Die Jovis 25° Junii 1981

Upon Report from the Appellate Committee to whom was referred the Cause Jobling (Assisted Person) against Associated Dairies Limited, That the Committee had heard Counsel as well on Tuesday the 28th as on Wednesday the 29th days of April last upon the Petition and Appeal of Alexander Jobling of 16 Adelaine Road, Prudhoe, Northumberland praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 11th day of July 1980 might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as also upon the Case of Associated Dairies Limited lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is *Ordered* and *Adjudged*, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal (Civil Division) of the 11th day of July 1980 complained of in the said Appeal be, and the same is hereby **Affirmed** and that the said Petition and Appeal be, and the same is hereby, dismissed this House: And it is further *Ordered*, That the Costs of the Respondents in this House be paid out of the Legal Aid Fund under section 13 of the Legal Aid Act 1974, the amount thereof to be certified by the Clerk to the Parliaments: And it is also further *Ordered*, That the Costs of the Appellant in this House be taxed in accordance with the provisions of schedule 2 to the Legal Aid Act 1974.

HOUSE OF LORDS

JOBLING (A.P.)
(APPELLANT)

v.

ASSOCIATED DAIRIES LIMITED
(RESPONDENTS)

Lord Wilberforce
Lord Edmond-Davies
Lord Russell of Killowen
Lord Keith of Kinkel
Lord Bridge of Harwich

Lord Wilberforce

my lords,

The question raised by this appeal is whether in assessing damages for personal injury in respect of loss of earnings, account should be taken of a condition of illness supervening after the relevant accident but before the trial of the action, which illness gives rise to a greater degree of incapacity than that caused by the accident.

The chronology is as follows:

In January 1973 the appellant slipped at his place of work and sustained injury to his back. The respondents were held liable in damages in respect of this injury. In 1975 the appellant had a fall which aggravated his condition which the judge held was referrable to the injury of 1973. He has not worked since this event. By 1976 his condition was such that by reason of his back injury he was only fit for sedentary work. In 1976, however, there supervened spondylotic myelopathy, which affected the appellant's neck. By the end of 1976 this had rendered him totally unfit for work.

The judge at the trial on 26th March 1979 awarded sums in respect of special damages and general damages for pain, suffering and loss of amenities: the figure for the latter was reduced by the Court of Appeal. No question now arises as regards these items. The figure now in dispute relates to loss of earnings—from the date of total incapacity to the date of the trial and for the future from the date of trial. This loss the judge fixed at £6,825 representing a sum of £13,650 arrived at by using a multiplier, and dividing this by 2 on the basis of a 50 per cent loss of earning capacity. The Court of Appeal set this figure aside on the basis that the appellant was made totally unfit for work by the supervening myelopathy. They supported this decision by an impressive judgment delivered by Ackner L.J.

The evidence as to myelopathy was provided by agreed medical reports. No doctor was called at the trial. An agreed joint report by a consultant neurologist and a surgeon, dated 5th March 1979, stated:

" (4) At the date of the relevant accident (1973) there was *(sic)* no
" discernible signs or symptoms of myelopathy.

" (5) The effect of myelopathy has of itself been such as to render the
" plaintiff totally unfit to work."

The finding (4) has been accepted as establishing that the myelopathy was not a condition existing, but dormant, at the date of the original injury:

it was a disease supervening after that event. If it had been dormant but existing it is not disputed that it would have had to be taken into account in the actual condition found to exist at the trial. But the appellant submits that a different result follows if the origination of the disease takes place after the accident, i.e. after the tortious act which gives rise to the claim. At the very first sight this distinction is unattractive, if only for the (to me compelling) reason that to accept it places in an impossible position both potential medical witnesses and the judge who has to value their evidence.

In an attempt to solve the present case, and similar cases of successive causes of incapacity according to some legal principle, a number of arguments have been invoked:

1. Causation arguments. The unsatisfactory character of these is demonstrated by the case of *Baker v. Willoughby* [1970] AC 467. I think

that it can now be seen that Lord Reid's theory of concurrent causes even if workable on the particular facts of *Baker v. Willoughby* (where successive injuries were sustained by the same limb) is as a general solution not supported by the authority he invokes *(Harwood* v. *Wyken Colliery Co.* [1913] 2 K.B. 158) nor workable in other cases. I shall not enlarge upon this point in view of its more than sufficient treatment in other opinions.

2. The " vicissitudes" argument. This is that since, according to accepted doctrine, allowance—and if necessary some discount—has to be made in assessing loss of future earnings for the normal contingencies of life, amongst which " illness" is normally enumerated, so, if one of these contingencies becomes actual before the date of trial, this actuality must be taken into account. Reliance is here placed on the apophthegm " the " court should not speculate when it knows ". This argument has a good deal of attraction. But it has its difficulties: it raises at once the question whether a discount is to be made on account of all possible " vicissitudes ", or only on account of " non culpable " vicissitudes (i.e. such that if they occur there will be no cause of action against anyone, the theory being that the prospect of being injured by a tort is not a normally foreseeable vicissitude) or only on account of " culpable" vicissitudes (such as *per contra).* And if this distinction is to be made how is the court to act when a discounted vicissitude happens before trial? Must it attempt to decide whether there was culpability or not? And how is it to do this if, as is

likely, the alleged culprit is not before it?

This actual distinction between " culpable " and " non culpable " events was made, with supporting argument, in the Alberta case of *Penner* v. *Mitchell* [1978] 5 W.W.R. 328. One may add to it the rider that, as pointed out by Dickson J. in the Supreme Court of Canada, there are in modern society many public and private schemes which cushion the individual against adverse circumstances *(Andrews* v. *Grand & Toy Alberta Ltd.* [1978] 1 W.W.R. 577, 596/7). One then has to ask whether a discount should be

made in respect of (a) such cases or (b) cases where there is no such cushion? There is indeed in the " vicissitude " argument some degree of circularity, since a discount in respect of possible events would only be fair if the actual event, discounted as possible, were to be taken into account when happening. But the whole question is whether it should be. One might just as well argue from what happens in " actual " cases to what should happen in discountable cases.

In spite of these difficulties, the " vicissitude" argument is capable in some, perhaps many cases, of providing a workable and reasonably just rule, and I would certainly not discountenance its use, either in the present case or in others.

The fact, however, is that to attempt a solution of these and similar problems, where there are successive causes of incapacity in some degree, upon classical lines (" the object of damages for tort is to place the " plaintiff in as good a position as if, etc." . ..." the defendant must " compensate for the loss caused by his wrongful act—no more "—" the " defendant must take the plaintiff as he finds him, etc.") is, in many cases no longer possible. We do not live in a world governed by the pure common law and its logical rules. We live in a mixed world where a man is protected against injury and misfortune by a whole web of rules and dispositions, with a number of timid legislative interventions. To attempt to compensate him upon the basis of selected rules without regard to the whole must lead either to logical inconsistencies, or to over—or under—compensation. As my noble and learned friend, Lord Edmund-Davies, has pointed out, no account was taken, in *Baker* v. *Willoughby* of the very real possibility that the plaintiff might obtain compensation from the Criminal Injuries Compensation Board. If he did in fact obtain this compensation he would, on the ultimate decision be over-compensated.

In the present, and in other industrial injury cases, there seems to me no justification for disregarding the fact that the injured man's employer is insured—indeed since 1972 compulsorily insured—against liability to his

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employees. The State has decided, in other words, on a spreading of *risk.* There seems to me no more justification for disregarding the fact that the plaintiff—presumably, we have not been told otherwise—is entitled to sickness and invalidity benefit in respect of his myelopathy the amount of which may depend on his contribution record, which in turn may have been affected by his accident. So we have no means of knowing whether the plaintiff would be over-compensated if he were, in addition, to receive the assessed damages from his employer, or whether he would be under-compensated if left to his benefit. It is not easy to accept a solution by which a partially incapacitated man becomes worse off in terms of damages and benefit through a greater degree of incapacity. Many other ingredients, of weight in either direction, may enter into individual cases. Without any satisfaction I draw from this the conclusion that no general,

logical, or universally fair rules can be stated which .will cover, in a manner consistent with justice, cases of supervening events whether due to tortious, partially tortious, non-culpable or wholly accidental events. The courts can only deal with each case as best they can in a manner so as to provide just and sufficient but not excessive compensation, taking all factors into account. I think that this is what *Baker* v. *Willoughby* did—and indeed that Lord Pearson reached his decision in this way: the rationalisation of the decision as to which I at least have doubts, need and should not be applied to other cases. In the present case the Court of Appeal reached the unanswerable conclusion that to apply *Baker* v. *Willoughby* to the facts of the present case would produce an unjust result, and I am willing to accept the corollary that justice, so far as it can be perceived, lies the other way and that the supervening myelopathy should not be disregarded. If rationalisation is needed, I am willing to accept the " vicissitudes" argument as the best available. I should be more firmly convinced of the merits of the conclusion if the whole pattern of benefits had been considered, in however general a way. The result of the present case may be lacking in precision and rational justification, but so long as we are content to live in a mansion of so many different architectures, this is inevitable.

I would dismiss the appeal.

Lord Edmund-Davies

my lords,

This appeal relates to the assessment of damages where a party has been injured by another's tort, but, before his action comes on for trial, the plaintiff sustains further injury as a result of a wholly independent and non-tortious event.

Mr. Jobling was the 48-year-old manager of the defendants' butcher shop at Newcastle-upon-Tyne. In January 1973 he slipped on the floor of a meat refrigerator owing to his employers' breach of the Office, Shops and Railway Premises Act 1963, by failing to keep it free from substances likely to cause persons to slip. He sustained a prolapsed intravertebral disc, but, although in considerable pain, which reduced his earning capacity by fifty per cent, he resumed work in a supervisory capacity until September 1976, when he became totally disabled by the manifestation of a hitherto unsuspected condition known as spondylotic myelopathy which was unrelated to the 1973 incident.

The action based on the 1973 incident came before Reeve J. in March 1979. He found that, even had the plaintiff sustained no injury therefrom, "... he would since 1976 by reason of his myelopathy have been rendered " unfit for work thereafter ". He continued, " Should I have regard to that " fact in assessing damages for loss of earnings arising from the 1973 " incident? At first blush it might seem that he is only entitled to be " compensated for loss of earnings during his working life as limited by " the myelopathy ". But, in the light of certain observations of Lord Reid in *Baker* v. *Willoughby* [1970] AC 467, Reeve J. concluded, " I am bound "to leave out of account the disability caused to Mr. Jobling by the

"myelopathy in assessing the damages resulting from the 1973 incident". In the result, his award of general damages included the sum of £6,825 for future loss of earnings, on the basis that the plaintiff's back injury must be regarded as continuing in to the future to reduce his earning capacity by 50 per cent. The Court of Appeal unanimously reversed that finding [1980] 3 W.L.R. 704), and this appeal has been brought to secure its restoration.

In *Baker v. Willoughby* this House found for the plaintiff on the basis of the Court of Appeal decision in *Harwood* v. *Wyken Colliery Co.* [1913] 2 K.B. 158. *Baker* v. *Willoughby* was different in one important respect from the present appeal, for this House was there concerned with successive torts. The plaintiff's left leg was injured in 1964 when he was knocked down by a car negligently driven by the defendant. In 1967, before his action came on for trial, he was shot in the same leg during an armed robbery and the limb had to be amputated well above the knee. The trial judge rejected the defendant's submission that no injury or loss suffered thereafter by the plaintiff could be attributed to his tort since its effect had been obliterated by the amputation, and he awarded damages on the basis of continued weakness and pain in the left ankle and the possibility of later development of arthritis in the leg. Following upon its unanimous reversal in the Court of Appeal ([1970] A.C., at p.478), this House restored the decision of the trial judge, Lord Reid (with whom Lord Guest, Viscount Dilhorne and Lord Donovan concurred) basing his conclusion largely on the Court of Appeal decision in *Harwood* v. *Wyken Colliery Co. (ante).* That was a case brought under the Workmen's Compensation Act 1906, where a miner, who had for some months been paid compensation for a personal injury by accident arising out of and in the course of his employment, was later disabled for work by heart disease in no way attributable to the accident. Holding that "... there is no work which ... the accident has prevented " him from doing which the heart disease would not also have prevented " him from doing ", the judge found that compensation had ceased to be payable. The Court of Appeal reversed that decision. Hamilton L.J. stressed that the 1906 Act compensated workmen "in a new and statutory manner " in respect of a wholly statutory right", markedly different from that operating in the common law assessment of damages, the latter necessitating regard being had to contingencies such as "... the possibility of future " diminution or loss of earnings arising independently of the cause of action, " from increasing age, from accident or illness in future, and so forth ". Hamilton L.J. explained (at p. 170):

" The compensation for workmen under the Act is very different ". . . . It is based on what the workman has earned, not on what " he will be prevented from earning .... Redemption of weekly " payments by a lump sum is on the basis of an annuity, calculated by " expectation of life and not by expectation of immunity from further " accident or from growing age and infirmity ".

Hamilton L.J. further pointed out that, whereas damages are calculated so as to put the victim of tort in as good a position as he was before the wrong,

the Act " is not founded on indemnity, and the ideas of retribution for " wrong doing and of *restitutio in integrum* are foreign to it ".

