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Tort law

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Contents

NOTES

Module descriptor

GENERAL INFORMATION

Module title

Tort law

Module code

LA2001

Module level

5

Enquiries

The Undergraduate Laws Programme courses are run in collaboration with the University of London. Enquiries may be made via the Student Advice Centre at: https://sid.london.ac.uk/sid

Credit value

30

Courses on which this module is offered

LLB, EMFSS

Module prerequisite

Legal system and method

Notional study time

300 hours

MODULE PURPOSE AND OVERVIEW

Tort law is one of the seven foundation modules required for a qualifying law degree in England and Wales and is a core requirement of the University of London LLB.

This module introduces students to various sectors of liability in tort, with primary emphasis on the tort of negligence.

MODULE AIM

Students are introduced to organising principles of tort law, such as damage, fault and vicarious liability. For the majority of the module, students will explore each element of the cause of action in a negligence claim, with particular emphasis on the duty of care concept. The module builds on the duty of care concept to develop students' knowledge and understanding of principles of liability governing pure economic loss, psychiatric harm and liability of public authorities. The module also explores those torts aimed at the safe and quiet enjoyment of land, freedom from trespass and protection of privacy.

LEARNING OUTCOMES: KNOWLEDGE

Students completing this module are expected to have knowledge and understanding of the main concepts and principles of Tort law. In particular they should be able to:

1. Demonstrate a critical awareness of the relationship between policy and principle in common law and legislative provisions in the tort of negligence;
2. Explain the way in which the duty concept is used as a device to control liability for pure economic loss, psychiatric injury and the liability of public bodies;

3. Identify and demonstrate the application of the defences to the torts studied, with particular attention to those pertaining to negligence: contributory negligence, consent and illegality;
4. Understand and apply the legal principles, statutes and case law governing liability of occupiers of premises;
5. Explain and apply both statute and case law regarding the negligence liability of employers;
6. Contextualise and analyse the legal principles and case law governing vicarious liability, including the most recent developments in this area;
7. Summarise the law governing trespass to the person, trespass to land and the tort in *Wilkinson* v *Downton*;
8. Explain the law of nuisance, including the specific attributes of private, public and statutory nuisance, as well as the rule in *Rylands* v *Fletcher*;
9. Contextualise and analyse the elements of claims regarding invasion of privacy and misuse of private information.

LEARNING OUTCOMES: SKILLS

Students completing this module should be able to demonstrate:

10. A developed capacity to evaluate and access legal analysis and argument;
11. Enhanced reasoning skills in relation to moderately complex legal questions and problems, and to reach reasoned conclusions;
12. The ability to evaluate and critique standard legal materials and arguments, including case law, statutes and academic writing;
13. The ability to conduct moderately complex research exercises and use research evidence.

BENCHMARK FOR LEARNING OUTCOMES

Quality Assurance Agency (QAA) benchmark statement for Law 2019.

MODULE SYLLABUS

(a) *The nature and function of tort law.* The scope of tort, historical development and relation to other branches of the common law, human rights principles and European law.

(b) *Organising themes.* Damage and fault.

(c) *The principles of duty, breach and damage components of negligence*.

(d) *Elements of the duty test in the context of liability for psychiatric injury, pure economic loss and on liability of public bodies.*

(e) *Defences to negligence*.

(f) *Vicarious liability*.

(g) *Defective premises and the law*.

(h) *Trespass to the person and to land*.

(i) *The tort of nuisance and the rule in* Rylands *v* Fletcher.

(j) *Privacy and misuse of private information*.

LEARNING AND TEACHING

Module guide

Module guides are the student's primary learning resource. The module guide covers the topics in the syllabus and provides the student with the grounding to complete the module successfully. It includes the Module Descriptor, which sets out the learning outcomes that must be achieved. It also includes the core, essential and further reading and a series of activities designed to enable students to test their understanding and develop relevant skills. The module guide is supplemented each year with a pre-exam update, made available on the VLE.

The Laws Virtual Learning Environment

The Laws VLE provides one centralised location where the following resources are provided:

- a module page with news and updates;
- a complete version of the module guides;
- mini lectures in some modules;
- pre-exam updates;
- past examination papers and reports;
- discussion forums where students can debate and interact with other students;
- quizzes – multiple choice questions with feedback are available for some modules.

The Online Library

The Online Library provides access to:

- the professional legal databases LexisLibrary and Westlaw;
- cases and up-to-date statutes;
- key academic law journals;
- law reports;
- links to important websites.

Core text

Students should refer to the following core text. Specific reading references are provided in each chapter of the module guide:

- **Giliker, P. *Tort*. (London: Sweet & Maxwell, 2020) seventh edition [ISBN 9780414077751].**

ASSESSMENT

Formative activities are contained in the core and applied comprehension exercises in each section of the module guide. The core and applied comprehensions are presented in a format that is similar to the format used in Part A of the examination. This, together with online guidance, helps to prepare students for the requirements of the research task and the examination. There are additional activities that prepare students for the summative assessment .

Summative assessment is through a three hour and 15 minute examination. The paper includes both seen and unseen elements. Part A includes questions on a previously seen research article and is worth 25 per cent of the marks. Part B includes a choice of essay and problem-based questions from which the student must answer three questions out of eight and is worth 75 per cent of the marks.

Please be aware that the format and mode of assessment may need to change in light of extraordinary events beyond our control, for example, an outbreak such as the coronavirus (COVID-19) pandemic. In the event of any change, students will be informed of any new assessment arrangements via the VLE.

Permitted materials

Students are permitted to bring into the examination room the following specified document:

- ***Hart core statutes on contract, tort & restitution 2022–23*** **(Bloomsbury).**

Part I: Organising principles of tort law

1 Sources

Contents

Introduction

The law of tort took its present shape in the 19th century. As it evolved, judicial influence reflected changing economic conditions and social values. Although tort is essentially a common law subject developed by judges, there are also a number of statutory developments and the influence of European Community law to consider. The Human Rights Act 1998 (HRA 1998), which gave effect in domestic law to the European Convention on Human Rights (ECHR) with effect from October 2000, is now a pervasive and increasing source of tort law.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **appreciate the importance of reading cases as an aid to learning and understanding the nature of tortious liability**
- **identify cases which place less emphasis on the logical application of pre-existing rules and focus more on social or economic considerations**
- **explain the influence of the European Convention on Human Rights contained in the Human Rights Act 1998**
- **analyse the role of domestic courts in applying human rights principles.**

CORE TEXT

- **Giliker, Chapter 1 'The nature of tortious liability'.**

1.1 How to use this guide

The best way to approach this guide is as a series of detailed lecture notes relating to each examinable topic.

The purpose of a lecture is to provide an overview (not a detailed analysis) of a topic, highlighting the main themes, difficulties and controversies of the subject and identifying the key cases, academic articles, policy reports and media and other sources that shed light on a difficult problem or controversial issue. You must supplement the module guide by drawing more detail from textbooks, by reading the full judgments of cases in the law reports or (for less significant cases) reading extracts and summaries of judgments in casebooks, by scrutinising relevant statutory provisions and by utilising various media sources and other sources in the public domain.

1.1.1 Comprehension activities

The core and applied comprehension activities link to your previous learning and extend your knowledge by challenging you to consider overarching concepts which underpin arguments advanced by academic writers. The skills you acquire through the completion of reading comprehension activities will further support your ability to write examination answers which meet the higher conceptual marking criteria – such as analytical thinking, application of the law and synthesis of materials. You will find core comprehension activities at the end of each topic in the guide and you are required to practise this type of activity to support your examination success. Core comprehensions reinforce basic principles and key information, and applied comprehensions contextualise important issues related to the topic.

1.1.2 Examination topics

The module guide is critical in identifying the range of topics that will be examined. All topics in this guide are examinable topics but not all topics contained in the guide will appear on any one examination paper. If a topic does not appear in this module guide, it will not be examined. Students are required to answer four questions from a total of nine. **One of the four questions is a compulsory question. It is based on an article, which students will have access to in advance of the day of the examination.** The remaining eight questions are a mix of essay and problem questions. Questions are designed to test problem-solving skills and research and critical evaluation skills.

1.2 Reading

1.2.1 Core text

All students must have access to the following textbook:

- **Giliker, P. *Tort*. (London: Sweet & Maxwell, 2020) seventh edition [ISBN 9780414077751] (available in VLeBooks via the Online Library).**

This textbook complements the module guide and you should use both resources to complete your Essential reading tasks.

The core textbook provides a comprehensive and detailed account of the topics covered in the respective chapters of the guide and includes a broad range of extracts from relevant sources.

1.2.2 Other books

Several other textbooks are identified below which you may wish to refer to as supplementary sources of information. These textbooks are not referenced specifically in the guide. You should use the table of contents or index of these books to locate the topic you wish to read about.

Introductory textbooks

Introductory textbooks are sometimes useful if you are finding a topic particularly difficult to understand. They should be viewed only as a stepping stone to your Essential reading.

- **Brennan, C. *Tort law*. (Oxford: Oxford University Press, 2022) eighth edition [ISBN 9780192855367].**
- **Horsey, K. and E. Rackley *Tort law*. (Oxford: Oxford University Press, 2021) seventh edition [ISBN 9780198867760].**

In-depth textbooks

In-depth textbooks include extensive exploration of central topics in the law of tort. Some discussions included in these books are beyond the scope of undergraduate law studies. Reading these books is not essential.

- **Deakin, S. and Z. Adams *Markesinis and Deakin's tort law*. (Oxford: Oxford University Press, 2019) eighth edition [ISBN 9780198747963].**
- **Goudkamp, J. and D. Nolan *Winfield & Jolowicz on tort*. (London: Sweet & Maxwell, 2020) 20th edition [ISBN 9780414066212].**
- **Lunney, M., D. Dolan and K. Oliphant *Tort law: text and materials*. (Oxford: Oxford University Press, 2017) sixth edition [ISBN 9780198745525].**
- **McBride, N.J. and R. Bagshaw *Tort law*. (Harlow: Pearson, 2018) sixth edition [ISBN 9781292207834]. This is available in VLeBooks via the Online Library.**
- **Steele, J. *Tort law: text, cases and materials*. (Oxford: Oxford University Press, 2022) fifth edition [ISBN 9780198853916].**

Useful collections of cases and materials

- **O'Sullivan, J., J. Morgan, S. Tofaris, M. Matthews and D. Howarth *Hepple and Matthews' tort: cases and materials*. (Oxford: Hart Publishing, 2015) seventh edition [ISBN 9781849465557].**
- **Horsey, H. and E. Rackley *Casebook on tort law*. (Oxford: Oxford University Press, 2021) 16th edition [ISBN 9780192893659].**

Academic articles

Topics that are examined by critical essay require you to make good use of academic articles, together with primary legal materials, to support your argument. You can gain a good mark in the examination – even a first class mark – if you use only the academic articles that are referenced in the guide. However, additional credit will be given if you can demonstrate that you have researched beyond the academic articles referenced in the guide and have made good use of relevant articles.

Part A of the Tort examination, worth 25 per cent of the overall mark for the module, is based on an academic article. The article will be available from the Online Library. A copy of the article will **not** be provided; students are required to locate and download the article themselves. A copy of the article **cannot** be taken into the examination and no copy of the article will be provided in the examination.

