by this time was in a terrible state. He was crying and praying at the same time. He thought that his wife must have gone to Mr. Gray at the farm. He went to the dining-room and picked up his shot-gun. (He had bought it from Mr. Gray six months earlier.) His cousin said to him: "You don't need that, Bill". He said nothing. He took up a handful of cartridges and loaded two of them. He asked his cousin to come with him. She would not. He went out with the loaded gun. He drove up to the farm. He got out of the car, leaving the engine running. He opened the front door. There at the head of the stairs he saw Mr. Gray. Mr. Gray said: "Come in, Bill". He called out: "Is Ethel here, Jim?" Mr. Gray said: "No, she is not". Mr. Barr said: "I want to see for myself". He went up the stairs, holding the gun at the port. He was determined to see into the bedroom. But Mr. Gray stood in the way. He said: "Put that bloody thing down and get out". Exactly what happened next is not clear. Two shots went off. The first went up through the ceiling. The second killed Mr. Gray.

It was all a mistake. Mrs. Barr was not in the bedroom. She was not even in the farmhouse. She was lying in the woods 100 yards from her home, unconscious, having taken an overdose of sleeping tablets. She had attempted to commit suicide. She was found early next morning, taken to hospital, and recovered in three weeks. She and her husband are now together again, with their family and their business.

Three months later—on Sept. 21 and 22, 1967—Mr. Barr was tried at the Central Criminal Court for the murder of Mr. Gray. His defence was that the fatal shot was an accident. The Judge directed the Jury that if