Notwithstanding this clear differentiation, this House (with the exception of Lord Pearson), holding that "causation cannot be different in tort", applied the *Harwood* decision to the different facts giving rise to the common law claim for damages brought in *Baker* v. *Willoughby.* Lord Reid could see "... no reason why the appellant's present disability cannot be regarded "as having two causes", and cited in support the following words of Hamilton L.J.:

" [the workman] is not disentitled to be paid compensation by reason " of the supervention of a disease of the heart. It cannot be said of " him that partial incapacity for work has not resulted and is not still " resulting from the injury. All that can be said is that such partial " incapacity is not still resulting ' solely' from the injury "

My Lords, I must respectfully decline to follow the route adopted by the majority of their Lordships in *Baker* v. *Willoughby.* For the decision in

Harwood v. *Wyken Colliery,* with its different facts requiring to be considered solely in the light of an elaborate statutory scheme having no counterpart in the common law, was there applied without qualification or differentiation to the common law claim then under consideration. In marked contrast was the speech of Lord Pearson, who made no reference to *Harwood* and who described as " formidable " the argument of defendant's counsel that the consequence of the original accident had been submerged and obliterated by the supervening event. He nevertheless added (at 495E):

" *But it must not be allowed to succeed, because it produces manifest* " *injustice.* The supervening event has not made the plaintiff less lame " nor less disabled nor less deprived of amenities. It has not shortened " the period over which he will be suffering. It has made him more " lame, more disabled, more deprived of amenities. He should not " have less damages through being worse off than might have been " expected ". (Emphasis added).

I have to say respectfully that I find this approach unrealistic. It involves awarding damages on the basis of pain and suffering which the plaintiff would have suffered *if* the amputation had not taken place, and it compensates him for that which no longer exists. Nor is it correct to compensate him for loss of earnings when the very state which has produced that loss of earnings has ceased. The loss of earnings sustained after the amputation of the leg was caused by the amputation, not by the first accident. And the effect of the amputation was to obliterate completely all the constituents (pain and suffering, reduced earning capacity, and loss of amenities) of the damages to be awarded for the injury sustained as a result of that accident.

The key, as I think, to the contrary conclusion arrived at by Lord Pearson is to be found in the words which followed immediately upon the passage quoted above:

" The nature of the *injustice* becomes apparent if the supervening
" event is treated as a tort (as indeed it was) and if one envisages the
" plaintiff suing the robbers who shot him . . .”

The undoubted attraction of the *Baker* v. *Willoughby* decision is that it avoided what was there understandably regarded as an unacceptable result, as " It provides a greater measure of protection for the victim. For if the
" whole burden is placed upon the second tortfeasor and he is a man of
" straw—as would appear to have been the position in *Baker* v. *Willoughby*
" itself—or cannot be traced, then the victim is left without any redress "
(McGregor on Damages, 14th Ed., 1980, para. 1146). But such a view ignores the *ex gratia* payment of compensation provided under the Criminal Injuries Compensation Scheme in respect of personal injury directly attributable to *(inter alia)* crimes of violence. Atiyah considered that,
"... the existence of the Criminal Injuries Compensation Board . . .
" plainly cast a long shadow over the entire proceedings " ((1969) 85 L.Q.R. 475), but were this indeed so it seems inconceivable that the reports contain no mention of the Scheme, despite its introduction in August 1964. The simple fact is that it was never adverted to at any stage by anyone.

It cannot be doubted that the injured plaintiff in *Baker* v. *Willoughby* had a valid claim to compensation under the Scheme. But it needs to be added that such compensation is assessed on the basis of common law damages, and Baker would naturally be treated as a workman who at the time of the armed robbery had a maimed leg and reduced earning capacity. And the Board imposes a compensation limit based on gross average industrial earnings and it applies a strict approach to collateral benefits (see the learned note in (1981) 97 L.Q.R. 210, at 212). So the injured plaintiff in *Baker* v. *Willoughby* might still have been better off under the decision of this House than under the Scheme, though that must remain a matter of pure speculation. And, even so, what one can say is that the " injustice ", the avoidance of which appears to have led to Lord Pearson's conclusion, did not, at least in its full dimensions, exist.
My Lords, the appellant's counsel submits that no materiality resides in the fact that the present case is not one of successive torts (as in *Baker),*

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but that of a tort followed by greater and enveloping injury arising from independent natural causes. He accepts (and, indeed, actually relies upon) the proposition that a defendant " must take the plaintiff as he finds him ". He also recognises that in the assessment of damages, the court must not speculate when it knows the facts, and must therefore have regard to relevant events which have occurred before trial or before the hearing of an appeal *(Curwen* v. *James* [1963] 1 W.L.R. 748; *Mulholland* v. *Mitchell* [1971] A.C. 666, *per* Lord Wilberforce at 680A). But appellant's counsel draws a novel distinction between (a) cases where at the time of the tort the

victim was (whether or not he knew it) already suffering from a disease which later manifested itself, and (b) cases where the *inception* of the disease was an event supervening after the tort, and he submits that in the second type of case the later event has no materiality.

In my judgment, the distinction drawn between (a) and (b) is in principle irrelevant and in practice capable of creating great confusion. Indeed, in the present case Reeve J. in the course of his careful judgment expressed no conclusion regarding the time of inception of the myelopathy, and simply proceeded on the basis of the " Agreed Medical Formula " that—

" (4) At the date of the relevant accident (1973) there was *(sic)* no
" discernible signs or symptoms of myelopathy.

" (5) The effect of the myelopathy has of itself been such as to render the plaintiff totally unfit to work ".

Uncertainty as to inception may well arise with frequency and ought not to be determinative of the outcome of proceedings unless legal principle demands. Not only was appellant's counsel unable to cite authority supporting the drawing of the distinction he advanced, but it is contrary to the principle enunciated in innumerable cases that, among the contingencies and vicissitudes of life relevant to the assessment of damages for tort, is that the victim's expectation of both natural and working life may be reduced or terminated by the future development of illness or infirmity; see, for example, the classic words of Brett L.J. in *Phillips* v. *L. and S.W. Railway Co.* (1879) 5 C.P.D. 280, at 291; those of Hamilton L.J., already quoted, in *Harwood* v. *Wyken Colliery Co.;* and those of Dickson J. in the Supreme Court of Canada in *Andrews* v.*Grand & Toy Alberta Ltd.* [1978] 1 W.W.R. 577.

But the submission of learned counsel for the appellant went even further. He would not restrict the exclusion of post-tort incidents to the inception of illness, for, as Ackner L.J. put it [1980] 1 W.L.R. 710C):

" It would equally follow on Mr. Stewart's submission that, if [after
" the tort] the plaintiff .... as a result solely of his own negligence,
" was knocked down by a motorcoach and thereby rendered totally
" incapable of further work, this incapacity would have to be wholly
" ignored and the plaintiff awarded his future loss of earnings as if
" that event had never occurred ".

Despite the attractive manner of their presentation, these bold submissions run so counter to fundamental principles as to be wholly unacceptable. In *Pearson* v. *Mitchell* [1978] 5 W.W.R. 328 the Alberta Supreme Court declined to extend the decision in *Baker* v. *Willoughby* to such cases as the present, Prowse J.A. saying that " any event that would otherwise be assessed
" as a future contingency is a relevant factor for assessing damages if it
" occurs before trial", and a similar conclusion was arrived at by Latey J. in *Hodgson* v. *GEC Ltd.* [1978] 2 Lloyd's 210.

My Lords, it is a truism that cases of cumulative causation of damage can present problems of great complexity. I can formulate no convincing juristic or logical principles supportive of the decision of this House in *Baker v. Willoughby,* and none were there propounded. Lord Pearson in particular manifestly acceded to the submission of learned counsel for the

plaintiff that, " The defendant's approach, although based on a neat logical " solution, results in culpable injustice and, *therefore*, must be rejected " (475 H) . . . . If it is necessary to weigh the balance between fairness " to the plaintiff and fairness to the defendant, the burden should not fall " on the innocent plaintiff rather than the tortious defendant. The present

" is a case where justice and logic do not go together, and in the interests " of justice the argument founded on logic by the defendants should be " rejected. (476G)". Perhaps Glanville Williams was right in saying that: " When the lawyer uses the conception of causation, he is not bound to use " it in the same way as a philosopher, or a scientist, or an ordinary man. " The concept can be moulded by considerations of policy " (1961 C.L.J. 62, at 75).

Abandoning the search for logical principles and advertising solely to questions of policy, it may therefore be that *Baker* v. *Willoughby* is acceptable on its own facts. Even so, I am shaken by (a) the reliance there mistakenly placed (as I respectfully think) upon *Harwood v. Wyken Colliery Co.*, and (b) the misapprehension that, were this House to uphold the Court of Appeal, the innocent yet badly injured workman might be wholly without redress for his injuries. As, however, learned counsel for the respondents was not minded to challenge the correctness of *Baker* on its different facts, the matter does not call for present determination.

But what is clear is that where, as in the present appeal, the question in issue relates to the assessment of damages when, a tort having been committed, the victim is overtaken before trial by a wholly unconnected and disabling illness, the decision in *Baker* v. *Willoughby* has no application. Your Lordships are therefore untrammelled by precedent. The effect of the Court of Appeal's decision is that no considerations of policy warrant the imposition on the respondent of liability for the loss of earnings after the emergence of myelopathy. That is in accordance with the long-established and eminently reasonable principle that the onset or emergence of illness is one of the vicissitudes of life relevant to the assessment of damages. And it is of some interest to note that this view was evidently shared at all stages by learned counsel for the plaintiff in *Baker* v. *Willoughby* itself, and had been anticipated as long ago as 1961 by Glanville Williams *(ibid.*, at p.76). I believe the Court of Appeal decision was entirely correct, and I would dismiss the appeal.

Lord Russell of Killowen

my lords,

It is well established that in assessing compensation for damage caused to a plaintiff by a tortfeasor among other considerations is the consequent loss or reduction in earning capacity in the working life of the plaintiff. It is also well established that it is appropriate, in arriving at an estimated figure

under that head, that some allowance or discount should be made for the ordinary vicissitudes of life. It is also well established that if by the time of trial facts emerge which make known a vicissitude of life as applicable to the plaintiff, that knowledge should replace that which would have been only an estimate: where there is knowledge estimation has no part.

One of these vicissitudes is that a plaintiff might thereafter succumb to a disease (unconnected with the tort) which would abbreviate the plaintiff's working life. Commonly the discount for such a possibility might well be small: but it is not to be ignored. If before trial the plaintiff does so succumb in my opinion the evidence of its abbreviating effect must take the place of estimate, and reduce the amount of compensation for the tortious damage under that head. In the instant case the plaintiff succumbed to spondylotic myelopathy which by 1976, before the trial, terminated his working life, which, had its length remained as at the date of the tort, would have continued (albeit at a lower wage earning capacity) for several more years. For the plaintiff appellant it was contended that since the evidence did not show that this condition was latent and dormant at the date of the tortious injury, its emergence could not serve to reduce the amount of compensation based on an estimate of working life. But it was conceded that if the condition was in some degree present at the date of the tort the contrary view should prevail.

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In the first place I find that this attempted distinction is calculated to produce medical problems virtually impossible of solution. In the joint medical report dated 5th March 1979 all that could be said was that at the date of the tort "there was no discernible signs or symptoms of " myelopathy ".

In the second place this approach appears to me to intrude upon the well known principle of discount or allowance for the vicissitudes of life, by the wholly irrelevant principle that a tortfeasor takes his victim as he finds him. Among the vicissitudes of life falls to be included the possibility of *developing* a disease which will shorten or terminate a plaintiff's working life: if that development takes place before trial the vicissitude must, it seems to me, move from the field of estimate to the field of knowledge.

I agree therefore with the approach of the Court of Appeal ([1980] 3 W.L.R. 704).

There remains the question of the decision of this House in *Baker* v. *Willoughby* [1970] AC 467, the facts in which have been related by others of your Lordships. That was a case of successive torts by two tortfeasors. The first tort severely damaged the plaintiff's leg: the second tort required the removal of that leg by surgery. This House decided that the first tortfeasor could not escape liability for the damage done to the now non-existent leg. The main consideration leading to the decision was that otherwise the second tortfeasor could (on the principle that a tortfeasor is entitled to take his victim as he finds him) reduce the damages against him on the ground that he was only responsible for the removal of an already

damaged leg, and not for removal of a sound leg: thus, if the first tortfeasor escaped liability, the plaintiff could not get full compensation for the injuries done to him. I am not prepared to state disagreement with the decision. I am prepared to suggest that physical damage due to a subsequent tort is not to be regarded as a relevant vicissitude. Some of the reasons given in that case are susceptible of being taken as pointing in favour of the appellant in the instant appeal, but they do not persuade me that we are led by *Baker* v. *Willoughby* to take a further step by allowing this appeal. I add that I cannot, with respect, find the reliance of Lord Reid on the workmen's compensation case of *Harwood v. Wyken Colliery Co.* sound.

In short I am persuaded that the Court of Appeal in the instant case was right, and I would dismiss this appeal.