Students are expected to read and familiarise themselves with the article in its entirety. Students will answer four short questions about the article. Further advice on answering the Part A questions will be provided in a Lecture Plus+ lecture in mid-February. In addition, guidance from previous years on preparing for Part A is available via the VLE.

1.3 Sources

In your study of this subject, you will have to consider the following sources of law.

1.3.1 Cases

Most of the law of tort is judge-made and is to be found in reported cases. Given that tort law involves a wide range of common law authorities, the sheer range of authorities may seem overwhelming in the early stages of your study of tort but the ability to identify important cases increases with experience. You can be guided by the way in which particular cases are discussed in the textbooks and your module guide.

Reading cases in full is the most effective means of learning and understanding the nature of tortious liability. It is essential that you understand the precedent and the judicial reasoning in any case. Not all decisions are of equal authority and decisions of the Court of Appeal are authoritative until reversed or overruled by the Supreme Court. As you read the cases, you should note the facts of the case, the legal issues involved and the decision of the court. Where there is a majority decision any dissenting opinions should be noted as well as strongly expressed opinions of the judges in the case, and where they occur.

In his *Introduction to tort law*, Tony Weir sets out the technique of reading cases:

> In order to discover what a decision is an authority for, one must first understand the relevant facts, and analyse the decision in the light of those facts, ignoring asides (*obiter dicta*). The aim is to ascertain the rule (the *ratio decidendi*) that the judge must have had in mind in order to reach his decision. Then one must decide whether that rule is applicable to the case in hand, which depends on whether its facts are different enough to enable the prior decision to be 'distinguished'; if so, the judge may disregard the prior decision or, if he thinks it right, extend it to the case in hand.
>
> (Weir, T. *An introduction to tort law.* (Oxford: Oxford University Press, 2006) second edition [ISBN 9780199290376] p.8)

Some cases are the source of important principles: the judgments are discursive, discuss issues of policy and suggest lines of development for the future. These cases may place less emphasis on the logical application of pre-existing rules and focus more on social or economic considerations. Such cases have to be studied with care because in answering a question, as in advising a client or employer, you have to be able to judge how a court might decide a future case as well as describing what has been decided in past cases. *Tomlinson*, below, is a case where judicial attempts to stem the development of a damaging 'compensation culture'[†] was an important consideration in the outcome of the decision. When you are reading cases you should also consider how appropriate judge-made law is as a source of new developments.

[†]A culture in which people are ready to 'blame and claim' and sue for compensation, even for relatively minor incidents.

Case law example

In *Tomlinson* v *Congleton Borough Council* [2004] 1 AC 46, concerns about the emergence of a compensation culture and fears that the deterrent effect of tort liability might lead to the withdrawal of social amenities of value to the wider community were addressed by the House of Lords. The claimant in this case went to a popular park with some friends on a hot day. Ignoring signs that swimming in the lake was prohibited and the prominent notices reading 'Dangerous water: no swimming' he dived into the water from a standing position. The stretch of water into which he dived was shallow and he struck his head and suffered injury which paralysed him from the neck down. Tomlinson accepted that on entering the water he ceased to be a visitor and became a trespasser but he claimed that the council was in breach of its duty to persons other than visitors under s.1(3) of the Occupiers' Liability Act 1984 (see Chapter 15). The defendants were aware of the danger and the claimant argued that the warning notices and other precautionary measures taken by the council were ineffective and did not discharge the council's duty under the Act.

The trial judge dismissed Tomlinson's claim but the Court of Appeal found the council liable. It held that on account of: the attraction of the lake to swimmers; the frequency of exposure to danger; and the relatively inexpensive and simple deterrents available to reduce the risk of persons entering the lake, the council had not discharged its duty by issuing the warning notices, oral warnings and safety leaflets.

However, the House of Lords allowed the council's appeal against the finding of liability. Their Lordships held that even if swimming had not been prohibited and the local authority had owed a duty of care, it would not have been required to take steps to prevent Tomlinson from diving or to warn him against dangers which were obvious. There was no risk to him from the state of the premises or from anything done or omitted to be done on them. The risk of striking the lake bottom from diving into shallow water was perfectly obvious and not a risk against which the defendant might reasonably have been expected to offer protection. The Court's concerns about the deterrent effect of liability in tort and the need for individuals to retain personal responsibility for their own safety and anticipate risk can be seen in the following comments:

Lord Hoffmann [46]

... I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them... A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger...

Lord Hobhouse [81]

... it is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? Does the law require that attractive waterside picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no. But this is the road down which your Lordships, like other courts before, have been invited to travel and which the councils in the present case found so inviting. In truth, the arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen.

1.3.2 Statutes

Some statutes replace or partly replace areas of the common law (e.g. Occupiers' Liability Acts 1957 and 1984); some provide additional protection over a wide field; and some effect minor amendments only. Product liability is not an examinable topic. Students are not expected to learn the Consumer Protection Act 1987.

1.4 Impact of European Union law

European Union law has also had a profound impact on certain areas of tort law. The area of product liability is a key example of this. The statute that governs product liability, the Consumer Protection Act 1987, was passed in order to give effect to a European Directive. Thus it is through the influence of the European Union that what was then the common law regime relating to manufacturers' liability expanded to its present level of protection. The 1987 Act imposes strict liability for defective products which cause personal injury and damage to private property. The most notable feature of the Act is that it removes the need for those injured by a defective product to establish fault on the part of the producer. There are other aspects of tort law that are now almost entirely determined by European regulation, such as aspects of employers' liability for the health and safety of their employees. Neither product liability nor employers' liability are specifically covered in this module. It is likely that there will be no immediate impact on tort law following the UK's withdrawal from the European Union.

1.5 Impact of the Human Rights Act 1998

Of recent years, the most important influence on tort has come from human rights principles enshrined under the ECHR, and contained in the HRA 1998. Human rights principles have been especially influential in the area of defamation, where the right to privacy has to be balanced against freedom of expression; in trespass to the person, which engages the right to liberty and (potentially) the prohibition of inhuman and degrading treatment; and punishment and (most controversially) the tort of negligence, which engages the right to life, the prohibition of inhuman and degrading treatment and punishment and (potentially) the right to an adequate judicial remedy.

Human rights principles are now a much more pervasive source of the law of tort than is European Union law. You will be familiar with the general principles of the ECHR from your study of the British constitution. You will find references to the ECHR at various points in this guide. Some relevant general principles are listed here: in some respects the ECHR has introduced new ways of thinking into the domestic law.

- Section 6 of the HRA 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. This section has its greatest impact where the defendant to a tort action is a public authority such as a local council.
- The courts are, however, themselves public authorities: they therefore have to take account of the ECHR in developing the law, even in tort actions between private citizens or private bodies such as companies, to ensure that the UK is not in breach of the ECHR. This is perhaps most obvious in relation to the tort of defamation and Article 10 of the ECHR (freedom of expression).
- The ECHR is based on a series of Convention rights of a general kind that have to be respected. This is an unfamiliar kind of classification in English law. In order to provide compensation for an interference with Convention rights the courts may do one of the following:
    - They may apply an existing tort. If a public authority in England kills someone (contrary to Article 2) or tortures someone (contrary to Article 3) this plainly falls within the existing English law of tort.
    - They may modify an existing tort. For example, Article 2 requires the state to provide protection against being killed and Article 3 requires the state to provide protection against inhuman and degrading treatment. An existing English tort may have to be modified in order to provide the necessary protection.
    - They may create a new right of action in damages. It should be noted that s.8 of the HRA 1998 provides that a person is not entitled to an award of damages merely because a public authority has acted unlawfully under the ECHR, and the court has a discretion to decide whether an award is necessary in a particular case.

More specifically relevant are the Articles of the European Convention on Human Rights, which the Human Rights Act 1998 incorporates into UK law, enabling individuals to seek remedies when public authorities act in ways incompatible with Convention rights. The rights that are relevant to tort law and are beginning to have an impact on the development of case law are as follows:

- Article 2: Right to life
- Article 3: Right to freedom from inhuman and degrading treatment
- Article 5: Right to liberty and security
- Article 6: Right to a fair trial
- Article 8: Right to respect for private and family life
- Article 10: Right to freedom of expression
- Article 13: Right to effective domestic remedy.

Activities

Activity 1.1

Applied comprehension

Take at least one hour to familiarise yourself with the Tort section of the VLE. Reading the relevant four previous Blog Posts (under Additional Resources) will give you a sense of the wide influence of tort law and some of the intriguing situations it can be involved in.

Answer the following introductory questions:

a. Non-delegable duty situations: vicarious liability occurs when the employer defendant has been negligent.

True or false?

b. Occupiers' liability: in *Edwards* v *London Borough of Sutton* [2016] EWCA Civ 1005, the bridge was held to be dangerous. The defendant occupier was liable in negligence.

True or false?

c. Informed consent: patient autonomy was fully recognised in *Montgomery* v *Lanarkshire* [2015] UKSC 11.

True or false?

d. Glass houses: breach of privacy can never constitute private nuisance.

True or false?

Activity 1.2

Applied comprehension – challenging views of tort

Using the Online Library, find and read Lewis, R. and A. Morris 'Challenging views of tort: Part 1' (2013) 2 *JPIL* 69 (available in Westlaw) and answer the following questions.

You are encouraged to read this journal article in full to appreciate how empirical research informs our understanding of the role of tort in modern day society and its relationship to the insurance and social security systems.

a. Why do the authors argue that in reality the scope of actions in tort for personal injury is severely limited?

b. From the statistical evidence provided for 2011–12, which two major areas of insurance accounted for the dominant share of claims for personal injury? Include the percentage of the market in your response.

c. Which argument is advanced to explain why only 0.5 per cent of 7.8 million accidents in the home in 1999 resulted in a successful tort claim?

d. From the statistical evidence provided, identify whether you are more likely to receive compensation if you are the victim of a road accident or a workplace accident. What would be the source of funds for your compensation?

e. In fewer than 40 words explain why tort and social security systems are closely linked.

f. Which statistic is advanced to evidence the claim that insurers are the real defendants behind the named litigant parties in the tort litigation?

g. Expressed as a percentage, how many adults have some form of before-the-event insurance?

h. What percentage of tort claims are settled out of court?

i. What is meant by a 'strict liability' regime and from which legal source is strict liability most commonly derived?

j. List the seven commonly held views about the scope of tort law which the authors have challenged.

NOTES

2 Modern influences on tort law

Contents

Introduction

Very broadly, tort law is one of the methods by which people who have suffered injuries are compensated. It deals with whether losses should 'lie where they fall' or should be transferred to someone thought to be 'to blame' (not necessarily in a moral sense) for what has happened. The person 'to blame' will often be insured or will be a large company or government department and so the losses will often be spread more widely. For example, when a person is injured by a careless motorist, the motorist's insurance company will pay the damages and the ultimate costs of the accident will fall on the general community who pay insurance premiums.

