which deals with the provisos to be considered where the purchaser or lessee is not a New Zealand citizen or is an overseas corporation, is similarly extended.

L. J. Turner

TORTS

Negligence

(1) *Duty of Care*

In *Dorset Yacht Co. Ltd.* v. *Home Office* [1969] 2 W.L.R. 1024 the English Court of Appeal held that the Home Office owed a general duty of care to neighbouring persons which on proof of negligence gave rise to liability for damages. Accordingly the defendant was held liable for damage done by the inmates of an open borstal who escaped.

The same court in *Grange Motors Ltd.* v. *Spencer* [1969] 1 W.L.R. 53 held that a road user who acts upon a signal given by some other road user or bystander has a duty to do so with reasonable care. Likewise the person giving the signal owes a duty of care to those persons who may act upon it.

In *Driver* v. *William Willett (Contractors) Ltd.* [1969] 2 All E.R. 665 Ross J. held that safety consultants owe a duty of care to that class of persons whom the consultants must reasonably foresee may be injured as a result of their failure to give proper advice.

In *Ross* v. *McCarthy* [1969] N.Z.L.R. 691 Richmond J. applied *Searle* v. *Wallbank* [1947] A.C. 341 in holding that there is no duty owed by a land owner to users of the highway to take reasonable care to prevent his animals not known to be dangerous from straying on to the highway.

In *Richards* v. *State of Victoria* [1969] V.R. 136 the Full Court of Victoria held that a teacher is under "a duty to take reasonable care to protect a pupil from reasonably foreseeable risk of injury". The court however stressed that this duty of care is not dependant upon the test of foreseeability of harm set out in *Donaghue* v. *Stevenson* [1932] A.C. 562 but exists prior to and independent of foreseeability in this sense and stems from the teacher-pupil relationship itself.

In *British Celenese Ltd.* v. *A. H. Hunt Ltd.* [1969] 1 W.L.R. 959 Lawton J. considered the following events: metal foil stored on the defendant's land blew on to an electricity substation, and the resultant failure in the supply of power to the plaintiff's factory 150 yards away caused delays in production and loss of profits. On these facts the judge held the defendant owed a duty of care to prevent the metal foil being blown about in such a way as to foul the substation.

(2) *Remoteness of Damage*

In *British Celanese Ltd.* v. *A. H. Hunt Ltd.* (*supra*) it was argued that the losses sustained by the plaintiff were indirect and as such not susceptible to liability in damages. *Weller v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569 cited in support of this proposition was distinguished by Lawton J. on the grounds that the concept of directness of damage as applied in that case meant not merely "immediate damage" but damage resulting from "the operation of the laws of nature without human intervention".

Rylands v. *Fletcher*

The storing of metal foil on an industrial estate is a natural user of that land: *British Celanese Ltd.* v. *A. H. Hunt Ltd.* (*supra*).

Nuisance

In *British Celanese Ltd.* v. *A. H. Hunt Ltd.* his Lordship held "It is clear from the authorities that an isolated happening by itself can create an actionable nuisance."

Negligent Misstatement

The question of the elements of relationship essential to liability under the principle enunciated in *Hedley Byrne and Co. Ltd.* v. *Heller and Partners Ltd.* [1964] A.C. 465 occupied the New Zealand Court of Appeal recently in *Dimond Manufacturing Co. Ltd.* v. *Hamilton* [1969] N.Z.L.R. 609. The court in reversing the decision at first instance (reviewed in Volume 2 No. 1 of this Review) held that such a special relationship is created where a certified company balance sheet is personally produced by a member of the firm preparing it to a prospective purchaser of shares in the company in "circumstances in which he knew the purchaser would rely upon it" and for the known purpose of constructing an offer. Personal production was clearly regarded by the court as cogent evidence that a special relationship existed. The dictum of Barwick C.J. in *M.L.C. Assurance Co. Ltd.* v. *Evatt* 42 A.L.J.R. 316 to the effect that the fact that the misstatement is made in the course of business or professional affairs was merely indicative of, but not essential to, the existence of a special relationship was expressly approved by McCarthy J.