Lord Keith of Kinkel

my lords,

This appeal raises a short but very difficult point in connection with the assessment of damages for personal injuries. In January 1973 the appellant, in the course of his employment with the respondents and as a result of their negligence, suffered an injury to his back in the shape of a slipped disc. This had the effect of incapacitating him for any but light work. In September 1976 the appellant was found to be suffering from a condition known as cervical myelopathy, unrelated to the accident, which by the time his claim came to trial, in March 1979, had resulted in a total incapacity for work. According to an agreed medical report, there were no discernible signs or symptoms of myelopathy at the date of the accident in 1973.

In that state of affairs the question arose whether the respondents were liable to pay damages for loss of earnings upon the basis of a partial incapacity continuing throughout the period which, in the absence of the myelopathy, would have represented the balance of the appellant's normal working life, or whether their liability was limited to loss of earnings up to the time when the myelopathy resulted in total incapacity.

The trial judge (Reeve J.) decided in favour of the greater liability. He took the view that he was bound, on the authority of *Baker* v. *Willoughby* [1970] AC 467, to leave out of account the disability caused to the appellant by the myelopathy in assessing the damages resulting from the 1973 accident.

The Court of Appeal (Stephenson and Ackner L.JJ. and Dame Elizabeth Lane) reversed the decision of Reeve J., holding that *Baker* v. *Willoughby (supra)* did not compel the conclusion that where the victim of a tortious act suffers a further disability through a supervening event of non-tortious character, such as natural disease, the consequences of the latter event must be ignored in the assessment of damages.

The facts in *Baker* v. *Willoughby (supra)* were that the plaintiff suffered an injury to his left leg through the defendant's negligence, resulting in a continuing disability which reduced his earning capacity. Before his case

came to trial he was shot by a robber in the same leg, which in consequence had to be amputated. As a result the plaintiff's disability was rather greater than it had been before. This House reversing the Court of Appeal, held that the award of damages for loss of earnings did not fall to be diminished by reason of the later injuries, upon the view that they represented no more than a concurrent cause, along with the original injury, of the plaintiff's disability.

It was argued for the respondent, defendant in the action, that the second injury removed the very limb from which the earlier disability had stemmed, and that therefore no loss suffered thereafter could be attributed to the respondent's negligence. In rejecting this argument Lord Reid, whose speech was concurred in by Lord Guest, Viscount Dilhorne and Lord Donovan, said at p.492:

" If it were the case that in the eye of the law an effect could only
" have one cause then the respondent might be right. It is always
" necessary to prove that any loss for which damages can be given was
" caused by the defendant's negligent act. But it is a commonplace
" that the law regards many events as having two causes: that happens
" whenever there is contributory negligence for then the law says that
" the injury was caused both by the negligence of the defendant and
" by the negligence of the plaintiff. And generally it does not matter
" which negligence occurred first in point of time."

Lord Reid took the view that the appellant's disability could be regarded as having two causes, and he found support for this view in *Harwood* v. *Wyken Colliery Co.* [1913] 2 K.B. 158. That was a workmen's compensation case in which the Court of Appeal held the plaintiff entitled to compensation, notwithstanding that there had supervened upon the incapacity resulting from an accident at work an incapacity of similar extent resulting from heart disease. Lord Reid later went on to distinguish the case where damages might properly fall to be diminished by reason of the death of the plaintiff before trial, upon the basis that in such a case the supervening event had reduced the plaintiff's loss. He said at p.494:

" If the later injury suffered before the date of the trial either reduces
" the disabilities from the injury for which the defendant is liable, or
" shortens the period during which they will be suffered by the plaintiff,
" then the defendant will have to pay less damages. But if the later
" injuries merely become a concurrent cause of the disabilities caused by
" the injury inflicted by the defendant, then in my view they cannot
" diminish the damages. Suppose that the plaintiff has to spend a
" month in bed before the trial because of some illness unconnected
" with the original injury, the defendant cannot say that he does
" not have to pay anything in respect of that month; during that month
" the original injuries and the new illness are concurrent causes of
" his inability to work and that does not reduce the damages."

It seems clear from this passage that the principle of concurrent causes which Lord Reid selected as the *ratio decidendi* of the case would, if sound, apply with the same force where the supervening event is natural disease, as in the present case, as it does where the supervening event is a tortious act.

Lord Pearson's main reason for rejecting the respondent's argument was that it would produce manifest injustice. He said at p.495:

" The supervening event has not made the plaintiff less lame nor
" less disabled nor less deprived of amenities. It has not shortened

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" the period over which he will be suffering. It has made him more
" lame, more disabled, more deprived of amenities. He should not have
" less damages through being worse off than might have been expected."

Lord Pearson went on to illustrate the nature of the injustice by pointing out that, where the supervening event was a tortious act, the later tortfeasor, upon the principle that he takes his victim as he finds him, would be liable for damages in respect of loss of earnings only to the extent that the act had caused an additional diminution of earning capacity. If the earlier incapacity were treated, in a question with the first tortfeasor, as submerged by the later, the plaintiff would be left in the position of being unable to recover from anyone a substantial part of the loss suffered after the date of the second tort. So he would not be fully compensated in respect of the combined effects of both torts. It is to be observed that this was the consideration which had been principally urged in the argument for the appellant.

A notable feature of the speeches in *Baker* v. *Willoughby (supra)* is the absence of any consideration of the possible implications of what may be termed the " vicissitudes " principle. The leading exposition of this principle is to be found in the judgment of Brett L.J. in *Phillips* v. *London & South Western Railway Co.* (1879) 5 C.P.D. 280, at p.291:

" if no accident had happened, nevertheless many circumstances
" might have happened to prevent the plaintiff from earning his previous
" income; he may be disabled by illness, he is subject to the ordinary
" accidents and vicissitudes of life; and if all these circumstances of
" which no evidence can be given are looked at, it will be impossible to
" exactly estimate them; yet if the jury wholly pass them over they will
" go wrong, because these accidents and vicissitudes ought to be taken
" into account. It is true that the chances of life cannot be accurately
" calculated, but the judge must tell the jury to consider them in order
" that they may give a fair and reasonable compensation."

This principle is to be applied in conjunction with the rule that the court will not speculate when it knows, so that when an event within its scope has actually happened prior to the trial date, that event will fall to be taken into account in the assessment of damages.

In *Harwood v. Wyken Colliery Co. (supra),* which was founded on by Lord Reid in *Baker* v. *Willoughby* as supporting the view which he took upon causation, Hamilton L.J. was at pains to stress that compensation under the Workmen's Compensation Acts had nothing in common with an award of damages for personal injuries, being based on what the workman has earned in the past, not upon what he will be prevented from earning in

the future. He fully recognised the application of the " vicissitudes" principle in the damages context, saying at p. 169:

" In assessing damages for injury caused to a plaintiff workman by
" the tortious negligence of the employer or his servants a jury would
" be directed that, their damages being a compensation once for all, they
" must consider not merely past injury, pain and suffering endured,
" expenses incurred and earnings lost, but also future loss. They
" would have to measure in money the future effects of permanent or
" continuing disablement, but they must consider also the possibility
" of future diminution or loss of earnings arising independently of the
" cause of action, from increasing age, from accident or illness in
" future, and so forth. They would be directed that they had to give
" solatium for suffering and compensation for disablement, but so that
" the tort-sufferer should not make a profit out of the wrong done him,
" the object being by the verdict to place him in as good a position as
" he was in before the wrong, but not in any wise in a better one."

By way of contrast, under the Workmen's Compensation Acts the workman was given a guarantee of compensation on the statutory scale where he was subject to an incapacity resulting from personal injury by accident arising out of and in the course of his employment. The statute did not say that the incapacity must result *solely* from the injury. It was therefore irrelevant

that the incapacity resulted also to some extent from heart disease. In the circumstances *Harwood v. Wyken Colliery Co. (supra)* must be regarded as an infirm foundation for the decision in *Baker* v. *Willoughby (supra).*

It is implicit in that decision that the scope of the " vicissitudes " principle is limited to supervening events of such a nature as either to reduce the disabilities resulting from the accident or else to shorten the period during which they will be suffered. I am of opinion that failure to consider or even advert to this implication weakens the authority of the *ratio decidendi* of the case, and must lead to the conclusion that in its full breadth it is not acceptable. The assessment of damages for personal injuries involves a process of *restitutio in integrum.* The object is to place the injured plaintiff in as good a position as he would have been in but for the accident. He is not to be placed in a better position. The process involves a comparison between the plaintiff's circumstances as regards capacity to enjoy the amenities of life and to earn a living as they would have been if the accident had not occurred and his actual circumstances in those respects following the accident. In considering how matters might have been expected to turn out if there had been no accident, the " vicissitudes " principle says that it is right to take into account events, such as illness, which not uncommonly occur in the ordinary course of human life. If such events are not taken into account, the damages may be greater than are required to compensate the plaintiff for the effects of the accident, and that result would be unfair to the defendant. Counsel for the appellant sought to draw a distinction between the case where the plaintiff, at the time of the

tortious injury, is already suffering from a latent undetected condition which later develops into a disabling illness, and the case where the inception of the illness occurs wholly at a later date. In the former case, so it was maintained, the illness would properly fall to be taken into account in diminution of damages, upon the principle that the tortfeasor takes his victim as he finds him, but in the latter case it would not. There is no trace of the suggested distinction in any of the authorities, and in my opinion it is unsound and apt to lead to great practical difficulties, providing ample scope for disputation among medical men. What would be the position, it might be asked, of an individual having a constitutional weakness making him specially prone to illness generally, or an hereditary tendency to some specific disease.

I am therefore of opinion that the majority in *Baker* v. *Willoughby* were mistaken in approaching the problems common to the case of a supervening tortious act and to that of supervening illness wholly from the point of view of causation. While it is logically correct to say that in both cases the original tort and the supervening event may be concurrent causes of incapacity, that does not necessarily, in my view, provide the correct solution. In the case of supervening illness, it is appropriate to keep in view that this is one of the ordinary vicissitudes of life, and when one is comparing the situation resulting from the accident with the situation had there been no accident, to recognise that the illness would have overtaken the plaintiff in any event, so that it cannot be disregarded in arriving at proper compensation, and no more than proper compensation.

Additional considerations come into play when dealing with the problems arising where the plaintiff has suffered injuries from two or more successive and independent tortious acts. In that situation it is necessary to secure that the plaintiff is fully compensated for the aggregate effects of all his injuries. As Lord Pearson noted in *Baker* v. *Willoughby (supra)* it would clearly be unjust to reduce the damages awarded for the first tort because of the occurrence of the second tort, damages for which are to be assessed on the basis that the plaintiff is already partially incapacitated. I do not consider it necessary to formulate any precise juristic basis for dealing with this situation differently from the case of supervening illness. It might be said that a supervening tort is not one of the ordinary vicissitudes of life, or that it is too remote a possibility to be taken into account, or that it can properly be disregarded because it carries its own remedy. None of these formulations, however, is entirely satisfactory. The fact remains that the principle of full

compensation requires that a just and practical solution should be found. In the event that damages against two successive tortfeasors fall to be assessed at the same time, it would be highly unreasonable if the aggregate of both awards were less than the total loss suffered by the plaintiff. The computation should start from an assessment of that total loss. The award against the second tortfeasor cannot in fairness to him fail to recognise that the plaintiff whom he injured was already to some extent incapacitated. In order that the plaintiff may be fully compensated, it becomes necessary to

deduct the award so calculated from the assessment of the plaintiff's total loss and award the balance against the first tortfeasor. If that be a correct approach, it follows that, in proceedings against the first tortfeasor alone, the occurrence of the second tort cannot be successfully relied on by the defendant as reducing the damages which he must pay. That, in substance, was the result of the decision in *Baker v. Willoughby*, where the supervening event was a tortious act, and to that extent the decision was, in my view, correct.

Before leaving the case, it is right to face up to the fact that, if a non-tortious supervening event is to have the effect of reducing damages but a subsequent tortious act is not, there may in some cases be difficulty in ascertaining whether the event in question is or is not of a tortious character, particularly in the absence of the alleged tortfeasor. Possible questions of contributory negligence may cause additional complications. Such difficulties are real, but are not sufficient, in my view, to warrant the conclusion that the distinction between tortious and non-tortious supervening events should not be accepted. The court must simply do its best to arrive at a just assessment of damages in a pragmatical way in the light of the whole circumstances of the case.

My Lords, for these reasons I would dismiss the appeal.

Lord Bridge of Harwich

my lords,

On the 15th January 1973, the appellant injured his back in a fall at the premises where he was employed by the respondents. He sustained a prolapsed intervertebral disc which produced low back pain. In 1976 he developed cervical myelopathy. This condition was wholly unrelated to the 1973 injury. It has also been treated as common ground in the courts below and in your Lordships' House, that the condition of cervical myelopathy was not present in any latent or dormant form at the date of the appellant's accident, but developed subsequently. The effect of the myelopathy was of itself such as to render the appellant totally unfit to work from the end of September 1976 onwards.