We have seen that human rights principles are increasingly important in the development of tort law. Other external factors, such as insurance, have a considerable influence on tort law. Nevertheless, the main source of compensation for accidents is state benefit.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **identify the interests protected by tort law**
- **explain the role and functions of tort law**
- **evaluate what amounts to actionable damage**
- **identify the type of damage excluded or limited from the scope of tort**
- **evaluate the fault principle and the role of insurance**
- **understand the concept of a compensation culture**
- **identify problems with the current system and proposals for reform**
- **explain the relation between the tort of negligence and the system of human rights norms.**

CORE TEXT

- **Giliker, Chapter 1 'The nature of tortious liability'.**

2.1 What is tort?

2.1.1 Definition

Tort is a branch of the civil law (as opposed to criminal law) which provides a remedy for a wrongfully inflicted injury or loss or for infringement of a protected interest. However, this definition tells you nothing about what conduct is tortious.† You will understand that only when you know what counts as **injury or loss** and what **interests** the law protects. When tort law declares that an interest is protected it is said to create a **right** on the part of the claimant against invasions of that interest. At the same time it imposes a **duty** or **obligation** on a defendant not to invade that interest.

†Note: 'tortious' is pronounced 'torshus'.

2.1.2 Structure of tort

There is no single principle of tort law but a series of different torts with different origins and purposes. A glance at the chapter headings in your textbook will show that the wrongs of tort are wide-ranging, comprising (*inter alia*) negligence, nuisance, trespass to the person and defamation. You will discover from your study of tort that it protects to different degrees and in different ways the physical integrity of the person, property interests, reputation and economic interests. You will see that each specific tort has different requirements for liability and that each 'ingredient' of the particular tort must be met before a claim can be established.

2.1.3 What interests are protected by the law of tort?

Different torts deal with different types of harm or wrongful conduct. For example:

- **physical integrity** is protected by the torts of negligence, public nuisance and trespass to the person
- **interests in property** are protected by the torts of negligence, private and public nuisance and trespass to land
- interests in the **use and enjoyment of land** are protected by the torts of negligence, private and public nuisance and trespass to land
- **reputation** is protected by the tort of defamation.
- **privacy** is protected by the torts of breach of privacy and misuse of private information.

Tort protects these different interests against different kinds of interference, usually by compensation – that is, an award of damages for wrongfully inflicted harm. Sometimes an order will be issued by the court to stop the defendant engaging in the wrongful conduct, such as, for example, where an indirect interference unreasonably affects the claimant's use or enjoyment of land, constituting an alleged nuisance. An order of the court issued to a defendant is known as an injunction. Injunctions are most commonly granted in the tort of nuisance. However, a party wishing to prevent publication of material alleged to be defamatory is less likely to be successful in obtaining an injunction because injunctions are very rarely granted in defamation claims.

It is important to note that the law of tort does not protect all interests. In some situations where harm or loss is suffered as the result of another's conduct there is no right to sue because the interest is not one which the law protects. An example of *damnum sine injuria*† arose in *Bradford Corporation* v *Pickles* [1895] AC 587 where the plaintiff supplied water to the City of Bradford. The defendant, Pickles, owned land through which water percolated in undefined, underground channels to land owned by Bradford Corporation. When Bradford Corporation refused to buy his land at the inflated price he demanded, Pickles began drainage work which diverted the water feeding the Corporation's reservoirs and diminished the water supply. The House of Lords decided that Mr Pickles had not committed a tort because, although the Corporation had suffered damage (*damnum*), it had not been able to establish a right to the flow of water (as it was not in a water course, such as a stream). Pickles' conduct

in diverting the water was a lawful act and Bradford Corporation had therefore suffered no legal wrong (*injuria*).

2.1.4 Fault

Except in the case of instances of so-called no-fault liability torts, intention or carelessness on the part of a defendant in a tort action must be proved. Carelessness is the main species of fault in tort – this is why the tort of negligence is so dominant a sector of liability – but intention must be proved in relation to other torts, such as trespass to person, for example. The Consumer Protection Act 1987 imposes strict liability for defective products which cause personal injury and damage to private property. This means that those injured by a defective product do not need to establish fault on the part of the producer.

2.1.5 Aims and functions of tort

The overriding purpose of the modern law of tort is to provide an injured claimant with monetary compensation. There are two main mechanisms for compensating innocent victims of actionable injury or loss. These are known as loss **shifting** and loss **spreading**.

- Loss shifting is where the loss that the innocent claimant suffers is **shifted** onto the defendant by forcing the defendant to pay the claimant damages.
- Loss spreading as a principle of compensation expresses the idea of so-called distributive justice – the **spreading** of losses among a number of people. This mechanism of compensation is more often underpinned by compulsory insurance.

Tony Weir notes that in most cases:

> … The plaintiff is asking for money (*damages*). Generally he has been hurt in one way or another and is claiming money as *compensation for harm* suffered (sometimes with a bit extra if the defendant behaved very badly), though occasionally, and increasingly, he is more intent on vindication or explanation rather than compensation. Usually, too, he is claiming that the harm was wrongfully caused. Accordingly, we may say that the prime function of the area of social regulation we call 'tort' is to determine when one person must pay another compensation for harm *wrongfully* caused.
>
> (Weir, T. *A casebook on tort*. (London: Sweet & Maxwell, 2004) 10th edition [ISBN 97804218788O8])

The states of mind relating to torts are malice, intention and negligence. Where a tort does not require any specific state of mind liability is said to be 'strict'.

Justice is also an important function of the law of tort; a recognition that a wrong has taken place, and that this must be acknowledged and righted.

While compensation is the main function of tort law it is not the only one: deterrence and retribution are also said to be important secondary functions. Glanville Williams' influential article 'The aims of the law of tort' (1951) *CLP* 137, extracted in Lunney and Oliphant, Chapter 1 'General Introduction', Section II.1 'The aims of the law of tort', summarises the main purpose of tort law.

2.1.6 The defining characteristics of tort law

Tort shares certain characteristics found in criminal law and contract law.

2.1.7 How does tort law compare with contract law?

Tort is a branch of the law of obligations (like contract) but unlike contract, which seeks to enforce a single obligation – a promise – the wrongs of tort are wide-ranging. Another distinction between contract and tort is that the content of a tortious obligation is fixed by law. For example, if I knock you down by carelessly driving my car, I am liable to compensate you because the law imposes a duty to drive carefully and not because I have promised you that I will do so. In contract, it is the parties who

(through their various negotiations) determine the content of a contract. Therefore, breach of contract involves the breach of an obligation voluntarily undertaken by the person in breach. So, if I fail to deliver the car that you have bought from me, I am liable to compensate you because I have failed to carry out my promise. This distinction is, however, not watertight. You will discover in Part II of this guide that in recent decades a whole area of tort law has developed based on a voluntary assumption of responsibility for negligent misstatements, which has blurred the traditional distinction between tort and contract.

2.1.8 How does tort law compare with criminal law?

A crime is an offence against the state and the purpose of a sanction is to punish the offender. Tort, by contrast, is not primarily about punishment, and unlike criminal law it is focused not on the interests of the state but on the individual victim of a tort. Both tort law and criminal law regulate behaviour by establishing standards of conduct. Yet, unlike the criminal law, tort law is not concerned to impose abstract standards. Liability in tort, for the most part, is predicated upon proof of actual damage. A person is not liable in the tort of negligence because they have driven down a one-way street, while drunk and without a valid driving licence. They are only potentially liable in the tort of negligence if this chain of events causes actual damage to a person or property or sometimes damage to a person's economic interests. Without damage, such actions would constitute a crime. Finally, one obvious connection between tort and criminal law is that the same conduct can be both tortious and criminal – careless driving being the clearest illustration, along with public nuisance and battery.

2.1.9 Damage

In many torts, material damage has to be shown before there can be an action, and there are rules about which losses are and which are not recoverable. In general, unless the claimant can prove that the defendant's tort in fact caused the loss suffered, the action will fail. You will see in Chapter 10 that even if the claimant can prove a sufficient causal connection in fact, the claim will still fail if the damage suffered is too remote.

2.1.10 Conduct can be actionable even though no damage is suffered

However, in some instances, intentional or negligent conduct can be actionable even though no damage has been caused.[†] Where one of the claimant's rights has been infringed there is no need for damage to be shown. For example, subject to many defences, it is an actionable tort deliberately to touch another person (trespass to person) even though no damage is caused. In such cases the tort is said to be actionable *per se* (i.e. in itself). The interest of reputation provided by defamation is equally strong. Until recently, the tort of defamation was actionable *per se*, which meant that to defame someone in writing, even though no damage was caused, was actionable.

[†] The Latin term *injuria sine damno* meaning 'injury with no damage' is sometimes used in these circumstances.

2.1.11 Not all damage is compensated by the law of tort

Even if a person suffers harm or loss as the result of another's tortious conduct, it may be that the damage they suffer is of a kind that the law of tort will not compensate. The question of the type of damage that the law will recognise is so fundamental to most torts that there is really no point in developing any further legal argument until you are sure that the claimant has suffered actionable damage.

Claimants in tort suffer a variety of ills. However, for a claim to succeed, the defendant's intentional or careless conduct must lead to damage (that is, loss or injury) of a kind that is recognisable in tort. People now claim to contract diseases as a result of exposure to harmful substances, they claim to suffer economic loss as a result of negligent advice. They claim to suffer psychological or emotional illness as a result of the malicious transmission of information. Advances in medical science and in information technology, developments in work technology and the changing nature of business enterprise have caused a proliferation of the type of losses and injuries that a person might be exposed to as a result of another's tortious conduct.

The types of damage that are recognisable in tort include but are not limited to:

- physical damage to the person or property
- psychological damage resulting from physical harm or the apprehension of physical harm
- interference with land
- economic loss.

Some forms of damage, like physical injury to the person or property, the law has little difficulty in acknowledging as a form of damage that gives rise to an action in tort – subject, of course, to other qualifications on liability. Other forms of damage are entirely excluded from the ambit of tort law. Between complete inclusion and complete exclusion lies an intermediate category of damage where claims are allowed but only after the claimant has overcome a number of hurdles. It is this intermediate category of damage that most concerns us throughout the module.

2.1.12 What is actionable damage?

The case law pertaining to actionable damage can be involved and difficult. It will help your study if you understand that there is a hierarchy of interests protected within the law of tort, with physical injury being most widely protected; followed by property damage; psychiatric well-being and economic losses. There are other types of injury or loss recognised in tort other than the four categories listed here, which pertain specifically to negligence actions. Clearly, breach of privacy and misuse of private information lead to particular forms of damage, which will be considered in detail in Part IV.

Underlying this hierarchy of interests are four general principles that judges often apply (usually not explicitly) in deciding whether or not to acknowledge a form of injury or loss as recognisable in tort law. These principles are as follows.

1. Losses or injury arising from natural causes are excluded from the ambit of tort. This would at first sight appear to be an obvious point, since we are concerned with **tortious** damage. Stapleton's article and her much longer study in a book called *Disease and the compensation debate* (1986) demonstrate how non-traumatic injuries (diseases) are less likely to be compensated in the law of tort. This is not because of any explicit bar on recovery but because non-traumatic injuries challenge the conceptual framework of tort law that is based on an increasingly tenuous distinction between 'man-made' and 'natural causes'. Once an injury is identified as arising from 'natural causes' (i.e. a disease and not an accident) then the general principle that losses should lie where they fall – unless there is a good reason to shift the loss – is used to deny recovery. On the other hand, traumatic injuries – those that can be precisely pinpointed in time and place – routinely receive compensation.