Defamation

It is apparent in view of *London Artists Ltd.* v. *Littler* [1969] 2 W.L.R. 409 that the defence of "fair comment" must fail where a defamatory allegation has been made without any basis of fact to support it or the allegation is not substantiated by the defendant. This is so even though the allegation concerns a matter of public interest affecting people at large.

The unsatisfactory principle laid down in *Hollington* v. *Hewthorn and Co. Ltd.* [1943] K.B. 587 no longer subsists in the law of New Zealand in the light of *Jorgensen* v. *News Media (Auckland) Ltd.* [1969] N.Z.L.R. 961 where the Court of Appeal declined to follow it. The Court held that a certificate to the effect that a person has been convicted of a criminal offence is admissible though not conclusive evidence for other proceedings that he is guilty of that crime. Whether such evidence discharges the evidentary burden of proof is a question to be decided by the judge on the basis of the total evidence before him.

Animals

In *Knowlson* v. *Solomon* [1969] N.Z.L.R. 686 a trained sheep dog owned by the respondent wandered on to a highway coming into collision with the appellant's car. McGregor J. held that proof of inevitable accident was sufficient to rebut the presumption of negligence on the part of the owner raised by s. 29 of the Dogs Registration Act 1955. The presumption of scienter was also held to be removed where the dog was shown to possess no dangerous propensity. A further

ground for dismissal of the action was that the dog's blundering on to the highway was a passive and not active action on the part of the dog and did not therefore come within the meaning of the words "done by the dog" in section 29. The case also contains a useful consideration of the general principles relating to injury caused by dogs.

In *Ross* v. *McCarthy* [1969] N.Z.L.R. 691 Richmond J. held that neither section 33 of the Impounding Act 1955 nor s. 4 (1) (i) of the Police Offences Act 1927 gives an individual the right of action in tort against owners of stock which have strayed on to the highway in breach of these statutory provisions.

Interference with Performance of Contract

In *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] 1 W.L.R. 289 the defendant trade union induced tanker drivers to refuse to deliver fuel to the Torquay Hotel and warned the regular supplier, Esso Petroleum, that there would be trouble if fuel was delivered, thus resulting in a failure by Esso to fulfill their contractual obligations. The effect of a 'force majeure' clause was that no liability arose upon that breach and Winn and Russell L.JJ. accordingly held the defendant liable under established principles in that their direct interference had induced a breach of contract albeit one for which no liability arose.

Lord Denning however treated the question of whether a breach of contract had been induced as irrelevant to liability. He took up the point expressly left open by Lord Reid in *Stratford* v. *Lindley* [1965] A.C. 269 and urged that the common law would be seriously deficient if it did not extend to render actionable a deliberate and direct interference with the execution of a contract which falls short of inducing a breach. He considered proof of only three elements to be essential: that there was interference in the execution of the contract (and here mere hindrance would do); that the interference was deliberate or intentional; and thirdly that it was direct or, if indirect, then the means used were unlawful.

[The judgment of Denning M.R. was considered with approval by Speight J. in *Pete's Tow Service Ltd.* v. *Northern Industrial Union of Workers* [1970] N.Z.L.R. 32.]

Measure of Damages

The English Court of Appeal in *Doyle* v. *Olby Ltd.* [1969] 2 W.L.R. 673 unanimously agreed that the proper measure of damages for deceit was such a sum as would compensate for all losses which are direct consequences of the tortious act whether or not the defendant could have foreseen such consequential losses with the qualification that losses rendered too remote by the plaintiff's own actions could not be recovered.

Though *Doyle* v. *Olby Ltd.* (*supra*) was not cited MacArthur J. came to the same conclusion in *New Zealand Refrigerating Co. Ltd.* v. *Scott* [1969] N.Z.L.R. 30 in holding the "out of pocket rule" to be the appropriate measure of damages for deceit. The rule involves assessing the entire loss resulting to the plaintiff by virtue of his reliance upon the deceitful representation reduced *pro tanto* by any advantage he has thereby gained.

A. D. McDougall