The appellant's claim for damages against the respondents was tried by Reeve J. who, on the 26th March 1979, gave judgment for the appellant, awarded him £6000 for general damages (reduced in the Court of Appeal to £4000) and awarded him special damages representing his loss of earnings from the date of the accident to the end of September 1976. No issue is raised as to any of these matters in your Lordships' House. The learned judge went on to consider the extent to which the appellant's earning capacity would have been impaired by the accident injury if the myelopathy had not supervened. He assessed this impairment at 50 per cent, held that he was bound by authority to disregard the supervening myelopathy in assessing the damages resulting from the accident, and accordingly awarded further special damages to represent half the appellant's lost earnings from October 1976 to the date of the trial, and a sum in respect of future loss of earnings calculated by applying a multiplier of 7 to a

figure representing half the appellant's annual earning capacity. The respondent appealed against the inclusion of these elements of damage in the award on the ground that the supervening incapacity of the appellant attributable to myelopathy put an end to their legal liability for any loss of earnings which, but for myelopathy, would have resulted from the

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appellant's accident injury in 1973. The Court of Appeal (Stephenson and Ackner LJJ. and Dame Elizabeth Lane), in a unanimous judgment delivered by Ackner LJ., so held and reduced the damages accordingly. The appellant invites your Lordships to restore the award of the learned judge.

The authority by which the judge held himself bound, and that which is the linchpin of the argument for the appellant before your Lordships, is the decision of this house in *Baker* v. *Willoughby* [1970] AC 467. The plaintiff in that case sustained, by the negligence of the defendant, an injury to his left leg which caused a stiff and painful left ankle, liability to future arthritis, diminished mobility and loss of earning capacity. Subsequently, but before the trial, he was shot in the left leg in the course of a robbery and as a result the leg had to be amputated above the knee. The trial judge held that he should not take into account in his assessment of the damages the amputation of the left leg, since the appellant's actual and prospective loss flowing from the respondent's negligent act had not been reduced by the subsequent loss of the leg. The Court of Appeal reduced the damages to such as were appropriate to compensate the plaintiff for the effects of the injury up to the date of the subsequent amputation but no longer, holding that the subsequent consequences of the plaintiff's disability were in law attributable not to the original injury but to the subsequent amputation. This House reversed that decision and restored the award of the trial Judge.

It is significant that the argument for the plaintiff in *Baker's* case, was put by Mr. Hugh Griffiths QC, as he then was, on the ground that special considerations governed the assessment of damages in the case of a plaintiff suffering successive injuries, such as those suffered by Mr. Baker, where both were caused tortiously. Mr. Griffiths appears to have conceded, by implication if not expressly, that, if the amputation of the plaintiff's leg had been caused by disease or non-tortious accident, the Court of Appeal's view of its effect on the assessment of damages for the previous injury would have been correct. He argued that the trial judge's basis of assessment was necessary in the case of successive tortious injuries to ensure that the plaintiff should recover in the sum of the awards against both tortfeasors the aggregate loss he had sustained from both injuries. This he would not do if the first tortfeasor's liability was reduced by the effect of the second injury, and the second tortfeasor was entitled to take the plaintiff as he found him, i.e. as an already injured man. The Court of Appeal rejected this argument as fallacious on the ground that the second tortfeasor would be liable to compensate the plaintiff not only for the loss of his injured lee, but also for the diminution of his entitlement to damages against the first tortfeasor attributable to the loss of the leg.

Notwithstanding the course taken by the argument, in the speech of Lord Reid in this House (with which Lord Guest, Viscount Dilhorne, and Lord Donovan agreed) there is no reference at all to the circumstance that the amputation of the plaintiff's leg was the result of a tort as a factor relevant to the decision. On the contrary, the reasoning in the speech applies equally to the effect of a supervening disability arising from illness or non-tortious accident as the following passages amply demonstrate.

His Lordship said, at p.492: —

"A man is not compensated for the physical injury: he is
" compensated for the loss which he suffers as a result of that injury.
" His loss is not in having a stiff leg: it is in his inability to lead a
" full life, his inability to enjoy those amenities which depend on
" freedom of movement and his inability to earn as much as he used to
" earn or could have earned if there had been no accident. In this
" case the second injury did not diminish any of these. So why should
" it be regarded as having obliterated or superseded them?

" If it were the case that in the eye of the law an effect could
" only have one cause then the respondent might be right. It is always
" necessary to prove that any loss for which damages can be given was
" caused by the defendant's negligent act. But it is a commonplace that

" the law regards many events as having two causes: that happens
" Whenever there is contributory negligence for then the law says
" that the injury was caused both by the negligence of the defendant
" and by the negligence of the plaintiff. And generally it does not
" matter which negligence occurred first in point of time.

" I see no reason why the appellant's present disability cannot be
" regarded as having two causes, and if authority be needed for this
" I find it in *Harwood v. Wyken Colliery Co.* [1913] 2 K.B. 158.
" That was a Workmen's Compensation Act case. But causation
" cannot be different in tort. There an accident made the man only
" fit for light work. And then a heart disease supervened and it also
" caused him only to be fit for light work. The argument for the
" employer was the same as in the present case. Before the disease
" supervened the workman's incapacity was caused by the accident.
" Thereafter it was caused by the disease and the previous accident
" became irrelevant: he would have been equally incapacitated if the
" accident had never happened. But Hamilton L.J. said, at p. 169:
" '... he is not disentitled to be paid compensation by reason of
" ' the supervention of a disease of the heart. It cannot be said
" ' of him that partial incapacity for work has not resulted and is not
" ' still resulting from the injury. All that can be said is that such
" ' partial incapacity is not still resulting " solely" from the
" ' injury.' "

He added, at p.494:

" If the later injury suffered before the date of the trial either reduces
" the disabilities from the injury for which the defendant is liable, or

" shortens the period during which they will be suffered by the plaintiff,
" then the defendant will have to pay less damages. But if the later
" injuries merely become a concurrent cause of the disabilities caused
" by the injury inflicted by the defendant, then in my view they cannot
" diminish the damages. Suppose that the plaintiff has to spend a
" month in bed before the trial because of some illness unconnected
" with the original injury, the defendant cannot say that he does not
" have to pay anything in respect of that month; during that month the
" original injuries and the new illness are concurrent causes of his
" inability to work and that does not reduce the damages."

In the speech of *Lord* Pearson there are references to the tortious causation of the supervening injury, but it is certainly not clear that his Lordship was treating this as the critical factor and thus adopting the narrow ground for decision advanced by Mr. Griffiths in argument. In any event, the *ratio decidendi* must be collected from the reasons adopted by the majority and, according to the strict doctrine of precedent, I think Reeve J. was right to treat the wide principle expressed in the passages from the speech of Lord Reid which I have cited as binding him to decide the present case as he did.

Mr. Stewart has naturally relied on *Baker's* case as binding authority supporting the learned judge's assessment of the damages, but, recognising that it is open to your Lordships to examine critically and, if thought right, to differ from Lord Reid's reasoning, he has sought to reconcile it with those principles of law which the Court of Appeal, in the instant case, treated as justifying them in reaching a different conclusion from the learned judge.

The first principle is that, in assessing damages for future loss of earnings, the court makes a discount for the possibility that, apart from the injury in respect of which he claims, the plaintiff's earning capacity may be diminished by some independent cause (" the vicissitudes principle ").

The second principle is that, since the court does not speculate when it knows, damages for loss of earnings, if the plaintiff's earning capacity has before trial been actually diminished by some independent cause of the kind to which the court would have had regard in applying the vicissitudes principle, must be reduced accordingly.

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Mr. Stewart does not dispute the existence of either of these principles, but he contends that the scope of the vicissitudes principle must be confined to consideration of those future possibilities which arise from factors which can be shown at the date of trial to have been already inherent in some way in the plaintiff's physical make-up, or in his situation at the date of the tort, such as a latent but symptomless arthritis or a particular liability to injury by accident arising from the hazardous nature of his occupation.

Naturally, when such factors *are shown* to have been present, they will materially affect the extent of the discount to be made in assessing damages,

but the judgment of the Court of Appeal has drawn attention to the absurdities which would flow from the adoption of any such absolute limitation of the vicissitudes principle as that suggested. The limitation would, moreover, be contrary both to authority and to the underlying theory of legal causation on which the vicissitudes principle itself depends.

In the classic words cited by the Court of Appeal from the judgment of Brett LJ. in *Phillips v. London and South-Western Railway Co.* (1879) 5 C.P.D. 280, at 291:—

" if no accident had happened, nevertheless many circumstances might
" have happened to prevent the plaintiff from earning his previous
" income; he may be disabled by illness, he is subject to the *ordinary*
" accidents and vicissitudes of life; and if all these circumstances of
" which no evidence can be given are looked at, it will be impossible
" to exactly estimate them; yet if the jury wholly passed them over
" they will go wrong, because these accidents and vicissitudes ought to
" be taken into account." (Emphasis added).

In delivering the judgment of the Privy Council in *Paul* v. *Rendell* on the very day your Lordships concluded the hearing of the appeal in this case, Lord Diplock said: —

" Where, as in the present case, the plaintiff's disability is permanent,
" it is, their Lordships are informed, the common practice in Australia
" to use actuarial tables for calculating the present capital value of
" future annual economic loss resulting from the reduction in the
" plaintiff's annual earnings which the judge considers that he will suffer
" for the remainder of his working life. From this figure as a starting
" point the judge makes such adjustments as he thinks appropriate.
" Some adjustment downwards would be needed to take account of all
" those contingencies such as unemployment, ill-health, or any other
" disability short of premature death, for which allowance is not made
" in the actuarial tables but which might have deprived the plaintiff of
" his earning power or reduced it below the figure adopted for the
" purpose of the actuarial calculation."

The vicissitudes principle itself, it seems to me, stems from the fundamental proposition of law that the object of every award of damages for monetary loss is to put the party wronged so far as possible in the same position, no better and no worse, as he would be in if he had not suffered the wrong in respect of which he claims. To assume that an injured plaintiff, if not injured, would have continued to earn his full wages for a full working life, is very probably to over-compensate him. To apply a discount, in respect of possible future loss of earnings, arising from independent causes, may be to under-compensate him. When confronted by future uncertainty, the court assesses the prospects and strikes a balance between these opposite dangers as best it can. But when the supervening illness or injury which is the independent cause of loss of earning capacity has manifested itself before trial, the event has demonstrated that, even if the plaintiff had never sustained the tortious injury, his earnings would now be reduced or extinguished. To hold the tortfeasor, in this situation, liable to pay damages

for a notional continuing loss of earnings attributable to the tortious injury, is to put the plaintiff in a better position than he would be in if he had never suffered the tortious injury. Put more shortly, applying well-established principles for the assessment of damages at common law, when a plaintiff

injured by the defendant's tort is wholly incapacitated from earning by supervening illness or accidental injury, the law will no longer treat the tort as a continuing cause of any loss of earning capacity.

It follows from the foregoing that I am, with the utmost respect, unable to agree with the opinion of Lord Reid in *Baker's* case, as expressed in the two passages from his speech which I have cited. In particular, I cannot accept that the decision in *Harwood v. Wyken Colliery Co.* [1913] 2 K.B. 158, affords any authority in support of Lord Reid's conclusion, or that he was right to say that causation could not be different in tort and under the Workmen's Compensation Acts. In *Harwood's* case, Hamilton LJ., with whose judgment Cozens-Hardy MR., agreed, was at pains to stress the very different principles governing a tortfeasor's liability to pay damages at common law on the one hand, and the statutory liability of an employer to compensate an injured workman on the other. With reference to the former, he clearly recognised the vicissitudes principle. "They" (sc. the jury) he said at p. 170 " would have to measure in money the future effects " of permanent or continuing disablement, but they must consider also " the possibility of future diminution or loss of earnings arising independently " of the cause of action, from increasing age, from accident or illness in " future, and so forth." With reference to the latter, he founded his view that an injury at work could be a continuing cause of incapacity, which would continue to attract compensation notwithstanding supervening illness, entirely on the construction of the particular language of the statute to be applied.

Having reached the conclusion that the *ratio decidendi* of *Baker's* case cannot be sustained, it remains to consider whether the case should still be regarded as authority, as a decision on its own facts for the proposition that, when two successive injuries are both caused tortiously, the supervening disability caused by the second tort should, by way of exception to the general rule arising from the application of the vicissitudes principle, be disregarded when assessing the liability of the first tortfeasor for damages for loss of earnings caused by the first tort. I find it difficult to attribute such authority to the decision, when both the Court of Appeal and this House were expressly invited to adopt that proposition, and both, in different ways, declined the invitation. There is a powerful, perhaps irresistible, attraction in the argument that, in the circumstances envisaged, the aggregate of the damages recoverable by the plaintiff, should, provided both tortfeasors can be found and can meet their liability, be sufficient to cover the aggregate loss of earnings, past and future, which results from the combined effect of both injuries. But whether this end is properly achieved, as between the two tortfeasors, by apportioning liability on the principle which commended itself to the Court of Appeal, or on the principle

for which Mr. Griffiths contended in argument, seems to me a very difficult question. For the reasons I have indicated, I think the speeches in your Lordships' House, by going off on a different tack, ultimately left that question unanswered. In the instant appeal, Mr. Lawton, for the respondents, was content to accept the decision in *Baker's* case as correct on its facts, so your Lordships have not heard argument on the question. In these circumstances, the proper conclusion seems to me to be that the question should remain open for decision on another occasion, if and when it arises.

However that may be, for the reasons indicated earlier in this speech, I would dismiss the appeal.