   Case law example
   In *Jobling* v *Associated Dairies Ltd* [1981] 2 All ER 752 the defendants were liable in negligence when the plaintiff sustained a back injury at his place of work. This injury led to a 50 per cent reduction in his earning capacity. Three years later, and before trial of his negligence action, the onset of a disease of the spine left him totally unfit for work. Because the second event was brought about by natural causes the House of Lords held that the defendants were only liable for the reduced earning capacity up to the time of the onset of the disease.

2. Injuries or other losses arising from a traumatic event – such as a car crash, or as a result of the claimant falling through a loose floor board – are forms of injury that tort law privileges above others. Such injuries, all other things being equal, are likely to be compensated in tort because the courts see them as forms of injury that are more deserving of compensation than others.

3. Types of losses that are compensated for within other categories of law are less likely to be compensated for or are likely to receive limited compensation in tort. For example, a person who claims to have suffered nothing more than financial loss as a result of another's wrongful or negligent act will have difficulty establishing a claim in tort – in part because the law of contract is seen as the appropriate law for compensating financial losses.
4. Forms of injury or loss that are likely to impact on a large number of potential claimants pose greater problems in relation to compensation than injuries or losses, which, by their nature, affect a smaller class of individuals. *Alcock* v *Chief Constable of South Yorkshire* (1992) discussed below is an example of the potential number of claimants in a tort claim.

Personal injury

This is by far the largest and most complex of the broad categories of damage. Personal injury can be further reduced into three subcategories.

- Traumatic physical injury (accidents, congenital disabilities and pain and suffering associated with wrongful birth claims, although there is some debate over whether the painful process of birth can be thought of as an 'injury').
- Non-traumatic physical injuries (disease, wrongful life).
- Psychological harm or nervous shock.

2.1.13 Damage excluded or limited from the scope of negligence

Although tort provides compensation for many different types of loss or harm, certain types of injury or loss are excluded or limited from the scope of tort. As we have seen, personal injury or other losses arising from a traumatic event are seen as deserving of compensation and damages in tort are likely to be recovered. For example: injuries arising from car accidents, such as *Nettleship* v *Weston* [1971] 2 QB 691, where the injury suffered was a broken kneecap; or medical mishaps as in *Bolitho* v *City and Hackney Health Authority* [1998] AC 232 where it was claimed that the death of a child was as the result of a doctor's failure to respond to calls to attend; or injuries occurring on premises, such as happened in *Wheat* v *Lacon* [1966] AC 552, where it was claimed that an unsafe staircase caused a fatal accident. In circumstances such as these the losses or injury suffered are easily recognisable as **actionable** damage giving rise to an action in negligence. You will see that this will be described as 'giving rise to a duty of care'.

However, the law justifies differential treatment of tort claims. The courts also take resource allocation and economic factors into account to protect certain classes of defendant against claims in damages. Commenting on *McFarlane* v *Tayside Health Board* [1999] 4 All ER 961 (see below), where parents of a healthy baby girl were not allowed to recover the costs of bringing up the child, Tony Weir (2006, p.25) said:

> … making a public body pay damages may reduce its ability to perform its services to the public. Thus hospital trusts which have to pay damages out of their normal budget have less money available for the cure of the sick. It was therefore nothing short of outrageous that for many years, until stopped by the House of Lords, our courts made them pay the cost of bringing up a perfectly healthy child born as a result of their negligence: it was robbing sick Paul to pay healthy Peterkin.

Case law example

In *McFarlane* the claimants, a married couple, had four young children. They decided not to have any more children and Mr McFarlane agreed to have a vasectomy. The operation, carried out at a National Health Service hospital, was not successful. Following the operation the consultant surgeon wrote to Mr McFarlane and informed him, incorrectly, that his sperm count was negative and that he could dispense with contraceptive precautions. When Mrs McFarlane conceived again a healthy, but unplanned, baby girl was born. Although the parents stated that they loved and cared for the child, they sued the health authority for the negligent failure of the vasectomy performed on the husband and for negligent advice concerning his fertility following the operation.

Mrs McFarlane claimed damages of £10,000 for the pain and distress of the pregnancy and delivery. Mr and Mrs McFarlane jointly claimed £100,000 in damages for the financial costs of the child's upbringing until the age of 18. The House of Lords unanimously rejected the claim for the costs of the child's upbringing and refused to accept that the law might regard a normal, healthy baby as more trouble and expense than it is worth.

According to Lord Slynn, claims in respect of the costs of bringing up a healthy child born as a consequence of a failed sterilisation fall into the category of pure economic loss (which, you will see below, is not recoverable in tort). Therefore, although some costs relating to the mother's pain and suffering during pregnancy were allowed, the economic cost of bringing up a healthy child was not.

Lord Millett did not consider that the question in this case should depend on whether the economic loss is characterised as pure or consequential. He thought that the placing of a monetary value on the birth of a normal and healthy child is as difficult and unrealistic as it is distasteful. He said:

> In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable.

Do you consider that the process of birth can be conceived of as an 'injury'?

The *McFarlane* principle cannot be departed from, even where the parent of the child is seriously disabled. In *Rees* v *Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 the severely visually handicapped claimant did not want children because she felt that her eyesight would make it difficult for her to look after a baby. She underwent a sterilisation operation (for which the defendant admitted negligence) and as a result of the failure of this operation the claimant gave birth to a healthy son.

The issue was whether the decision in *McFarlane* meant that none of the costs of bringing up a healthy child could ever be claimed whatever the circumstances. At first instance the trial judge held that the House of Lords decision in *McFarlane* precluded a disabled parent from recovering the economic costs of bringing up a healthy child born as the result of a negligently performed sterilisation. The Court of Appeal, however, said there was a crucial difference in the case of a seriously disabled parent who, unlike an able-bodied one, would be in need of assistance to discharge their basic parental responsibility of looking after a child properly and safely and held that it was fair, just and reasonable that the mother should recover the additional costs. However, when the case reached the House of Lords, the appeal was allowed by a 4:3 majority on the ground that no exception to the principle in *McFarlane* was justified, even when the parent of the child was seriously disabled. In stating that the law must take the birth of a normal healthy baby to be a blessing and not a detriment, the House reaffirmed its unanimous decision in *McFarlane*.

It is important at this stage in your studies to note that as you learn about the law of tort in more detail you will see that, in addition to actionable damage, there are further requirements which must be met in order to establish a defendant's liability to pay compensation.

2.1.14 Claims for emotional harm and psychiatric injury

We have seen that the law offers protection against personal injury, but the courts have been reluctant to allow claims for other types of personal harm, such as emotional harm and psychiatric injury.

As a starting point, it must be made clear that emotional and psychological harm that is a consequence of actual physical injury is always recoverable. This category of claimants will normally recover for consequential psychological harm under the category of pain and suffering or loss of amenity. Loss of amenity essentially means loss of enjoyment in life. Such a loss of enjoyment may be occasioned by many causes, such as loss of a limb, but it will also cover emotional and psychological harm that results from the traumatic physical injury.

However, difficult questions arise where the injury claimed to have been suffered as a result of negligence or any other tort is **purely** emotional or psychological. Unless the psychiatric harm is as a result of the impact of a sudden event, it will not qualify under this category of legal claim. A key limiting mechanism on claims for psychiatric harm is that a distinction is drawn between claims for a medically recognised psychiatric illness which is the result of the impact of a sudden event or its immediate aftermath (which is why the term 'nervous shock' was originally used to describe the condition) and mere grief, sorrow and distress. Mere grief, sorrow and distress are viewed as ordinary emotions and not harm for which compensation is possible.

Although it is increasingly recognised that psychiatric injury can be just as debilitating as physical injuries, because such claims are likely to impact on a large number of potential claimants the circumstances in which compensation is recoverable are restricted. (See further, Chapter 5.)

2.1.15 Defects and damage: 'imminent risk'

Subject to other rules on recovery, we have seen that physical damage to property is a form of damage for which the law of tort will provide compensation. It is important to ensure that the claim in respect of the property is one based on **damage** to property and not a **defect** in property. No claim in tort lies in respect of defective property unless the defect in a property causes damage to other property or to a person or persons. This is an important and difficult area of law (which will be studied in Part II).

For now, let's begin our approach to this difficult area by first elucidating the distinction between damage and a defect. In *D&F Estates Ltd* v *Church Commissioners for England* [1989] AC 177 it was said that 'damage' is to be given its natural meaning, which is to 'make a thing worse' not to create a bad thing; the latter capturing the meaning of a defect. So, if as a result of negligent inspection of the foundations on which a property is built, the property becomes weakened and subject to subsidence, it cannot be said that the negligent inspection caused damage to the property in question. Rather, the negligent act resulted in the construction of a defective property.

A defect *per se* is irrecoverable because, according to Lord Bridge in *D&F*, to allow recovery for a defect in property would be to introduce into the law of tort a non-contractual remedy as to fitness for purpose. Such guarantees are the province of the law of contract and not the law of tort.

The issue becomes complicated where the defect causes damage to the property itself. Is it then possible to claim in respect of the now damaged property? The answer is no – a defect in property that merely causes damage to itself does not provide a basis for recovery, but if the defect causes damage to other property, then damages will lie. (See further, Chapter 14.)

2.1.16 No recovery in tort for pure economic loss

You will have seen that the law of tort provides damages or compensation for many different types of loss or harm such as: physical injuries caused by traffic accidents; workplace accidents; and medical negligence. In these cases the claimant may suffer

financial loss as a result of having to take time off from work to recover from the injury or where damage to property used for business purposes results in loss of profits. Financial loss such as this, which results from physical injury to persons or physical damage to property, is known as consequential economic loss. Consequential economic loss is recoverable in tort.

However, consequential economic loss must be distinguished from pure economic loss, because the law has developed very differently in relation to the two areas. There is no recovery in tort for pure economic loss. A person who has not suffered physical harm and only suffered financial loss as a result of another's wrongful or negligent act will have difficulty establishing a claim in tort. Any loss which is not linked to physical injury, death or property damage is known as pure economic loss and is not recoverable in tort.

One of the reasons why recovery for pure economic loss is limited is the threat of a flood of potential claims for financial loss. The floodgates of litigation is defined as the undesirability of exposing defendants to potential liability 'in an indeterminate amount for an indeterminate time to an indeterminate class', *per* Cardozo CJ in *Ultramares Corp* v *Touche* (1931). Also, financial interests are protected outside tort law: the law of contract is seen as the appropriate place for compensating financial losses.

A relatively recent exception to the absence of duty of care in negligence for pure economic loss has has developed in respect of loss caused by negligent misstatements. In Chapter 6 we will see that when the damage has been caused by carelessly compiled advice, reference, information or even services there is the possibility of a successful claim, when the legal requirements are satisfied.

2.2 Insurance

The overriding purpose of the modern law of tort is to provide an injured claimant with monetary compensation. As a means of compensating victims of torts the system of compulsory insurance is extremely important, with over 90 per cent of tort compensation being derived from insurance – especially where the injury results from a road or workplace accident. Insurance significantly supports the tort system and unless the defendant is insured (or very wealthy) it would not be worth the trouble and expense of claiming in tort. The prevalence of insurance as a factor in most tort claims is often cited as significantly undermining any deterrent value which tort law might have.

