cover perhaps "third-party" discrimination, perceived discrimination, and conduct unrelated to any particular person's condition. Various versions appear inconsistently and incoherently across the domestic legislation, and those definitions falling short of the broad possibility confirmed in *English*, fall short of the consistently broad definition provided by the predominant EC Directives.

MICHAEL CONNOLLY

CAUSATION AND THE COMPULSIVE GAMBLER

IN *Calvert* v. *William Hill Credit Ltd.* [2008] EWHC 454 (Ch) Briggs J. held that the defendant bookmakers owed a duty of care to the claimant (one of their customers, and a compulsive gambler) to stop him from placing telephone bets with them. This sounds extraordinary, but Briggs J.'s careful judgment limited his findings to the unusual facts of the case, in which William Hill had expressly assumed responsibility to Mr Calvert to prevent him from gambling telephonically with them, pursuant to their published "self-exclusion policy". William Hill's employees negligently failed to "exclude" Mr Calvert, in breach of these express undertakings. Nevertheless, the learned judge held that the claim failed at the causation hurdle: it would "fly in the face of common sense … were [Mr Calvert] able to attribute liability for his financial ruin to a particular bookmaker with whom he had made the relevant losses due to their failure to exclude him at his request, if he would, had he been excluded by that bookmaker, probably have ruined himself by betting with one or more of that bookmaker's competitors," at [196].

Mr Calvert's appeal against the decision on causation has now been dismissed: [2008] EWCA Civ 1427. The Court of Appeal seemed to take a fundamentally similar approach to Briggs J. (see [2008] EWHC 454 (Ch) at [197]: the breach "may have been a *sine qua non* for [the claimant's] particular gambling losses, but would not have been *the effective cause* of his ruin," (emphasis added)). Sir Anthony May P.'s leading judgment stressed the need to limit recovery to losses within the scope of the duty assumed by the defendant. Indeed, duty and causation were said, at [45], to form a "composite" question. In *Calvert* itself, the Court of Appeal held that William Hill had not undertaken to prevent Mr Calvert from gambling altogether, but only to stop him from placing telephone bets with William Hill. They "did not assume a responsibility to enable Mr Calvert to gamble free from all risk," at [47]. Accordingly, the learned judge's finding that Mr Calvert would probably have gambled away the money anyway, albeit with different bookmakers, even if William Hill had properly implemented the self-exclusion policy, meant the claim must fail.

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It is suggested that this potentially overcomplicates the analysis. The case could have been decided on simple factual "but for" grounds, by analogy with *Barnett* v. *Chelsea and Kensington Hospital* [1969] 1 Q.B. 428 (as counsel for the defendants had submitted: see [37]). In *Barnett*, but for the doctor's negligent failure to diagnose arsenic poisoning, the victim would still have died as there was no known antidote. In *Calvert*, Briggs J. had similarly found, on the balance of probabilities, that Mr Calvert would anyway have sustained the financial losses that he claimed. May P. indeed commented at [36]: "It is certainly correct that the judge answered this question as a finding of fact, which incidentally in our view is not amenable to appeal in this court."

Yet both courts seemed reluctant to hold that there was no "but for" causation given that, but for William Hill's negligence, Mr Calvert would not (and could not) have placed the actual losing bets that he did place and thus would not have lost his money in precisely the same way. Indeed, the dismissal of his claim sits uneasily with *Chester* v. *Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 (see [34]), albeit that that was an unusual, not to say questionable, decision. Nonetheless, "but for" always requires a comparison between what actually happened (past fact) and would have happened were it not for the tort (past hypothetical). Deciding what *would have* happened may often be difficult. But once the court has determined that the loss would still have occurred despite the tort, the claim must fail on orthodox grounds without the need to consider the "scope of the duty" (see also e.g. *McWilliams* v. *Arrol* [1962] 2 All E.R. 623).

Consider further the "*SAAMCO*" case [1997] A.C. 191, a seminal decision for the "scope of the duty" analysis. The House of Lords held that negligent property valuers were not liable for that part of their clients' losses attributable to a general collapse in the property market since the valuers had assumed responsibility only for the accuracy of their valuations, and not the wisdom of investing in the property market at all. Counsel for the defendants criticised the Court of Appeal (which had allowed recovery in full: [1995] Q.B. 375) for "ignor[ing] the reality that the plaintiffs might have entered into a different or alternative transaction and have been similarly exposed to market fall". This criticism suggested that there was no but-for causation of the market fall losses, and accordingly that that part of the loss was unrecoverable. But Lord Hoffmann did not think that the case could be decided so easily. He accepted that "in principle there is no reason why the valuer should not be entitled to prove that the lender has suffered no loss because he would have used his money in some altogether different but equally disastrous venture". But in practice, his Lordship explained, this will be difficult because "it will not ordinarily be easy for

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the valuer to prove what else the lender would have done with his money". (For this aspect of *SAAMCO*, citing cases where such an approach has been taken, see Loke, "The valuer's liability for negligent valuation" [1999] Legal Studies 48, 60–63.) The House of Lords was not willing to hold that the plaintiff lenders would have lost the money in the property crash in any case, and therefore had to consider whether the "scope of the duty" limited recovery *as a matter of law* for loss which was *in fact caused by* the defendants' negligence.

This poses extremely controversial questions (for criticism of Lord Hoffmann's answer in *SAAMCO* itself, see Stapleton (1997) 113 L.Q.R. 1). But those questions are simply unnecessary when there was no but-for causation in fact. (For a plea to separate legal responsibility from the factual element of causation altogether, see now Stapleton, "Choosing what we mean by 'causation' in the law" (2008) 73 Missouri L.R. 433.) Of course, the Court of Appeal in *Calvert* was entirely correct to say that the legal responsibility question must be faced directly; Briggs J.'s reliance on "common sense" was therefore obfuscation, and rightly deplored. But this case could and should have been decided without entering into the complex debate of "legal causation" at all, given the judge's unchallenged findings of fact.

JONATHAN MORGAN

LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES

IN *D* v. *East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] A.C. 373, Lord Nicholls considered the "radical suggestion" that the common law of negligence should jettison the concept of duty of care (the famous "fifth wheel on the coach"), making use instead of fault as the appropriate control mechanism for liability, analogous to the approach under the European Convention on Human Rights (ECHR). Despite recognising the attraction of this idea, Lord Nicholls expressed the reservation that to adopt it would lead to uncertainty in cases "where a person's acts or omissions do not render him liable in negligence for another's loss, even though this loss may be foreseeable." A paradigm example of such a case is where A seeks to make B liable in negligence for C's deliberate wrongdoing, as in the Scottish appeal *Mitchell* v. *Glasgow City Council* [2009] UKHL 11, [2009] 2 W.L.R. 481.

Mitchell lived on a council estate, next door to the aggressive and anti-social Drummond, who had constantly harassed and threatened Mitchell after a row over loud music several years earlier. Their landlord, the council, knew of Drummond's behaviour. Eventually the

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