313388 Dd 8208150 C2 6/81

Die Jovis 25° Junii 1981

Upon Report from the Appellate Committee to whom was referred the Cause Jobling (Assisted Person) against Associated Dairies Limited, That the Committee had heard Counsel as well on Tuesday the 28th as on Wednesday the 29th days of April last upon the Petition and Appeal of Alexander Jobling of 16 Adelaine Road, Prudhoe, Northumberland praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 11th day of July 1980 might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as also upon the Case of Associated Dairies Limited lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is *Ordered* and *Adjudged*, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal (Civil Division) of the 11th day of July 1980 complained of in the said Appeal be, and the same is hereby **Affirmed** and that the said Petition and Appeal be, and the same is hereby,

dismissed this House: And it is further *Ordered,* That the Costs of the Respondents in this House be paid out of the Legal Aid Fund under section 13 of the Legal Aid Act 1974, the amount thereof to be certified by the Clerk to the Parliaments: And it is also further *Ordered,* That the Costs of the Appellant in this House be taxed in accordance with the provisions of schedule 2 to the Legal Aid Act 1974.

HOUSE OF LORDS

JOBLING (A.P.)
(APPELLANT)

v.

ASSOCIATED DAIRIES LIMITED
(RESPONDENTS)

Lord Wilberforce
Lord Edmond-Davies
Lord Russell of Killowen
Lord Keith of Kinkel
Lord Bridge of Harwich

Lord Wilberforce

my lords,

The question raised by this appeal is whether in assessing damages for personal injury in respect of loss of earnings, account should be taken of a condition of illness supervening after the relevant accident but before the trial of the action, which illness gives rise to a greater degree of incapacity than that caused by the accident.

The chronology is as follows:

In January 1973 the appellant slipped at his place of work and sustained injury to his back. The respondents were held liable in damages in respect of this injury. In 1975 the appellant had a fall which aggravated his condition which the judge held was referrable to the injury of 1973. He has not worked since this event. By 1976 his condition was such that by reason of his back injury he was only fit for sedentary work. In 1976, however, there supervened spondylotic myelopathy, which affected the appellant's neck. By the end of 1976 this had rendered him totally unfit for work.

The judge at the trial on 26th March 1979 awarded sums in respect of special damages and general damages for pain, suffering and loss of amenities: the figure for the latter was reduced by the Court of Appeal. No question now arises as regards these items. The figure now in dispute relates to loss of earnings—from the date of total incapacity to the date of the trial and for the future from the date of trial. This loss the judge fixed at £6,825 representing a sum of £13,650 arrived at by using a multiplier, and dividing this by 2 on the basis of a 50 per cent loss of earning capacity. The Court of Appeal set this figure aside on the basis that the appellant was made totally unfit for work by the supervening myelopathy. They supported this decision by an impressive judgment delivered by Ackner L.J.

The evidence as to myelopathy was provided by agreed medical reports. No doctor was called at the trial. An agreed joint report by a consultant neurologist and a surgeon, dated 5th March 1979, stated:

" (4) At the date of the relevant accident (1973) there was *(sic)* no
" discernible signs or symptoms of myelopathy.

" (5) The effect of myelopathy has of itself been such as to render the
" plaintiff totally unfit to work."

The finding (4) has been accepted as establishing that the myelopathy was not a condition existing, but dormant, at the date of the original injury: it was a disease supervening after that event. If it had been dormant but existing it is not disputed that it would have had to be taken into account in the actual condition found to exist at the trial. But the appellant submits that a different result follows if the origination of the disease takes place after the accident, i.e. after the tortious act which gives rise to the claim. At the very first sight this distinction is unattractive, if only for the (to me compelling) reason that to accept it places in an impossible position both potential medical witnesses and the judge who has to value their evidence.

In an attempt to solve the present case, and similar cases of successive causes of incapacity according to some legal principle, a number of arguments have been invoked:

1. Causation arguments. The unsatisfactory character of these is demonstrated by the case of *Baker v. Willoughby* [1970] AC 467. I think

that it can now be seen that Lord Reid's theory of concurrent causes even if workable on the particular facts of *Baker v. Willoughby* (where successive injuries were sustained by the same limb) is as a general solution not supported by the authority he invokes *(Harwood* v. *Wyken Colliery Co.* [1913] 2 K.B. 158) nor workable in other cases. I shall not enlarge upon this point in view of its more than sufficient treatment in other opinions.

2. The " vicissitudes" argument. This is that since, according to accepted doctrine, allowance—and if necessary some discount—has to be made in assessing loss of future earnings for the normal contingencies of life, amongst which " illness" is normally enumerated, so, if one of these contingencies becomes actual before the date of trial, this actuality must

be taken into account. Reliance is here placed on the apophthegm " the " court should not speculate when it knows ". This argument has a good deal of attraction. But it has its difficulties: it raises at once the question whether a discount is to be made on account of all possible " vicissitudes ", or only on account of " non culpable " vicissitudes (i.e. such that if they occur there will be no cause of action against anyone, the theory being that the prospect of being injured by a tort is not a normally foreseeable vicissitude) or only on account of " culpable" vicissitudes (such as *per contra).* And if this distinction is to be made how is the court to act when a discounted vicissitude happens before trial? Must it attempt to decide whether there was culpability or not? And how is it to do this if, as is

likely, the alleged culprit is not before it?

This actual distinction between " culpable " and " non culpable " events was made, with supporting argument, in the Alberta case of *Penner* v. *Mitchell* [1978] 5 W.W.R. 328. One may add to it the rider that, as pointed out by Dickson J. in the Supreme Court of Canada, there are in modern society many public and private schemes which cushion the individual against adverse circumstances *(Andrews* v. *Grand & Toy Alberta Ltd.* [1978] 1 W.W.R. 577, 596/7). One then has to ask whether a discount should be made in respect of (a) such cases or (b) cases where there is no such cushion? There is indeed in the " vicissitude " argument some degree of circularity, since a discount in respect of possible events would only be fair if the actual event, discounted as possible, were to be taken into account when happening. But the whole question is whether it should be. One might just as well argue from what happens in " actual " cases to what should happen in discountable cases.

In spite of these difficulties, the " vicissitude" argument is capable in some, perhaps many cases, of providing a workable and reasonably just rule, and I would certainly not discountenance its use, either in the present case or in others.

The fact, however, is that to attempt a solution of these and similar problems, where there are successive causes of incapacity in some degree, upon classical lines (" the object of damages for tort is to place the " plaintiff in as good a position as if, etc." . ..." the defendant must " compensate for the loss caused by his wrongful act—no more "—" the " defendant must take the plaintiff as he finds him, etc.") is, in many cases no longer possible. We do not live in a world governed by the pure common law and its logical rules. We live in a mixed world where a man is protected against injury and misfortune by a whole web of rules and dispositions, with a number of timid legislative interventions. To attempt to compensate him upon the basis of selected rules without regard to the whole must lead either to logical inconsistencies, or to over—or under—compensation. As my noble and learned friend, Lord Edmund-Davies, has pointed out, no account was taken, in *Baker* v. *Willoughby* of the very real possibility that the plaintiff might obtain compensation from the Criminal Injuries Compensation Board. If he did in fact obtain this compensation he would, on the ultimate decision be over-compensated.

In the present, and in other industrial injury cases, there seems to me no justification for disregarding the fact that the injured man's employer is insured—indeed since 1972 compulsorily insured—against liability to his

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employees. The State has decided, in other words, on a spreading of *risk.* There seems to me no more justification for disregarding the fact that the plaintiff—presumably, we have not been told otherwise—is entitled to sickness and invalidity benefit in respect of his myelopathy the amount of which may depend on his contribution record, which in turn may have been affected by his accident. So we have no means of knowing whether the plaintiff would be over-compensated if he were, in addition, to receive the assessed damages from his employer, or whether he would be under-compensated if left to his benefit. It is not easy to accept a solution by which a partially incapacitated man becomes worse off in terms of damages and benefit through a greater degree of incapacity. Many other ingredients, of weight in either direction, may enter into individual cases. Without any satisfaction I draw from this the conclusion that no general, logical, or universally fair rules can be stated which .will cover, in a manner consistent with justice, cases of supervening events whether due to tortious, partially tortious, non-culpable or wholly accidental events. The courts can only deal with each case as best they can in a manner so as to provide just and sufficient but not excessive compensation, taking all factors into account. I think that this is what *Baker* v. *Willoughby* did—and indeed that Lord Pearson reached his decision in this way: the rationalisation of the decision as to which I at least have doubts, need and should not be applied to other cases. In the present case the Court of Appeal reached the unanswerable conclusion that to apply *Baker* v. *Willoughby* to the facts of the present case would produce an unjust result, and I am willing to accept the corollary that justice, so far as it can be perceived, lies the other way and that the supervening myelopathy should not be disregarded. If rationalisation is needed, I am willing to accept the " vicissitudes" argument as the best available. I should be more firmly convinced of the merits of the conclusion if the whole pattern of benefits had been considered, in however general a way. The result of the present case may be lacking in precision and rational justification, but so long as we are content to live in a mansion of so many different architectures, this is inevitable.

I would dismiss the appeal.

Lord Edmund-Davies

my lords,

This appeal relates to the assessment of damages where a party has been injured by another's tort, but, before his action comes on for trial, the

plaintiff sustains further injury as a result of a wholly independent and non-tortious event.

Mr. Jobling was the 48-year-old manager of the defendants' butcher shop at Newcastle-upon-Tyne. In January 1973 he slipped on the floor of a meat refrigerator owing to his employers' breach of the Office, Shops and Railway Premises Act 1963, by failing to keep it free from substances likely to cause persons to slip. He sustained a prolapsed intravertebral disc, but, although in considerable pain, which reduced his earning capacity by fifty per cent, he resumed work in a supervisory capacity until September 1976, when he became totally disabled by the manifestation of a hitherto unsuspected condition known as spondylotic myelopathy which was unrelated to the 1973 incident.

The action based on the 1973 incident came before Reeve J. in March 1979. He found that, even had the plaintiff sustained no injury therefrom, "... he would since 1976 by reason of his myelopathy have been rendered " unfit for work thereafter ". He continued, " Should I have regard to that " fact in assessing damages for loss of earnings arising from the 1973 " incident? At first blush it might seem that he is only entitled to be " compensated for loss of earnings during his working life as limited by " the myelopathy ". But, in the light of certain observations of Lord Reid in *Baker* v. *Willoughby* [1970] AC 467, Reeve J. concluded, " I am bound "to leave out of account the disability caused to Mr. Jobling by the

"myelopathy in assessing the damages resulting from the 1973 incident". In the result, his award of general damages included the sum of £6,825 for future loss of earnings, on the basis that the plaintiff's back injury must be regarded as continuing in to the future to reduce his earning capacity by 50 per cent. The Court of Appeal unanimously reversed that finding [1980] 3 W.L.R. 704), and this appeal has been brought to secure its restoration.

In *Baker v. Willoughby* this House found for the plaintiff on the basis of the Court of Appeal decision in *Harwood* v. *Wyken Colliery Co.* [1913] 2 K.B. 158. *Baker* v. *Willoughby* was different in one important respect from the present appeal, for this House was there concerned with successive torts. The plaintiff's left leg was injured in 1964 when he was knocked down by a car negligently driven by the defendant. In 1967, before his action came on for trial, he was shot in the same leg during an armed robbery and the limb had to be amputated well above the knee. The trial judge rejected the defendant's submission that no injury or loss suffered thereafter by the plaintiff could be attributed to his tort since its effect had been obliterated by the amputation, and he awarded damages on the basis of continued weakness and pain in the left ankle and the possibility of later development of arthritis in the leg. Following upon its unanimous reversal in the Court of Appeal ([1970] A.C., at p.478), this House restored the decision of the trial judge, Lord Reid (with whom Lord Guest, Viscount Dilhorne and Lord Donovan concurred) basing his conclusion largely on the Court of Appeal decision in *Harwood* v. *Wyken Colliery Co. (ante).* That was

a case brought under the Workmen's Compensation Act 1906, where a miner, who had for some months been paid compensation for a personal injury by accident arising out of and in the course of his employment, was later disabled for work by heart disease in no way attributable to the accident. Holding that "... there is no work which ... the accident has prevented " him from doing which the heart disease would not also have prevented " him from doing ", the judge found that compensation had ceased to be payable. The Court of Appeal reversed that decision. Hamilton L.J. stressed that the 1906 Act compensated workmen "in a new and statutory manner " in respect of a wholly statutory right", markedly different from that operating in the common law assessment of damages, the latter necessitating regard being had to contingencies such as "... the possibility of future " diminution or loss of earnings arising independently of the cause of action, " from increasing age, from accident or illness in future, and so forth ". Hamilton L.J. explained (at p. 170):

" The compensation for workmen under the Act is very different ". . . . It is based on what the workman has earned, not on what " he will be prevented from earning .... Redemption of weekly " payments by a lump sum is on the basis of an annuity, calculated by " expectation of life and not by expectation of immunity from further " accident or from growing age and infirmity ".

Hamilton L.J. further pointed out that, whereas damages are calculated so as to put the victim of tort in as good a position as he was before the wrong, the Act " is not founded on indemnity, and the ideas of retribution for " wrong doing and of *restitutio in integrum* are foreign to it ".