2.2.1 Insurance – defendants likely to have 'deep pockets'

It is possible to insure against liability in tort and it is likely that occupiers of premises, schools, manufacturers and professionals such as doctors will be insured in respect of many situations in which tort claims could be made.

Loss insurance

First party insurance allows an individual to buy insurance policies that will compensate them for personal injury or damage to their property, regardless of the fault of others.

Liability insurance

Third party insurance provides protection when the insured party is liable for injury done to the person or property of someone else. Liability insurance is compulsory for motorists under the Road Traffic Act 1988. The Employers' Liability (Compulsory Insurance) Act 1969 imposes similar requirements upon employers regarding work-related accident and disease.

One of the purposes of tort is said to be to enforce standards of good behaviour: to deter people from being careless. However, in many situations the deterrent effect is limited. Car drivers are likely to drive carefully because of a fear of death or injury, or of prosecution resulting in fine or imprisonment. Fear of a civil action for damages hardly figures, since the damages will come from an insurance company (although admittedly the driver may find insurance more expensive or even impossible in future).

2.2.2 The notion of fault

Except in the case of instances of so-called no-fault liability torts, intention or carelessness on the part of a defendant in a tort action must be proved. Carelessness is the main species of fault in tort – someone must be at fault in order for the claimant to obtain tort compensation. This is why the modern law of tort is dominated by one cause of action – negligence – which is the topic of Parts II and III of this guide.

Fault, as one of the key elements of tort liability, had little currency before the 19th century. It is only in relatively recent times that the legal system began to preoccupy itself with the notion of fault. Before tort law emerged in the 19th century, a direct link between the defendant's act and a claimant's injury or loss was sufficient to found liability in law.

The general principle underlying tort law is that losses should lie where they fall unless there is a good reason for moving the loss away from where it falls. Fault of the party causing the harm is commonly advanced as a justification for moving the loss away from where it falls.

2.2.3 Why did preoccupation with fault come about?

The answer to this question cannot be internal to the legal system itself. Conaghan, J. and W. Mansell, in their specialist book *The wrongs of tort* (London: Pluto Press, 1998) second edition [ISBN 9780745312934], argued that the element of fault was imported into the tort not as a result of a shift in judicial thinking but because of a need – a social need – to deal with more complex relations brought about by the move from agriculture to industry. The industrial revolution created increased risks of injury to those working in factories, mines, quarries and other dangerous situations. The mass production of goods and the development of railways and other forms of transportation increased the potential for many people to be affected by the faulty conduct of others with whom there was no 'direct' causal link. However, businesses emerging during the industrial revolution also led to the formation of companies for their organisation and management. This meant that ascribing responsibility became easier and those injured in workplace accidents had a company to sue for compensation. Social attitudes began to change from individualism towards social and civil responsibility. Legislation to improve citizens' welfare generally was introduced, particularly following the Second World War, when the Welfare State and the National Health Service were created. This meant that tort law was no longer the primary support for those suffering loss due to accidents.

2.2.4 Policy questions

As you consider the purposes to be served by the law of tort you should think about the following questions of policy.

2.2.5 How far should liability be based on fault?

The tort system in Britain is supported by different sources of compensation. The main source of compensation for accidents is state benefit (also known as social security). It is relatively quick, cheap and accessible to many accident victims. The tort system, underpinned by liability insurance, is seen as supplemental to state benefit and it plays a minor role in compensating victims. The tort system is committed to the principle of full compensation, as far as is possible, so a victim who can make out a tort claim stands to recover substantially more than one who cannot.

Compensation in tort depends on proving that someone was at fault; the claimant must show that the defendant was at fault in causing the injury or harm. Tort compensation has a significant earnings-related component and takes into account loss of promotion prospects and matters like pain and suffering. Also, unlike social security payments, the amount of compensation is not subject to financial limits. However, if the claimant fails to prove the defendant was at fault they will be reliant on some alternative form of compensation such as social welfare or a private insurance policy.

2.2.6 Social security benefits – no need to prove fault

The objectives of compensation provided by social security benefits differ from those in tort. As we have seen above, the tort system is committed to the principle of full compensation. The social security system does not aim to provide full compensation; it is based on objective criteria with almost no earnings-related component in the amount paid.

However, a distinct advantage in receiving state benefit is the lack of need to prove any fault and (unlike most tort compensation) social security is paid on a periodic basis. The aim of minimising the likelihood of double compensation under the social security system is achieved by requiring successful tort claimants to repay most of the social security benefits which they received for up to five years after the accident.

2.2.7 Problems with the fault principle as the basis of liability

The tort system based on fault is criticised as being the least effective system of compensation because litigation costs are extremely high and the system is slow to administer (which further adds to the costs). One consequence of the emphasis on fault is uncertainty. It may be difficult to get agreement as to whether the defendant was careless, and entitlement to substantial compensation may depend on the strength of the evidence before the court or (since all except a very tiny proportion of negligence claims for personal injuries are settled by negotiation or agreement) the strength of the bargaining positions of the parties. The ability to obtain compensation may also depend on the financial resources available to the defendant. A high proportion of successful claims are in areas (medical, road and industrial accidents for example) where defendants are either rich or are insured. For this reason the fault principle is said to be unfair to claimants.

The adversarial system also makes the outcome of litigation unpredictable and this can lead claimants to settle actions for considerably less than they could expect if the case succeeded at trial. Another criticism identified by Lord Pearson, who led a Royal Commission on Civil Liability and Compensation for Personal Injury in 1978, was that the system was difficult for the injured person to understand and operate. It was also found that the adversarial nature of the system had a damaging effect on family relations, friendships and employment relations.

2.2.8 Concerns about a compensation culture

We have seen in *Tomlinson* v *Congleton Borough Council* [2004] 1 AC 46 (Section 1.3.1) that courts are increasingly aware of the so-called 'compensation culture', the desire to identify someone who is able to pay for injuries. The fear is that there will be a defensive reaction that drives out many socially useful activities. Schools may stop arranging excursions for pupils for fear of claims by injured pupils. Institutions such as homes for the elderly or nurseries for children may close if the costs of liability insurance become prohibitive. There may be other defensive consequences. Family doctors may refer too many healthy patients to specialists to protect themselves against negligence claims, thereby adding to the costs of the health service and delaying appointments for patients in need of specialist services. In *Majrowski* v *Guy's and St Thomas' NHS Trust* [2006] 4 All ER 395, further concerns about compensation claims in the modern law were expressed. Here, a former employee claimed that he had been bullied, intimidated and harassed by his departmental manager, acting in the course of her employment. He claimed for damages against the NHS Trust for breach of statutory duty under the Protection from Harassment Act 1997. The question for the House of Lords was whether an employer could be vicariously liable under the Protection from Harassment Act 1997 for the departmental manager's conduct. In order to succeed under the Protection from Harassment Act 1997 there is no need for the claimant to prove foreseeability of harm or personal injury.

In confirming that such a claim could be brought the House of Lords dismissed the NHS Trust's appeal and held that an employer might be vicariously liable for a breach of statutory duty imposed on its employee if, in all the circumstances of the case, the

test of fairness and justice was met. Lord Nicholls pointed out that where the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. He noted that courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. The increased scope for claiming compensation was expressed in the following way:

BARONESS HALE OF RICHMOND [69]

> There is already concern amongst some of our legislators that the scope for claiming compensation, even for recognised physical injuries, has gone too far. The avowed purpose of the Compensation Bill currently before Parliament is to reign in the so-called 'compensation culture'. The fear is that, instead of learning to cope with the inevitable irritations and misfortunes of life, people will look to others to compensate them for all their woes, and those others will then become unduly defensive or protective.

Concerns about the supposed 'compensation culture' and fears of an insurance crisis because of the steadily escalating costs of compensation were referred to the government's Better Regulation Task Force.

In reporting its findings (*Better routes to redress*, 2004) the Task Force concluded that the compensation culture was something of a myth but the public perception of people trying to claim what appear to be large sums of money for what are portrayed as dubious reasons results in real and costly burdens. The report pointed out that the threat of litigation, or just a complaint or a claim, can have some positive effects, such as improved risk assessments in the case of schools and maintenance of work by local authorities. The negative aspects of the 'have a go' culture were also recognised because as well as genuine claims, local authorities spend considerable time and resources dealing with vexatious or frivolous claims.†

† Is there sufficient factual evidence for the existence of a compensation culture?

Case law example

In response to the perception that society is becoming risk averse, and the emergence of a compensation culture, the Compensation Act 2006 referred to by Lady Hale (above) has been enacted. The Act aims to address concerns that many worthwhile activities would be curtailed because of the deterrent effect of potential liability and to serve as a reminder to judges to consider carefully the impact which decisions about potential negligence liability might have in deterring the organisation and pursuit of worthwhile activities.

***Perry* v *Harris* (2008)**

Although the Act was not specifically applied in *Perry* v *Harris* [2008] EWCA Civ 907, the reluctance of courts to perpetuate a culture which is excessively risk-averse is reflected in the decision of the Court of Appeal. The issue was whether parents who hired a bouncy castle for a child's birthday party were required to watch the children playing in the castle continuously to prevent injury occurring. In allowing the parents' appeal against liability the Court of Appeal held that children play by themselves or with other children in a wide variety of circumstances and it was impossible to avoid all risk that, when playing together, children might injure themselves or each other. It was impractical for parents to keep children under constant surveillance or even supervision and it would not be in the public interest for the law to impose a duty upon them to do so.

***Sutton* v *Syston Rugby Football Club Ltd* (2011)**

The Act was applied in *Sutton* v *Syston Rugby Football Club Ltd* [2011] EWCA Civ 1182 where the claimant was injured when he fell on a plastic object submerged in the rugby pitch. The object was not easy to see. The judge had rejected the suggestion that a quick walk over inspection of the rugby pitch was sufficient to discharge the club's duty to take such care as was reasonable. The club's appeal against liability was allowed. The Court of Appeal held that a 'reasonable walk over of the pitch' was sufficient and noted that games of rugby are no more than games and desirable activities within the meaning of s.1 of the Compensation Act 2006.

2.2.9 Proposals for reform

The Pearson Commission (above) made a number of proposals for reform of the tort system. One proposal, aimed at addressing the costs of operating the tort system, was a no-fault liability system which seeks to compensate all accident victims on the basis of need. Such a scheme was adopted by the government of New Zealand in 1974 when the tort system was abolished for all personal injuries arising out of accidents. A state compensation scheme was established, contributed to by employers, car owners, and the government, which enabled payments to be made on an administrative basis without proof of fault. Recommendations for reform of the UK tort system by replacing it with a no-fault system have not been adopted and the fault principle continues to dominate the law of tort.†

† Identify the drawbacks which have been discovered in the New Zealand no-fault state compensation scheme.

2.2.10 Human rights principles

We have seen in Chapter 1 that s.6 of the HRA 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. You will see below that this section has its greatest impact where the defendant to a negligence action is a public authority, such as a local council.