Notwithstanding this clear differentiation, this House (with the exception of Lord Pearson), holding that "causation cannot be different in tort", applied the *Harwood* decision to the different facts giving rise to the common law claim for damages brought in *Baker* v. *Willoughby.* Lord Reid could see "... no reason why the appellant's present disability cannot be regarded "as having two causes", and cited in support the following words of Hamilton L.J.:

" [the workman] is not disentitled to be paid compensation by reason " of the supervention of a disease of the heart. It cannot be said of " him that partial incapacity for work has not resulted and is not still " resulting from the injury. All that can be said is that such partial " incapacity is not still resulting ' solely' from the injury "

My Lords, I must respectfully decline to follow the route adopted by the majority of their Lordships in *Baker* v. *Willoughby.* For the decision in

Harwood v. *Wyken Colliery,* with its different facts requiring to be considered solely in the light of an elaborate statutory scheme having no counterpart in the common law, was there applied without qualification or differentiation to the common law claim then under consideration. In marked contrast was the speech of Lord Pearson, who made no reference to *Harwood* and who described as " formidable " the argument of defendant's

counsel that the consequence of the original accident had been submerged and obliterated by the supervening event. He nevertheless added (at 495E):

" *But it must not be allowed to succeed, because it produces manifest*
" *injustice.* The supervening event has not made the plaintiff less lame
" nor less disabled nor less deprived of amenities. It has not shortened
" the period over which he will be suffering. It has made him more
" lame, more disabled, more deprived of amenities. He should not
" have less damages through being worse off than might have been
" expected ". (Emphasis added).

I have to say respectfully that I find this approach unrealistic. It involves awarding damages on the basis of pain and suffering which the plaintiff would have suffered *if* the amputation had not taken place, and it compensates him for that which no longer exists. Nor is it correct to compensate him for loss of earnings when the very state which has produced that loss of earnings has ceased. The loss of earnings sustained after the amputation of the leg was caused by the amputation, not by the first accident. And the effect of the amputation was to obliterate completely all the constituents (pain and suffering, reduced earning capacity, and loss of amenities) of the damages to be awarded for the injury sustained as a result of that accident.

The key, as I think, to the contrary conclusion arrived at by Lord Pearson is to be found in the words which followed immediately upon the passage quoted above:

" The nature of the *injustice* becomes apparent if the supervening
" event is treated as a tort (as indeed it was) and if one envisages the
" plaintiff suing the robbers who shot him . . .”

The undoubted attraction of the *Baker* v. *Willoughby* decision is that it avoided what was there understandably regarded as an unacceptable result, as " It provides a greater measure of protection for the victim. For if the
" whole burden is placed upon the second tortfeasor and he is a man of
" straw—as would appear to have been the position in *Baker* v. *Willoughby*
" itself—or cannot be traced, then the victim is left without any redress "
(McGregor on Damages, 14th Ed., 1980, para. 1146). But such a view ignores the *ex gratia* payment of compensation provided under the Criminal Injuries Compensation Scheme in respect of personal injury directly attributable to *(inter alia)* crimes of violence. Atiyah considered that,
"... the existence of the Criminal Injuries Compensation Board . . .
" plainly cast a long shadow over the entire proceedings " ((1969) 85 L.Q.R. 475), but were this indeed so it seems inconceivable that the reports contain no mention of the Scheme, despite its introduction in August 1964. The simple fact is that it was never adverted to at any stage by anyone.

It cannot be doubted that the injured plaintiff in *Baker* v. *Willoughby* had a valid claim to compensation under the Scheme. But it needs to be added that such compensation is assessed on the basis of common law damages, and Baker would naturally be treated as a workman who at the time of the armed robbery had a maimed leg and reduced earning capacity. And the Board imposes a compensation limit based on gross average industrial earnings and it applies a strict approach to collateral

benefits (see the learned note in (1981) 97 L.Q.R. 210, at 212). So the injured plaintiff in *Baker* v. *Willoughby* might still have been better off under the decision of this House than under the Scheme, though that must remain a matter of pure speculation. And, even so, what one can say is that the " injustice ", the avoidance of which appears to have led to Lord Pearson's conclusion, did not, at least in its full dimensions, exist.
My Lords, the appellant's counsel submits that no materiality resides in the fact that the present case is not one of successive torts (as in *Baker),*

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but that of a tort followed by greater and enveloping injury arising from independent natural causes. He accepts (and, indeed, actually relies upon) the proposition that a defendant " must take the plaintiff as he finds him ". He also recognises that in the assessment of damages, the court must not speculate when it knows the facts, and must therefore have regard to relevant events which have occurred before trial or before the hearing of an appeal *(Curwen* v. *James* [1963] 1 W.L.R. 748; *Mulholland* v. *Mitchell* [1971] A.C. 666, *per* Lord Wilberforce at 680A). But appellant's counsel draws a novel distinction between (a) cases where at the time of the tort the victim was (whether or not he knew it) already suffering from a disease which later manifested itself, and (b) cases where the *inception* of the disease was an event supervening after the tort, and he submits that in the second type of case the later event has no materiality.

In my judgment, the distinction drawn between (a) and (b) is in principle irrelevant and in practice capable of creating great confusion. Indeed, in the present case Reeve J. in the course of his careful judgment expressed no conclusion regarding the time of inception of the myelopathy, and simply proceeded on the basis of the " Agreed Medical Formula " that—

" (4) At the date of the relevant accident (1973) there was *(sic)* no " discernible signs or symptoms of myelopathy.

" (5) The effect of the myelopathy has of itself been such as to render the plaintiff totally unfit to work ".

Uncertainty as to inception may well arise with frequency and ought not to be determinative of the outcome of proceedings unless legal principle demands. Not only was appellant's counsel unable to cite authority supporting the drawing of the distinction he advanced, but it is contrary to the principle enunciated in innumerable cases that, among the contingencies and vicissitudes of life relevant to the assessment of damages for tort, is that the victim's expectation of both natural and working life may be reduced or terminated by the future development of illness or infirmity; see, for example, the classic words of Brett L.J. in *Phillips* v. *L. and S.W. Railway Co.* (1879) 5 C.P.D. 280, at 291; those of Hamilton L.J., already quoted, in *Harwood* v. *Wyken Colliery Co.;* and those of Dickson J. in the Supreme Court of Canada in *Andrews* v.*Grand & Toy Alberta Ltd.* [1978] 1 W.W.R. 577.

But the submission of learned counsel for the appellant went even further. He would not restrict the exclusion of post-tort incidents to the inception of illness, for, as Ackner L.J. put it [1980] 1 W.L.R. 710C):

" It would equally follow on Mr. Stewart's submission that, if [after
" the tort] the plaintiff .... as a result solely of his own negligence,
" was knocked down by a motorcoach and thereby rendered totally
" incapable of further work, this incapacity would have to be wholly
" ignored and the plaintiff awarded his future loss of earnings as if
" that event had never occurred ".

Despite the attractive manner of their presentation, these bold submissions run so counter to fundamental principles as to be wholly unacceptable. In *Pearson* v. *Mitchell* [1978] 5 W.W.R. 328 the Alberta Supreme Court declined to extend the decision in *Baker* v. *Willoughby* to such cases as the present, Prowse J.A. saying that " any event that would otherwise be assessed
" as a future contingency is a relevant factor for assessing damages if it
" occurs before trial", and a similar conclusion was arrived at by Latey J. in *Hodgson* v. *GEC Ltd.* [1978] 2 Lloyd's 210.

My Lords, it is a truism that cases of cumulative causation of damage can present problems of great complexity. I can formulate no convincing juristic or logical principles supportive of the decision of this House in *Baker v. Willoughby,* and none were there propounded. Lord Pearson in particular manifestly acceded to the submission of learned counsel for the plaintiff that, " The defendant's approach, although based on a neat logical
" solution, results in culpable injustice and, *therefore,* must be rejected
" (475 H) . . . . If it is necessary to weigh the balance between fairness
" to the plaintiff and fairness to the defendant, the burden should not fall
" on the innocent plaintiff rather than the tortious defendant. The present

" is a case where justice and logic do not go together, and in the interests
" of justice the argument founded on logic by the defendants should be
" rejected. (476G)". Perhaps Glanville Williams was right in saying that:
" When the lawyer uses the conception of causation, he is not bound to use
" it in the same way as a philosopher, or a scientist, or an ordinary man.
" The concept can be moulded by considerations of policy " (1961 C.L.J. 62, at 75).

Abandoning the search for logical principles and advertising solely to questions of policy, it may therefore be that *Baker* v. *Willoughby* is acceptable on its own facts. Even so, I am shaken by (a) the reliance there mistakenly placed (as I respectfully think) upon *Harwood v. Wyken Colliery Co.,* and (b) the misapprehension that, were this House to uphold the Court of Appeal, the innocent yet badly injured workman might be wholly without redress for his injuries. As, however, learned counsel for the respondents was not minded to challenge the correctness of *Baker* on its different facts, the matter does not call for present determination.

But what is clear is that where, as in the present appeal, the question in issue relates to the assessment of damages when, a tort having been

committed, the victim is overtaken before trial by a wholly unconnected and disabling illness, the decision in *Baker* v. *Willoughby* has no application. Your Lordships are therefore untrammelled by precedent. The effect of the Court of Appeal's decision is that no considerations of policy warrant the imposition on the respondent of liability for the loss of earnings after the emergence of myelopathy. That is in accordance with the long-established and eminently reasonable principle that the onset or emergence of illness is one of the vicissitudes of life relevant to the assessment of damages. And it is of some interest to note that this view was evidently shared at all stages by learned counsel for the plaintiff in *Baker* v. *Willoughby* itself, and had been anticipated as long ago as 1961 by Glanville Williams *(ibid.,* at p.76). I believe the Court of Appeal decision was entirely correct, and I would dismiss the appeal.

Lord Russell of Killowen

my lords,

It is well established that in assessing compensation for damage caused to a plaintiff by a tortfeasor among other considerations is the consequent loss or reduction in earning capacity in the working life of the plaintiff. It is also well established that it is appropriate, in arriving at an estimated figure under that head, that some allowance or discount should be made for the ordinary vicissitudes of life. It is also well established that if by the time of trial facts emerge which make known a vicissitude of life as applicable to the plaintiff, that knowledge should replace that which would have been only an estimate: where there is knowledge estimation has no part.

One of these vicissitudes is that a plaintiff might thereafter succumb to a disease (unconnected with the tort) which would abbreviate the plaintiff's working life. Commonly the discount for such a possibility might well be small: but it is not to be ignored. If before trial the plaintiff does so succumb in my opinion the evidence of its abbreviating effect must take the place of estimate, and reduce the amount of compensation for the tortious damage under that head. In the instant case the plaintiff succumbed to spondylotic myelopathy which by 1976, before the trial, terminated his working life, which, had its length remained as at the date of the tort, would have continued (albeit at a lower wage earning capacity) for several more years. For the plaintiff appellant it was contended that since the evidence did not show that this condition was latent and dormant at the date of the tortious injury, its emergence could not serve to reduce the amount of compensation based on an estimate of working life. But it was conceded that if the condition was in some degree present at the date of the tort the contrary view should prevail.

In the first place I find that this attempted distinction is calculated to produce medical problems virtually impossible of solution. In the joint medical report dated 5th March 1979 all that could be said was that at the

date of the tort "there was no discernible signs or symptoms of " myelopathy ".

In the second place this approach appears to me to intrude upon the well known principle of discount or allowance for the vicissitudes of life, by the wholly irrelevant principle that a tortfeasor takes his victim as he finds him. Among the vicissitudes of life falls to be included the possibility of *developing* a disease which will shorten or terminate a plaintiff's working life: if that development takes place before trial the vicissitude must, it seems to me, move from the field of estimate to the field of knowledge.

I agree therefore with the approach of the Court of Appeal ([1980] 3 W.L.R. 704).

There remains the question of the decision of this House in *Baker* v. *Willoughby* [1970] AC 467, the facts in which have been related by others of your Lordships. That was a case of successive torts by two tortfeasors. The first tort severely damaged the plaintiff's leg: the second tort required the removal of that leg by surgery. This House decided that the first tortfeasor could not escape liability for the damage done to the now non-existent leg. The main consideration leading to the decision was that otherwise the second tortfeasor could (on the principle that a tortfeasor is entitled to take his victim as he finds him) reduce the damages against him on the ground that he was only responsible for the removal of an already damaged leg, and not for removal of a sound leg: thus, if the first tortfeasor escaped liability, the plaintiff could not get full compensation for the injuries done to him. I am not prepared to state disagreement with the decision. I am prepared to suggest that physical damage due to a subsequent tort is not to be regarded as a relevant vicissitude. Some of the reasons given in that case are susceptible of being taken as pointing in favour of the appellant in the instant appeal, but they do not persuade me that we are led by *Baker* v. *Willoughby* to take a further step by allowing this appeal. I add that I cannot, with respect, find the reliance of Lord Reid on the workmen's compensation case of *Harwood v. Wyken Colliery Co.* sound.

In short I am persuaded that the Court of Appeal in the instant case was right, and I would dismiss this appeal.

Lord Keith of Kinkel

my lords,

This appeal raises a short but very difficult point in connection with the assessment of damages for personal injuries. In January 1973 the appellant, in the course of his employment with the respondents and as a result of their negligence, suffered an injury to his back in the shape of a slipped disc. This had the effect of incapacitating him for any but light work. In September 1976 the appellant was found to be suffering from a condition known as cervical myelopathy, unrelated to the accident, which by the time his claim came to trial, in March 1979, had resulted in a total incapacity for work. According to an agreed medical report, there were no discernible signs or symptoms of myelopathy at the date of the accident in 1973.

In that state of affairs the question arose whether the respondents were liable to pay damages for loss of earnings upon the basis of a partial incapacity continuing throughout the period which, in the absence of the myelopathy, would have represented the balance of the appellant's normal working life, or whether their liability was limited to loss of earnings up to the time when the myelopathy resulted in total incapacity.

The trial judge (Reeve J.) decided in favour of the greater liability. He took the view that he was bound, on the authority of *Baker* v. *Willoughby* [1970] AC 467, to leave out of account the disability caused to the appellant by the myelopathy in assessing the damages resulting from the 1973 accident.

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The Court of Appeal (Stephenson and Ackner L.JJ. and Dame Elizabeth Lane) reversed the decision of Reeve J., holding that *Baker* v. *Willoughby (supra)* did not compel the conclusion that where the victim of a tortious act suffers a further disability through a supervening event of non-tortious character, such as natural disease, the consequences of the latter event must be ignored in the assessment of damages.

The facts in *Baker* v. *Willoughby (supra)* were that the plaintiff suffered an injury to his left leg through the defendant's negligence, resulting in a continuing disability which reduced his earning capacity. Before his case came to trial he was shot by a robber in the same leg, which in consequence had to be amputated. As a result the plaintiff's disability was rather greater than it had been before. This House reversing the Court of Appeal, held that the award of damages for loss of earnings did not fall to be diminished by reason of the later injuries, upon the view that they represented no more than a concurrent cause, along with the original injury, of the plaintiff's disability.

It was argued for the respondent, defendant in the action, that the second injury removed the very limb from which the earlier disability had stemmed, and that therefore no loss suffered thereafter could be attributed to the respondent's negligence. In rejecting this argument Lord Reid, whose speech was concurred in by Lord Guest, Viscount Dilhorne and Lord Donovan, said at p.492:

" If it were the case that in the eye of the law an effect could only
" have one cause then the respondent might be right. It is always
" necessary to prove that any loss for which damages can be given was
" caused by the defendant's negligent act. But it is a commonplace
" that the law regards many events as having two causes: that happens
" whenever there is contributory negligence for then the law says that
" the injury was caused both by the negligence of the defendant and
" by the negligence of the plaintiff. And generally it does not matter
" which negligence occurred first in point of time."

Lord Reid took the view that the appellant's disability could be regarded as having two causes, and he found support for this view in *Harwood* v. *Wyken Colliery Co.* [1913] 2 K.B. 158. That was a workmen's compensation case in which the Court of Appeal held the plaintiff entitled to compensation,

notwithstanding that there had supervened upon the incapacity resulting from an accident at work an incapacity of similar extent resulting from heart disease. Lord Reid later went on to distinguish the case where damages might properly fall to be diminished by reason of the death of the plaintiff before trial, upon the basis that in such a case the supervening event had reduced the plaintiff's loss. He said at p.494:

" If the later injury suffered before the date of the trial either reduces
" the disabilities from the injury for which the defendant is liable, or
" shortens the period during which they will be suffered by the plaintiff,
" then the defendant will have to pay less damages. But if the later
" injuries merely become a concurrent cause of the disabilities caused by
" the injury inflicted by the defendant, then in my view they cannot
" diminish the damages. Suppose that the plaintiff has to spend a
" month in bed before the trial because of some illness unconnected
" with the original injury, the defendant cannot say that he does
" not have to pay anything in respect of that month; during that month
" the original injuries and the new illness are concurrent causes of
" his inability to work and that does not reduce the damages."

It seems clear from this passage that the principle of concurrent causes which Lord Reid selected as the *ratio decidendi* of the case would, if sound, apply with the same force where the supervening event is natural disease, as in the present case, as it does where the supervening event is a tortious act.

Lord Pearson's main reason for rejecting the respondent's argument was that it would produce manifest injustice. He said at p.495:

" The supervening event has not made the plaintiff less lame nor
" less disabled nor less deprived of amenities. It has not shortened

" the period over which he will be suffering. It has made him more
" lame, more disabled, more deprived of amenities. He should not have
" less damages through being worse off than might have been expected."

Lord Pearson went on to illustrate the nature of the injustice by pointing out that, where the supervening event was a tortious act, the later tortfeasor, upon the principle that he takes his victim as he finds him, would be liable for damages in respect of loss of earnings only to the extent that the act had caused an additional diminution of earning capacity. If the earlier incapacity were treated, in a question with the first tortfeasor, as submerged by the later, the plaintiff would be left in the position of being unable to recover from anyone a substantial part of the loss suffered after the date of the second tort. So he would not be fully compensated in respect of the combined effects of both torts. It is to be observed that this was the consideration which had been principally urged in the argument for the appellant.

A notable feature of the speeches in *Baker* v. *Willoughby (supra)* is the absence of any consideration of the possible implications of what may be termed the " vicissitudes " principle. The leading exposition of this principle

is to be found in the judgment of Brett L.J. in *Phillips* v. *London & South Western Railway Co.* (1879) 5 C.P.D. 280, at p.291:

" if no accident had happened, nevertheless many circumstances
" might have happened to prevent the plaintiff from earning his previous
" income; he may be disabled by illness, he is subject to the ordinary
" accidents and vicissitudes of life; and if all these circumstances of
" which no evidence can be given are looked at, it will be impossible to
" exactly estimate them; yet if the jury wholly pass them over they will
" go wrong, because these accidents and vicissitudes ought to be taken
" into account. It is true that the chances of life cannot be accurately
" calculated, but the judge must tell the jury to consider them in order
" that they may give a fair and reasonable compensation."

This principle is to be applied in conjunction with the rule that the court will not speculate when it knows, so that when an event within its scope has actually happened prior to the trial date, that event will fall to be taken into account in the assessment of damages.

In *Harwood v. Wyken Colliery Co. (supra),* which was founded on by Lord Reid in *Baker* v. *Willoughby* as supporting the view which he took upon causation, Hamilton L.J. was at pains to stress that compensation under the Workmen's Compensation Acts had nothing in common with an award of damages for personal injuries, being based on what the workman has earned in the past, not upon what he will be prevented from earning in the future. He fully recognised the application of the " vicissitudes" principle in the damages context, saying at p. 169:

" In assessing damages for injury caused to a plaintiff workman by
" the tortious negligence of the employer or his servants a jury would
" be directed that, their damages being a compensation once for all, they
" must consider not merely past injury, pain and suffering endured,
" expenses incurred and earnings lost, but also future loss. They
" would have to measure in money the future effects of permanent or
" continuing disablement, but they must consider also the possibility
" of future diminution or loss of earnings arising independently of the
" cause of action, from increasing age, from accident or illness in
" future, and so forth. They would be directed that they had to give
" solatium for suffering and compensation for disablement, but so that
" the tort-sufferer should not make a profit out of the wrong done him,
" the object being by the verdict to place him in as good a position as
" he was in before the wrong, but not in any wise in a better one."

By way of contrast, under the Workmen's Compensation Acts the workman was given a guarantee of compensation on the statutory scale where he was subject to an incapacity resulting from personal injury by accident arising out of and in the course of his employment. The statute did not say that the incapacity must result *solely* from the injury. It was therefore irrelevant

that the incapacity resulted also to some extent from heart disease. In the circumstances *Harwood v. Wyken Colliery Co. (supra)* must be regarded as an infirm foundation for the decision in *Baker* v. *Willoughby (supra).*

It is implicit in that decision that the scope of the " vicissitudes " principle is limited to supervening events of such a nature as either to reduce the disabilities resulting from the accident or else to shorten the period during which they will be suffered. I am of opinion that failure to consider or even advert to this implication weakens the authority of the *ratio decidendi* of the case, and must lead to the conclusion that in its full breadth it is not acceptable. The assessment of damages for personal injuries involves a process of *restitutio in integrum.* The object is to place the injured plaintiff in as good a position as he would have been in but for the accident. He is not to be placed in a better position. The process involves a comparison between the plaintiff's circumstances as regards capacity to enjoy the amenities of life and to earn a living as they would have been if the accident had not occurred and his actual circumstances in those respects following the accident. In considering how matters might have been expected to turn out if there had been no accident, the " vicissitudes " principle says that it is right to take into account events, such as illness, which not uncommonly occur in the ordinary course of human life. If such events are not taken into account, the damages may be greater than are required to compensate the plaintiff for the effects of the accident, and that result would be unfair to the defendant. Counsel for the appellant sought to draw a distinction between the case where the plaintiff, at the time of the tortious injury, is already suffering from a latent undetected condition which later develops into a disabling illness, and the case where the inception of the illness occurs wholly at a later date. In the former case, so it was maintained, the illness would properly fall to be taken into account in diminution of damages, upon the principle that the tortfeasor takes his victim as he finds him, but in the latter case it would not. There is no trace of the suggested distinction in any of the authorities, and in my opinion it is unsound and apt to lead to great practical difficulties, providing ample scope for disputation among medical men. What would be the position, it might be asked, of an individual having a constitutional weakness making him specially prone to illness generally, or an hereditary tendency to some specific disease.

I am therefore of opinion that the majority in *Baker* v. *Willoughby* were mistaken in approaching the problems common to the case of a supervening tortious act and to that of supervening illness wholly from the point of view of causation. While it is logically correct to say that in both cases the original tort and the supervening event may be concurrent causes of incapacity, that does not necessarily, in my view, provide the correct solution. In the case of supervening illness, it is appropriate to keep in view that this is one of the ordinary vicissitudes of life, and when one is comparing the situation resulting from the accident with the situation had there been no accident, to recognise that the illness would have overtaken the plaintiff in any event, so that it cannot be disregarded in arriving at proper compensation, and no more than proper compensation.

Additional considerations come into play when dealing with the problems arising where the plaintiff has suffered injuries from two or more successive and independent tortious acts. In that situation it is necessary to secure that the plaintiff is fully compensated for the aggregate effects of all his injuries. As Lord Pearson noted in *Baker* v. *Willoughby (supra)* it would clearly be unjust to reduce the damages awarded for the first tort because of the occurrence of the second tort, damages for which are to be assessed on the basis that the plaintiff is already partially incapacitated. I do not consider it necessary to formulate any precise juristic basis for dealing with this situation differently from the case of supervening illness. It might be said that a supervening tort is not one of the ordinary vicissitudes of life, or that it is too remote a possibility to be taken into account, or that it can properly be disregarded because it carries its own remedy. None of these formulations, however, is entirely satisfactory. The fact remains that the principle of full

compensation requires that a just and practical solution should be found. In the event that damages against two successive tortfeasors fall to be assessed at the same time, it would be highly unreasonable if the aggregate of both awards were less than the total loss suffered by the plaintiff. The computation should start from an assessment of that total loss. The award against the second tortfeasor cannot in fairness to him fail to recognise that the plaintiff whom he injured was already to some extent incapacitated. In order that the plaintiff may be fully compensated, it becomes necessary to deduct the award so calculated from the assessment of the plaintiff's total loss and award the balance against the first tortfeasor. If that be a correct approach, it follows that, in proceedings against the first tortfeasor alone, the occurrence of the second tort cannot be successfully relied on by the defendant as reducing the damages which he must pay. That, in substance, was the result of the decision in *Baker v. Willoughby*, where the supervening event was a tortious act, and to that extent the decision was, in my view, correct.

Before leaving the case, it is right to face up to the fact that, if a non-tortious supervening event is to have the effect of reducing damages but a subsequent tortious act is not, there may in some cases be difficulty in ascertaining whether the event in question is or is not of a tortious character, particularly in the absence of the alleged tortfeasor. Possible questions of contributory negligence may cause additional complications. Such difficulties are real, but are not sufficient, in my view, to warrant the conclusion that the distinction between tortious and non-tortious supervening events should not be accepted. The court must simply do its best to arrive at a just assessment of damages in a pragmatical way in the light of the whole circumstances of the case.

My Lords, for these reasons I would dismiss the appeal.

Lord Bridge of Harwich

my lords,

On the 15th January 1973, the appellant injured his back in a fall at the premises where he was employed by the respondents. He sustained a prolapsed intervertebral disc which produced low back pain. In 1976 he developed cervical myelopathy. This condition was wholly unrelated to the 1973 injury. It has also been treated as common ground in the courts below and in your Lordships' House, that the condition of cervical myelopathy was not present in any latent or dormant form at the date of the appellant's accident, but developed subsequently. The effect of the myelopathy was of itself such as to render the appellant totally unfit to work from the end of September 1976 onwards.