2.2.11 Human rights, negligence and public bodies

In this introductory chapter only a brief explanation of the relation between the tort of negligence and the system of human rights norms is needed. Briefly, then, there has been growing concern that certain classes of defendant in tort actions routinely avoid having to face the full consequences of actions/decisions that appear careless and cause damage to other individuals. By and large these are defendants who exercise wide discretionary powers, such as the police and local authorities. The difficulties in bringing actions against these bodies do not arise where the body in question has made a decision to act in a particular way and then has carried out those actions carelessly – for example, where a police officer arrests a dangerous criminal (the decision to act) and then carelessly allows the criminal to escape and the criminal injures an innocent third party. Subject to certain proofs the public body will almost certainly be held liable. The problem occurs where the public body refrains from acting and where it is alleged that the failure to act led to damage. Let us now vary the above scenario by way of illustration: the police fail to arrest the dangerous criminal – because they claim that due to other policing priorities they cannot commence an investigation into that particular crime – and the criminal injures an innocent third party. In the latter scenario, liability on the part of the police will be hard to establish because:

- there is reluctance to impose liability on any defendant who has simply failed to act. The 'omissions principle' (discussed below) has been reaffirmed in *Robinson* v *Chief Constable of West Yorkshire Police* [2018] UKSC 4. (Chapter 4 of this guide develops this theme)
- there is reluctance on the part of the courts to fetter the discretion of the public body. If the courts concluded in the above hypothetical scenario that the police ought to have investigated the crime, the court would indirectly control how the police determine priorities. In *Robinson* the Supreme Court held that the absence of a duty in these cases does not depend on 'policy' considerations but can be justified on the basis of the general principles of negligence. This theme is explored further in Chapter 7 of this guide.

Over the years, so many courts have decided cases brought before public authorities taking these two factors into account that such bodies were said to enjoy a virtual immunity from tort actions. As a result of this 'immunity' many novel claims, such as the claims against educational authorities alleged to have negligently caused children in their care to suffer economic and other losses as a result of sub-standard education, were deemed to fall outside the scope of the law of tort. It can be readily seen that such 'immunities' sit uneasily with a law that aims to remedy those 'wrongs' falling outside extant legal categories. However, previous rulings on the liability of public

authorities will now need to be understood in the context of *Robinson* where the Supreme Court reviewed the development of the law in this area (see Section 7.1).

From these examples, you will gather that many of the public defendants called to account were charged with responsibilities that could affect the health, wellbeing and lives of individuals, leading to potential breaches of the fundamental right to life or the right to be protected against inhuman or degrading treatment and punishment. How these claims have played out in the legal system is one of the most interesting and controversial aspects of the development of tort law.

As public authorities themselves, the courts have to take account of human rights principles (see Section 1.5). In *Campbell* v *MGN Ltd*, Baroness Hale of Richmond observed at [132]:

> Neither party to this appeal has challenged the basic principles which have emerged from the Court of Appeal in the wake of the Human Rights Act 1998. The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights… "The court's approach to the issues which the applications raise has been modified because, under section 6 of the 1998 Act, the court, as a public authority, is required not to 'act in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of these articles."
>
> **[133]**
>
> The action for breach of confidence is not the only relevant cause of action: the inherent jurisdiction of the High Court to protect the children for whom it is responsible is another example: see In *re S (A Child) (Identification: Restrictions on Publication)* [2004] Fam 43. But the courts will not invent a new cause of action to cover types of activity which were not previously covered: see *Wainwright* v *Home Office* [2004] 2 AC 406. Mrs Wainwright and her disabled son suffered a gross invasion of their privacy when they were strip-searched before visiting another son in prison. The common law in this country is powerless to protect them. As they suffered at the hands of a public authority, the Human Rights Act 1998 would have given them a remedy if it had been in force at the time, but it was not. That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy. But where existing remedies are available, the court not only can but must balance the competing Convention rights of the parties.

Activities

Activity 2.1

Core comprehension – compensating victims of diseases

Using the Online Library, find and read Stapleton, J. 'Compensating victims of diseases' (1985) 5(2) *OJLS* 248 (available in JSTOR and HeinOnline).

This comprehension activity focuses on pp.253–68 of the Stapleton article, starting from 'Suggested reforms'.

a. **What are the hallmarks of man-made disease?**
b. **What are the three main types of injury? Can you name a related case for each type?**
c. **As identified by Stapleton, list the three main barriers which victims of man-made disease must overcome for a successful claim in tort.**
d. **Why was there a need for the overriding discretion to bring claims which had exceeded the thresholds of the law of limitations?**
e. **How, specifically, does the passing of time present difficulties for victims of man-made diseases?**
f. **Why does Stapleton argue that medical causation is the most important barrier to a successful claim for injury caused by man-made disease?**
g. **How does 'proof of fault' differ from 'medical causation'?**
h. **Identify the three problems associated with 'manufacturing defect' cases. Why are these problematic for the claimant?**
i. **Summarise in 2–3 sentences the basic argument presented by Stapleton.**

Activity 2.2

Applied comprehension – reforming compensation

Using the Online Library, find and read Taylor, A. 'Concurrent duties' (2019) *MLR* 82 (1) 17–45 (available in LexisLibrary and Academic Search Complete).

This applied comprehension task links to your previous learning and extends your knowledge by challenging you to consider overarching concepts which underpin arguments advanced by academic writers. The skills you acquire through the completion of applied reading comprehension tasks will further support your ability to write examination answers which meet the higher conceptual marking criteria – such as analytical thinking, application of the law and synthesis of materials.

As you continue your studies, you should be able to further comprehend and apply Taylor's important analysis of civil liability.

a. **What two main cases are said to have recognised the existence of concurrent liability in English law?**
b. **Briefly paraphrase Lord Goff's reasoning in *Henderson* v *Merrett Syndicates*.**
c. **What is an 'assumpsit duty'?**
d. **Is there a difference between concurrent duties and concurrent remedies? What case might illustrate your answer?**
e. **Explain what is meant by 'remoteness'? What is the simple test for remoteness in negligence.**
f. **Briefly summarise the approach of Professor Burrows.**
g. **What might be the practical implications of Taylor's conclusion?**

Activity 2.3

Core comprehension – social value of activities

This comprehension activity focuses on the discussion of the social value of activities and the Court's approach to limiting the reach of the compensation culture. You will return to this case later when you study the topic of occupiers' liability.

Find and read the case of *Tomlinson* v *Congleton Borough Council* [2004] 1 AC 46 and answer the following questions.

a. **Summarise in fewer than 25 words how John Tomlinson (the claimant) sustained his injury and the severity of his loss.**

b. **Why is the severity of Mr Tomlinson's injury not enough in itself to trigger an award of compensation?**

c. **Which type of activities with a social value were identified as a major concern and why?**

d. **Which factors have to be balanced against each other when deciding liability in the case of common law negligence?**

e. **Identify some authorities referred to within the judgment where the lack of common sense of the claimants in their approach to the obvious dangers of natural features of landscapes has contributed to their claim for compensation being dismissed.**

f. **Why is the issue of free will important when considering compensation claims for injury sustained during participation in activities with social value?**

g. **Summarise what Lord Hobhouse of Woodborough identifies as an 'evil consequence' of an 'unrestrained culture of blame and compensation'.**

h. **Does Lord Scott of Foscote agree with Lord Hobhouse on this issue?**

Activity 2.4

Core comprehension – compensation culture

Using the Online Library, find and read Williams, K. 'State of fear: Britain's "compensation culture" reviewed' (2005) *Legal Studies* 25(3) 499–515 (available in HeinOnline via the Online Library) and answer the following questions.

a. **According to Williams, why is a growth in 'compensation culture' undesirable?**

b. **What are the main features of undesirable levels of formal disputes?**

c. **Concisely paraphrase in bullet points the issues inherent in these features.**

d. **In the discussion of 'the numbers issue', Williams identifies two considerations related to empirical evidence on the existence of a compensation culture. What are they? What does Williams conclude?**

e. **Explain why a well-founded claim should not be viewed as 'part of the problem'.**

f. **How does the 'compensation culture' impact on potential defendants in legal disputes?**

g. **Explain what is meant by 'an expanding liability regime'.**

h. **Explain how an expanding liability regime would impact upon insurers' underwriting and pricing policies.**

Activity 2.5

Applied comprehension – liability in insurance claims

Look up the judgment in *Durham* v *BAI (Run Off) Ltd* [2012] UKSC 14 (the *Trigger* litigation). You are not required to read the whole judgment to complete this applied comprehension activity.

Questions (a)–(f) relate to the Introduction section of Lord Mance's judgment at [1]–[6].

Questions (g)–(l) relate to Lord Phillips' opinion at [91]–[98].

a. **Identify the subject area of this case and its relevance to the theme of tort and insurance.**

b. **What is the difference between employers' liability insurance and public liability insurance?**

c. **Describe in fewer than 30 words how the Employers' Liability (Compulsory Insurance) Act 1969 contributes to enabling employees of businesses other than local authorities to recover damages for bodily injury or disease related to the workplace.**

d. **Identify the two triggers of liability in insurance claims.**

e. **Which trigger is most favourable to victims of diseases which are related to harmful exposure to substances before the manifestation of a related disease at a later date? Why?**

f. **Which statistic evidences the common use of asbestos materials in the 1960s and 1970s in the UK?**

g. **What type of diseases are 'long tail' industrial diseases? Give three examples of 'long tail' diseases and one of a 'short tail' industrial disease.**

h. **How are employer liability insurance contracts usually constructed with regards to the period of insurance cover?**

i. **What was the traditional understanding of duty, breach, causation and liability in reference to the duration of the cover period?**

j. **How did the *Bolton* decision, which related to public liability insurance, contribute to the approach of insurance companies to employers' liability insurance for long tail diseases?**

k. **Paraphrase in fewer than 50 words the impact of this approach on the interpretation of employers' liability insurance contracts.**

l. **What is the correct interpretation as held in the *Trigger* case?**

3 Trespass to the person and to land

Contents

Introduction

Trespass, one of the oldest torts, was developed to give legal remedies to those who might otherwise be driven to exact personal vengeance in response to an unjustifiable interference with their person, land or property. This chapter will deal with trespass to the person in detail and trespass to land in outline. It is important to note the overlap of this tort with the criminal law, for instance in the case of battery and assault. However, there are key differences between tort and the criminal law and so it is important that keep your focus primarily on the nature of tortious liability, despite the fact that some of the cases cited are criminal cases. Trespass torts concern intentional and direct actions by the defendant and are actionable *per se*, that is without proof of damage.

Learning outcomes

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **define assault, battery, and false imprisonment**
- **evaluate the defences to trespass to the person**
- **discuss the applicability of the tort of *Wilkinson* v *Downton***
- **explain the basic elements of trespass to land and its relationship to other torts.**

Core text

- **Giliker, Chapter 11 'Trespass'.**

3.1 Trespass to the person

3.1.1 Battery

Battery is the actual infliction of unlawful force on another person. As well as bodily integrity, the tort of battery protects the claimant's dignity. An action might be brought where the claimant's rights have been infringed technically but no physical injury has been suffered. An example could be unlawfully taking a person's fingerprints or wrongfully seizing a person's arm to detain him in a shop or on the street on suspicion of shoplifting. In these cases, the claimant may only want to establish a principle, rather than seek compensation. Because proof of physical injury is not required, an action in trespass is appropriate.

Because battery is a trespass tort, it must be direct and intentional. The following two cases, which involve discussion of directness, indicate that this element has been very generously interpreted by the courts. In *Scott* v *Shepherd* (1773) 2 Wm Bl 892 the defendant threw a lighted firework into a market stall. Eventually, after several stallholders had instinctively thrown it from stall to stall, it injured the plaintiff. Although this injury was not a strictly a direct result of the defendant's throwing of the firework and the action arguably should have been brought in case (negligence), the courts were prepared to extend the definition of direct injury to give the plaintiff a remedy. It was held that the link between the defendant's act of throwing the firework had not been broken by the instinctive reaction of others throwing it on. *Haystead* v *Chief Constable of Derbyshire* [2000] 3 All ER 890 concerned a physical attack on a woman who was holding a baby. As a result, she dropped the baby, who was injured. The defendant was held to have committed battery against the baby, although physical force had not been directly applied. In both cases the intervening acts were seen as inevitable.

The defendant's act must be intentional. In *Nash* v *Sheen* (1953) CL Y 3726 the defendant hairdresser was liable in battery when a tone rinse that caused a rash was given to a plaintiff who had instead requested a permanent wave. The hairdresser's act in applying the rinse was deliberate, even if the outcome had not been.

In *Wilson* v *Pringle* [1987] QB 237 the defendant, a 13-year-old schoolboy, admitted that as an act of ordinary horseplay in a school corridor he pulled the plaintiff's schoolbag from his shoulder. This caused the plaintiff to fall and suffer a hip injury and he applied for a summary judgment on the ground that the defendant's admission of horseplay amounted to a clear case of battery to which there was no defence. The Court of Appeal reversed the finding in favour of the claimant and introduced a requirement for hostility: 'unless it was self-evident from the act itself, the plaintiff must show the contact to be hostile', while adding that hostility did not necessarily require 'ill-will or malevolence'. This left much uncertainty and in the medical case of *Re F* [1990] 2 AC 1 Lord Goff declared that battery constituted any intentional physical contact that was not 'generally acceptable in the ordinary conduct of daily life' (*Collins* v *Wilcock*) and doubted whether it is correct to say that the touching must be hostile.

An interesting question arose in *Fagan* v *Metropolitan Police Commissioner* [1969] 1 QB 439 where the defendant accidentally stopped his car on a policeman's foot. At this point, no battery had been committed. However, when loudly requested to move his car, the defendant refused and at that point the tort was completed.

Transferred intention was the issue in *Livingstone* v *MoD* [1984] NILR 356 where the defendant soldier in Northern Ireland intended to hit someone other than the victim when he fired a baton round. However, because his action in firing the baton was intentional, even though he was aiming at a rioter when he fired, the soldier was found liable in battery when he missed his target and struck the plaintiff.

What degree of force is necessary? In *Collins* v *Wilcock* [1984] 1 WLR 1172 a female police officer tried to question a woman whom she suspected of soliciting for prostitution. When she took hold of the woman's arm in order to detain her and administer a caution the woman scratched the police officer's arm. On appeal against the suspect's

conviction for assaulting a police officer in the execution of her duty, it was held that the officer had gone beyond the scope of her duty and, when not exercising her powers of arrest, the officer's action in touching the woman amounted to a battery. You should note the distinction between restraint in these circumstances and a touching to attract a person's attention or in the ordinary conduct incidental in everyday life, as described by Goff LJ in *Re F*.

3.1.2 Assault

As defined by Goff LJ in *Collins* v *Wilcock* assault is 'an act which causes another person to apprehend the infliction of immediate, unlawful force on his person'. The intention required is of a voluntary act that was intended or at the least reckless to cause the claimant to (reasonably) apprehend the immediate infliction of unlawful force.

In *Stephens* v *Myers* (1840) 4 C&P 349 the plaintiff was the chairman of a parish meeting at which it was resolved, by a large majority, to expel the defendant. The defendant became increasingly vociferous and moved towards the plaintiff saying that he would rather pull him out of the chair than be expelled. As the defendant moved to unseat the plaintiff, he was prevented by the churchwarden from doing so. The question to be decided was whether the defendant's threat was sufficient to put the plaintiff in reasonable apprehension of an immediate battery. In finding the defendant was liable in assault Lord Tindal CJ stated that:

> … though he was not near enough at the time to have struck him, yet if he was advancing with intent, I think it amounts to an assault in law.

The element of 'Immediate and direct infliction of illegal force' was discussed in *Thomas* v *National Union of Mineworkers* [1986] Ch 20 where picketing miners made violent threats and gestures at working miners who were being taken into the colliery in buses. There was no liability in assault because there was no danger of an immediate battery since the working miners were safely in vehicles protected by police barricades.

It has been long debated whether words can constitute assault. In *R* v *Mead and Belt* (1823) 1 Lew CC 184 it was held that 'No words or singing are equivalent to an assault' unless accompanied by a threatening gesture; but in *R* v *Wilson* [1955] 1 WLR 493 'Get out knives' was capable of constituting assault. It has been said that words can negate a potential assault, as in *Tuberville* v *Savage* (1669) 1 Mod Rep 3. Where the defendant placed his hand on his sword and said: 'If it were not Assize time, I would not take such language from you'. It was held that by his own words the defendant had denied the possibility of a battery, because it was indeed Assize time. It has certainly been suggested, however, that a reasonable person in the position of the plaintiff observing the sword might continue to feel real fear. The criminal case of *R* v *Ireland* [1998] AC 147 considered these issues. Three women suffered psychiatric injury, following a campaign of threatening silent phone calls from the defendant. The Court of Appeal recognised that the law must continue to adapt to growing understanding about the ways in which a 'person of evil disposition' may inflict fear and concluded that in some circumstances both words and silence could constitute assault. This scenario would now be dealt with under the Protection from Harassment Act 1997 (see Section 3.3).

3.1.3 False imprisonment

False imprisonment is the total, intentional and unlawful constraint on the freedom of movement of another but it does not require incarceration or the use of force.

Total

Constraint was not total in *Bird* v *Jones* (1845) 7 QB 745. The defendants, in order to provide seating for spectators at a rowing event on the Thames, wrongfully cordoned off a footpath on Hammersmith Bridge. The plaintiff insisted on his right to use a part of the footpath that had been cordoned off. He was prevented from doing so by the defendant and was told that he could go back the way he had come. The plaintiff

refused but, because he had that alternative option, it was held that there was therefore no false imprisonment: 'imprisonment is…a total restraint of the liberty of the person…and not a partial obstruction of his will, whatever inconvenience it may bring on him.' In *Robinson* v *Balmain Ferry Co Ltd* [1910] AC 295 the plaintiff was a lawyer who missed a ferry and decided that he could not wait 20 minutes for the next boat. He was directed to the turnstile that was at the exit but, when he refused to pay the one penny exit charge at the turnstile, the defendant's employee refused to let him through. It was held that there was no false imprisonment because the condition of paying a penny to leave was a reasonable one in the circumstances and the plaintiff had been aware of this in advance. The reasonable condition meant that restraint was not total.

Intentional

Difficult questions arise when formal imprisonment is involved. In *R* v *Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 AC 19 a prisoner who had been detained in Brockhill Prison for 59 days beyond her correct release date was awarded £5,000 compensation for false imprisonment, despite the fact that the prison governor had not been to blame for the miscalculation of the date of the prisoner's release, which had been made according to law that existed at the time of the calculation. However, in dismissing his appeal, the House of Lords held that the prison governor's belief that the prisoner was lawfully detained was insufficient justification for the unauthorised detention. It was not necessary that there be an intention to detain unlawfully.

The question of whether a defendant's omission can constitute false imprisonment was considered in *Iqbal* v *Prison Officers Association* [2009] EWCA Civ 1312. Here, prisoners claimed false imprisonment because they had to spend an extra six hours of their day locked in their cell as the result of an unannounced strike by prison officers. The Court of Appeal held that as a general principle a defendant was not to be held liable in tort for the result of his inaction unless he held a specific duty to the claimant to act; here the mere failure of the prison officers to carry out their contractual duties involved no positive action on their part. See also *Herd* v *Weardale Steel* [1915] AC 67.

It is not necessary that the claimant be aware of their detention. This was held in *Meering* v *Grahame-White Aviation Co Ltd* (1919) 122 LT 44, contrary to an early decision in *Herring* v *Boyle* (1934) 149 ER 1126. The plaintiff was suspected of theft from his employers and taken to the company's office for questioning. Unknown to him, the police waited outside the office and, if the plaintiff had tried to leave, they would have prevented him from doing so. The Court of Appeal held that there was no need for the plaintiff to have been aware of that he was being constrained, however, the extent of knowledge of the detention would be relevant to the assessment of damages. In *Murray* v *Ministry of Defence* [1988] 1 WLR 692 the House of Lords declared, 'the law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage.'

Unlawful

There are significant civil liberties aspects to some cases of false imprisonment and, since the Human Rights Act 1998, the influence of the European Court of Human Rights has been significant. Article 5 was applicable in *R* v *Bournewood Mental Health Trust (ex p L)* [1999] UKHL 24 but the controversial majority decision against the claimants by the House of Lords eventually resulted in a finding against the UK in *HL* v *UK* (2005) 40 EHRR 32, followed by legislation addressing the issues raised: the Mental Capacity Act 2005.

An important case in this area was *Austin* v *Commissioner of Police of the Metropolis* [2009] UKHL 5. It arose from the G20 summit in London in May 2001, which involved considerable confrontation and widespread violence. Police intelligence identified that the protest would create one of the most serious threats to public order ever seen in the city, with a real risk of serious injury and even death, as well as damage to property. The crowd-control strategy adopted by the police – kettling – was imposed to create an absolute cordon to restrict movement around specific areas. The

appellants, not themselves protestors, were contained within the cordon for up to seven hours during the afternoon and into the evening.

Following their unsuccessful claim for false imprisonment in the domestic courts, they appealed to the European Court of Human Rights, arguing that their containment within the cordon amounted to deprivation of liberty within the meaning of Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

This was the first time that the Court in Strasbourg had considered the application of the Convention in respect of the 'kettling' carried out by the police on public order grounds. Agreeing with the House of Lords, in *Austin and others* v *UK* [2012] Crim LR 544 the Grand Chamber ruled that, based on the specific and exceptional facts of this case, the kettling did not amount to a deprivation of liberty so Article 5 was inapplicable. However, the Court went on to declare:

> It must be underlined that measures of crowd control should not be used by the national authorities directly or indirectly to stifle or discourage protest, given the fundamental importance of freedom of expression and assembly in all democratic societies. Had it not remained necessary for the police to impose and maintain the cordon in order to prevent serious injury or damage, the 'type' of the measure would have been different, and its coercive and restrictive nature might have been sufficient to bring it within Article 5.

The impact of the criminal justice system continues to affect the law on false imprisonment. *R (on the application of Jalloh)* v *Secretary of State for the Home Department* [2020] UKSC 4 concerned the definition of false imprisonment and its relationship to deprivation of liberty under Article 5. The claimant had been subject to a night curfew for over two years, which was monitored by an electronic tag. It was later established that there had been no lawful authority for the imposition of the curfew and the claimant brought an action for damages for false imprisonment.