The appellant's claim for damages against the respondents was tried by Reeve J. who, on the 26th March 1979, gave judgment for the appellant, awarded him £6000 for general damages (reduced in the Court of Appeal to £4000) and awarded him special damages representing his loss of earnings from the date of the accident to the end of September 1976. No issue is raised as to any of these matters in your Lordships' House. The learned judge went on to consider the extent to which the appellant's earning capacity would have been impaired by the accident injury if the myelopathy had not supervened. He assessed this impairment at 50 per cent, held that he was bound by authority to disregard the supervening myelopathy in assessing the damages resulting from the accident, and accordingly awarded further special damages to represent half the appellant's lost earnings from October 1976 to the date of the trial, and a sum in respect of future loss of earnings calculated by applying a multiplier of 7 to a figure representing half the appellant's annual earning capacity. The respondent appealed against the inclusion of these elements of damage in the award on the ground that the supervening incapacity of the appellant attributable to myelopathy put an end to their legal liability for any loss of earnings which, but for myelopathy, would have resulted from the

appellant's accident injury in 1973. The Court of Appeal (Stephenson and Ackner LJJ. and Dame Elizabeth Lane), in a unanimous judgment delivered by Ackner LJ., so held and reduced the damages accordingly. The appellant invites your Lordships to restore the award of the learned judge.

The authority by which the judge held himself bound, and that which is the linchpin of the argument for the appellant before your Lordships, is the decision of this house in *Baker* v. *Willoughby* [1970] AC 467. The plaintiff in that case sustained, by the negligence of the defendant, an injury to his left leg which caused a stiff and painful left ankle, liability to future arthritis, diminished mobility and loss of earning capacity. Subsequently, but before the trial, he was shot in the left leg in the course of a robbery and as a result the leg had to be amputated above the knee. The trial judge held that he should not take into account in his assessment of the damages the amputation of the left leg, since the appellant's actual and prospective loss flowing from the respondent's negligent act had not been reduced by the subsequent loss of the leg. The Court of Appeal reduced the damages to such as were appropriate to compensate the plaintiff

for the effects of the injury up to the date of the subsequent amputation but no longer, holding that the subsequent consequences of the plaintiff's disability were in law attributable not to the original injury but to the subsequent amputation. This House reversed that decision and restored the award of the trial Judge.

It is significant that the argument for the plaintiff in *Baker's* case, was put by Mr. Hugh Griffiths QC, as he then was, on the ground that special considerations governed the assessment of damages in the case of a plaintiff suffering successive injuries, such as those suffered by Mr. Baker, where both were caused tortiously. Mr. Griffiths appears to have conceded, by implication if not expressly, that, if the amputation of the plaintiff's leg had been caused by disease or non-tortious accident, the Court of Appeal's view of its effect on the assessment of damages for the previous injury would have been correct. He argued that the trial judge's basis of assessment was necessary in the case of successive tortious injuries to ensure that the plaintiff should recover in the sum of the awards against both tortfeasors the aggregate loss he had sustained from both injuries. This he would not do if the first tortfeasor's liability was reduced by the effect of the second injury, and the second tortfeasor was entitled to take the plaintiff as he found him, i.e. as an already injured man. The Court of Appeal rejected this argument as fallacious on the ground that the second tortfeasor would be liable to compensate the plaintiff not only for the loss of his injured lee, but also for the diminution of his entitlement to damages against the first tortfeasor attributable to the loss of the leg.

Notwithstanding the course taken by the argument, in the speech of Lord Reid in this House (with which Lord Guest, Viscount Dilhorne, and Lord Donovan agreed) there is no reference at all to the circumstance that the amputation of the plaintiff's leg was the result of a tort as a factor relevant to the decision. On the contrary, the reasoning in the speech applies equally to the effect of a supervening disability arising from illness or non-tortious accident as the following passages amply demonstrate.

His Lordship said, at p.492: —

"A man is not compensated for the physical injury: he is
" compensated for the loss which he suffers as a result of that injury.
" His loss is not in having a stiff leg: it is in his inability to lead a
" full life, his inability to enjoy those amenities which depend on
" freedom of movement and his inability to earn as much as he used to
" earn or could have earned if there had been no accident. In this
" case the second injury did not diminish any of these. So why should
" it be regarded as having obliterated or superseded them?

" If it were the case that in the eye of the law an effect could
" only have one cause then the respondent might be right. It is always
" necessary to prove that any loss for which damages can be given was
" caused by the defendant's negligent act. But it is a commonplace that

" the law regards many events as having two causes: that happens
" Whenever there is contributory negligence for then the law says
" that the injury was caused both by the negligence of the defendant
" and by the negligence of the plaintiff. And generally it does not
" matter which negligence occurred first in point of time.

" I see no reason why the appellant's present disability cannot be
" regarded as having two causes, and if authority be needed for this
" I find it in *Harwood v. Wyken Colliery Co.* [1913] 2 K.B. 158.
" That was a Workmen's Compensation Act case. But causation
" cannot be different in tort. There an accident made the man only
" fit for light work. And then a heart disease supervened and it also
" caused him only to be fit for light work. The argument for the
" employer was the same as in the present case. Before the disease
" supervened the workman's incapacity was caused by the accident.
" Thereafter it was caused by the disease and the previous accident
" became irrelevant: he would have been equally incapacitated if the
" accident had never happened. But Hamilton L.J. said, at p. 169:
" '... he is not disentitled to be paid compensation by reason of
" ' the supervention of a disease of the heart. It cannot be said
" ' of him that partial incapacity for work has not resulted and is not
" ' still resulting from the injury. All that can be said is that such
" ' partial incapacity is not still resulting " solely" from the
" ' injury.' "

He added, at p.494:

" If the later injury suffered before the date of the trial either reduces
" the disabilities from the injury for which the defendant is liable, or
" shortens the period during which they will be suffered by the plaintiff,
" then the defendant will have to pay less damages. But if the later
" injuries merely become a concurrent cause of the disabilities caused
" by the injury inflicted by the defendant, then in my view they cannot
" diminish the damages. Suppose that the plaintiff has to spend a
" month in bed before the trial because of some illness unconnected
" with the original injury, the defendant cannot say that he does not
" have to pay anything in respect of that month; during that month the
" original injuries and the new illness are concurrent causes of his
" inability to work and that does not reduce the damages."

In the speech of *Lord* Pearson there are references to the tortious causation of the supervening injury, but it is certainly not clear that his Lordship was treating this as the critical factor and thus adopting the narrow ground for decision advanced by Mr. Griffiths in argument. In any event, the *ratio decidendi* must be collected from the reasons adopted by the majority and, according to the strict doctrine of precedent, I think Reeve J. was right to treat the wide principle expressed in the passages from the speech of Lord Reid which I have cited as binding him to decide the present case as he did.

Mr. Stewart has naturally relied on *Baker's* case as binding authority supporting the learned judge's assessment of the damages, but, recognising that it is open to your Lordships to examine critically and, if thought right,

to differ from Lord Reid's reasoning, he has sought to reconcile it with those principles of law which the Court of Appeal, in the instant case, treated as justifying them in reaching a different conclusion from the learned judge.

The first principle is that, in assessing damages for future loss of earnings, the court makes a discount for the possibility that, apart from the injury in respect of which he claims, the plaintiff's earning capacity may be diminished by some independent cause (" the vicissitudes principle ").

The second principle is that, since the court does not speculate when it knows, damages for loss of earnings, if the plaintiff's earning capacity has before trial been actually diminished by some independent cause of the kind to which the court would have had regard in applying the vicissitudes principle, must be reduced accordingly.

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Mr. Stewart does not dispute the existence of either of these principles, but he contends that the scope of the vicissitudes principle must be confined to consideration of those future possibilities which arise from factors which can be shown at the date of trial to have been already inherent in some way in the plaintiff's physical make-up, or in his situation at the date of the tort, such as a latent but symptomless arthritis or a particular liability to injury by accident arising from the hazardous nature of his occupation.

Naturally, when such factors *are shown* to have been present, they will materially affect the extent of the discount to be made in assessing damages, but the judgment of the Court of Appeal has drawn attention to the absurdities which would flow from the adoption of any such absolute limitation of the vicissitudes principle as that suggested. The limitation would, moreover, be contrary both to authority and to the underlying theory of legal causation on which the vicissitudes principle itself depends.

In the classic words cited by the Court of Appeal from the judgment of Brett LJ. in *Phillips v. London and South-Western Railway Co.* (1879) 5 C.P.D. 280, at 291:—

" if no accident had happened, nevertheless many circumstances might
" have happened to prevent the plaintiff from earning his previous
" income; he may be disabled by illness, he is subject to the *ordinary*
" accidents and vicissitudes of life; and if all these circumstances of
" which no evidence can be given are looked at, it will be impossible
" to exactly estimate them; yet if the jury wholly passed them over
" they will go wrong, because these accidents and vicissitudes ought to
" be taken into account." (Emphasis added).

In delivering the judgment of the Privy Council in *Paul* v. *Rendell* on the very day your Lordships concluded the hearing of the appeal in this case, Lord Diplock said: —

" Where, as in the present case, the plaintiff's disability is permanent,
" it is, their Lordships are informed, the common practice in Australia

" to use actuarial tables for calculating the present capital value of
" future annual economic loss resulting from the reduction in the
" plaintiff's annual earnings which the judge considers that he will suffer
" for the remainder of his working life. From this figure as a starting
" point the judge makes such adjustments as he thinks appropriate.
" Some adjustment downwards would be needed to take account of all
" those contingencies such as unemployment, ill-health, or any other
" disability short of premature death, for which allowance is not made
" in the actuarial tables but which might have deprived the plaintiff of
" his earning power or reduced it below the figure adopted for the
" purpose of the actuarial calculation."

The vicissitudes principle itself, it seems to me, stems from the fundamental proposition of law that the object of every award of damages for monetary loss is to put the party wronged so far as possible in the same position, no better and no worse, as he would be in if he had not suffered the wrong in respect of which he claims. To assume that an injured plaintiff, if not injured, would have continued to earn his full wages for a full working life, is very probably to over-compensate him. To apply a discount, in respect of possible future loss of earnings, arising from independent causes, may be to under-compensate him. When confronted by future uncertainty, the court assesses the prospects and strikes a balance between these opposite dangers as best it can. But when the supervening illness or injury which is the independent cause of loss of earning capacity has manifested itself before trial, the event has demonstrated that, even if the plaintiff had never sustained the tortious injury, his earnings would now be reduced or extinguished. To hold the tortfeasor, in this situation, liable to pay damages for a notional continuing loss of earnings attributable to the tortious injury, is to put the plaintiff in a better position than he would be in if he had never suffered the tortious injury. Put more shortly, applying well-established principles for the assessment of damages at common law, when a plaintiff

injured by the defendant's tort is wholly incapacitated from earning by supervening illness or accidental injury, the law will no longer treat the tort as a continuing cause of any loss of earning capacity.

It follows from the foregoing that I am, with the utmost respect, unable to agree with the opinion of Lord Reid in *Baker's* case, as expressed in the two passages from his speech which I have cited. In particular, I cannot accept that the decision in *Harwood v. Wyken Colliery Co.* [1913] 2 K.B. 158, affords any authority in support of Lord Reid's conclusion, or that he was right to say that causation could not be different in tort and under the Workmen's Compensation Acts. In *Harwood's* case, Hamilton LJ., with whose judgment Cozens-Hardy MR., agreed, was at pains to stress the very different principles governing a tortfeasor's liability to pay damages at common law on the one hand, and the statutory liability of an employer to compensate an injured workman on the other. With reference to the former, he clearly recognised the vicissitudes principle. "They" (sc. the jury) he said at p. 170 " would have to measure in money the future effects

" of permanent or continuing disablement, but they must consider also " the possibility of future diminution or loss of earnings arising independently " of the cause of action, from increasing age, from accident or illness in " future, and so forth." With reference to the latter, he founded his view that an injury at work could be a continuing cause of incapacity, which would continue to attract compensation notwithstanding supervening illness, entirely on the construction of the particular language of the statute to be applied.

Having reached the conclusion that the *ratio decidendi* of *Baker's* case cannot be sustained, it remains to consider whether the case should still be regarded as authority, as a decision on its own facts for the proposition that, when two successive injuries are both caused tortiously, the supervening disability caused by the second tort should, by way of exception to the general rule arising from the application of the vicissitudes principle, be disregarded when assessing the liability of the first tortfeasor for damages for loss of earnings caused by the first tort. I find it difficult to attribute such authority to the decision, when both the Court of Appeal and this House were expressly invited to adopt that proposition, and both, in different ways, declined the invitation. There is a powerful, perhaps irresistible, attraction in the argument that, in the circumstances envisaged, the aggregate of the damages recoverable by the plaintiff, should, provided both tortfeasors can be found and can meet their liability, be sufficient to cover the aggregate loss of earnings, past and future, which results from the combined effect of both injuries. But whether this end is properly achieved, as between the two tortfeasors, by apportioning liability on the principle which commended itself to the Court of Appeal, or on the principle for which Mr. Griffiths contended in argument, seems to me a very difficult question. For the reasons I have indicated, I think the speeches in your Lordships' House, by going off on a different tack, ultimately left that question unanswered. In the instant appeal, Mr. Lawton, for the respondents, was content to accept the decision in *Baker's* case as correct on its facts, so your Lordships have not heard argument on the question. In these circumstances, the proper conclusion seems to me to be that the question should remain open for decision on another occasion, if and when it arises.

However that may be, for the reasons indicated earlier in this speech, I would dismiss the appeal.