According to Lady Hale, who gave the lead judgment, in this case there was no doubt that the defendant had defined the place where the claimant was to stay between the hours of 23.00 and 07.00. There was no suggestion that he could go somewhere else during those hours without the Secretary of State's permission. Although the claimant broke his curfew from time to time, this made no difference to his situation while he was obeying it. Although it was physically possible for the claimant to leave, his compliance was enforced and not voluntary. He was wearing an electronic tag, which meant that leaving his address would be detected. This is a case of 'classic detention or confinement' under the common law. Ruling in favour of the claimant, the Supreme Court firmly declined the opportunity to align the common law definition with the more nuanced (and less generous) concept of deprivation of liberty under the European Convention.

3.1.4 Defences to trespass to the person

In addition to the defences outlined below, a number of statutes authorise conduct that would, under different conditions, amount to trespass to the person: for instance, the Police and Criminal Evidence Act 1984 provides police with powers of arrest, constituting a defence to what might otherwise be false imprisonment or battery; the Mental Health Act 1983 makes provision for the compulsory admission to hospital and treatment in relation to mental health.

Consent

Many cases of physical contact that might otherwise be a battery will be lawful because the claimant expressly consented to the contact. As we have seen in *Nash* v *Sheen* there will be a trespass if there is a deviation from the procedure consented to – in that case, the application of a tone rinse to a plaintiff who requested a permanent wave was held to be trespass.

Medical treatment involving the direct application of physical contact administered without the patient's consent, or giving treatment different from that for which consent has been given, constitutes a battery. In *Chatterton* v *Gerson* (1981) QB 432, the

plaintiff was suffering from severe pain when her doctor gave her spinal injections, which helped the pain for a while. But, when her right leg became numb, she claimed in trespass on the ground that her consent to the injection was invalid because she had not been informed of this potential side effect. The defendant was not liable in trespass on the ground that if a patient is informed in broad terms of the nature of the procedure this amounts to 'real consent' and any failure to disclose the risks associated with the procedure does not invalidate the consent. However, even where consent is a valid defence to a claim in trespass, it is important to note that an action in respect of a doctor's failure to disclose sufficiently the risks inherent in medical treatment may be taken in negligence (see Section 9.3.3).

Implied consent to battery also arises in the case of participants in sporting activities who are implied to consent to the physical contact that occurs within the ordinary conduct of a game or sport, such as rugby (*R* v *Billinghurst* (1978) Crim LR 533). In *Condon* v *Basi* [1985] 1 WLR 866, it was held that consent to contact that could reasonably be expected is consent only to non-negligent behaviour. In this case, the defendant was found liable in negligence when the plaintiff suffered a broken leg as the result of a foul tackle in the course of a game of football. In *Watson* v *British Boxing Board of Control* [2001] QB 1134, it was held that although a boxer consents to injury caused by his opponent in the boxing ring, he does not consent to injury resulting from inadequate ringside safety arrangements.

For consent to be valid, the person must be have the capacity to do so; that is must be an adult (16 or over), sufficiently informed of the substance, risks and benefits of what is proposed and with the ability to understand the information. Capacity is presumed unless disproved. The law on capacity is complex (for instance consent and refusal to consent are distinguished) and beyond the scope of this guide. The common law, as exemplified in the important case of *Re F* [1990] 2 AC 1 has been largely codified in the Mental Capacity Act 2005.

Necessity

A narrowly applied defence is that of necessity: that the defendant was acting to avoid a greater harm to the claimant, a third party, the public or the defendant. It is this defence that permits the medical treatment by paramedics of someone found unconscious due to an accident or illness. It also permits the courts to authorise invasive medical procedures for those who are permanently unable to consent because they are in a coma or due to mental incapacity. The underlying principle, as stated by the majority of the House of Lords in *Re F* (1990), is that the treatment must be one that would be recommended by a responsible body of medical practitioners (*Bolam* v *Friern Hospital* [1957] 1 WLR 582) and in the best interests of the patient.

Self-defence

Self-defence will be a justification to an action in battery if the force used is reasonable and is proportionate to the threat. In *Cockroft* v *Smith* (1705) 2 Salk 642 the plaintiff, Cockroft, ran his forefinger towards Smith's eyes during a scuffle. Smith bit off Cockroft's finger during the incident and the question was whether in these circumstances self-defence was a proper defence. It was held that a person may only use reasonable force in self-defence; here Smith could not justify biting off the plaintiff's finger. Holt LJ said:

> … hitting a man a little blow with a little stick on the shoulder, is not a reason for him to draw a sword and cut and hew the other.

The defendant has the burden of proving self-defence (on the balance of probabilities) and the requirements for what the defendant needs to show to establish this defence in civil law are different from what is required in criminal law. *Ashley* v *Chief Constable of Sussex Police* [2008] UKHL 25 involved the fatal shooting of Mr Ashley by the police during an armed drugs raid at his home in the early hours of the morning. The police admitted negligence and accepted responsibility for all damage flowing from the raid but disputed liability for battery on the basis that the officer in question had acted

in self-defence. One of the questions considered by the House of Lords was whether a defendant who had mistakenly but honestly thought it was necessary to defend himself against an imminent risk could rely on self-defence when his mistaken belief, although honestly held, had not been a reasonable one. It was held that, unlike the position in criminal law, here the belief must have been a reasonable one in the opinion of the court.

Although the defence is available to one who goes to assist another under attack, in *Bici* v *Ministry of Defence* [2004] EWHC 786 self-defence failed when soldiers taking part in United Nations peacekeeping operations in Kosovo who were not being threatened, shot the claimants; there were no reasonable grounds for them to believe that they were in danger.

3.2 Intentional and indirect infliction of physical harm or psychological injury – the tort in *Wilkinson* v *Downton*

In *Wilkinson* v *Downton* [1897] 2 QB 57, the range of conduct that could amount to a battery was extended to include situations where no contact or physical force is used. Liability can arise where words calculated to cause physical injury (including severe distress or psychiatric harm) are spoken. In *Wilkinson* itself the defendant, as a practical joke, falsely told the plaintiff that her husband had been seriously injured in an accident. As a result of hearing this information, the plaintiff suffered a severe nervous disorder. At the time this case was decided, however, there was: (1) no recovery in negligence for psychiatric harm; and (2) the specific requirements for assault and battery – the application, or threat, of force – were not present, so the plaintiff could not claim in trespass to the person. The court distinguished the particular facts from trespass to the person and instead found the defendant liable for wrongful interference. The conduct had not been negligent but yet was intended to cause harm. Liability will arise under the principle established in *Wilkinson* v *Downton* where an act willfully calculated to cause physical or psychiatric damage does actually cause such harm.

The defendant's act or words will be voluntary but there has been some uncertainty regarding the degree to which the consequent harm must be intended. In *Wainwright* v *Home Office* [2003] UKHL 53 the House of Lords indicated that recklessness as to the outcome would suffice but this was rejected by the Supreme Court in *Rhodes* v *OPO* [2015] UKSC 32. The case concerned an attempt to prevent the publication of a memoir on the grounds that its contents were likely to cause distress to the author's son. *Wilkinson* was held not to apply because it could not be inferred that the defendant had intended to cause severe mental or emotional distress to the claimant.

3.3 Protection from Harassment Act 1997

Passed at least in part due to an awareness of the serious impact of behaviour such as stalking and serious press intrusion, this legislation provides both civil and criminal remedies for behaviour defined in s.1(1): 'a person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows, or ought to know, amounts to harassment of the other.' A 'course of conduct' consists of two or more occasions and 'harassment' may include but is not limited to 'alarming the person or causing the person distress'. Under s.3, an individual may bring civil proceedings for damages and or an injunction.

3.4 Trespass to land

Trespass to the person, as we have seen, protects against interferences with the person, whereas trespass to land is concerned with protection of interests in land. However, as with trespass to the person, the unlawful interference with land must be direct and intentional and it is also actionable *per se* (although only nominal damages will be awarded without proof of loss).

It is the intention to enter the land that is essential for liability; an intention to trespass is not required. This means that a guest who walks up the drive to the front door of a house in the mistaken belief that it is the home of a family with whom he is staying could be a trespasser. Although he had no intention to trespass, his intention was to enter the land of another, albeit in a mistaken belief as to who owned the land.

Basely v *Clarkson* (1681) 3 Lev 37, here the defendant was mowing his own land he mistakenly went over the boundary and mowed his neighbour's land, believing it to be his own. The defendant's plea of mistake to a claim in trespass to land failed because his act of cutting the grass was intentional even though he made a mistake about where the boundary was.

It is important to note that trespass to land protects against direct interferences with land that can be committed by: entering someone's house; walking on the land; leaning against a fence; or sitting on a wall. In *Gregory* v *Piper* [1829] 9 B&C 591 a pile of rubbish on the defendant's land accidentally collapsed and fell against the plaintiff's wall. The court held that this was probably a natural consequence of the rubbish collection and thus actionable as trespass. Indirect interferences with use or enjoyment of land such as smells, smoke, or noise are protected by the tort of nuisance.

'Land' includes the surface and anything permanently attached to the land, like houses, walls, or standing crops. It also includes the subsoil and airspace, which means anything above or below the land to a reasonable height or depth in relation to the normal use of the land. In *Kelsen* v *Imperial Tobacco Co* [1957] 2 QB 334 an advertising sign that protruded a few inches into the airspace over the plaintiff's land amounted to trespass to land and in *Woolerton and Wilson* v *Richard Costain* [1970] 1 WLR 411 a builder was liable in trespass for a crane that overhung the plaintiff's land. Although invasions of airspace are actionable, a landowner's rights in the airspace above his land do not extend to an unlimited height. In *Bernstein* v *Skyviews* [1978] QB 479 the issue of intrusion in airspace above the land was in question when Bernstein sued the defendants in trespass for taking aerial photographs from hundreds of metres above the grounds of his house. The court held that Bernstein had no reasonable use for the airspace at that height and on this ground the defendant was not liable in trespass.

Who can bring an action in trespass to land? This tort developed to protect a person's possession of land and so only a person who has exclusive possession of land may sue in trespass. A landlord of leased premises does not have exclusive possession, nor does a lodger or a guest, who cannot therefore bring such an action.

The remedies for trespass to land are primarily damages and injunction; less commonly self-help and an order for possession of land (basically declaring the plaintiff's title to the land) may apply.

Defences

The most important defence is permission or 'licence'. Permission may be express or implied – for instance there is presumed permission to go up someone's front path to knock on their door. When this is prohibitied (i.e. a notice saying 'do not enter') or withdrawn then trespass occurs after a reasonable opportunity to leave the premises. In *Wood* v *Leadbitter* (1845) 153 ER 351, a ticket-holder for a race track was ejected forcibly by an employee after refusing a request to leave. Although the ticket-holder had wrongfully been excluded in breach of contract, this was held to be irrelevant to an action in tort; the ticket-holder had become a trespasser. Legal justification to enter a premises may be granted by statute, such as that of the police to enter a premises under warrant under the Police and Criminal Evidence Act 1984.

It is possible to defend an action in trespass on grounds of necessity but for this defence to succeed there must be no reasonable alternative course of action open to the defendant. S*outhwark London Borough Council* v *Williams* [1971] Ch 734 was an action for trespass in unoccupied premises against squatters who were homeless. The squatters were not allowed to rely on the necessity for shelter as a defence; according to the Court of Appeal the situation was not sufficiently urgent. In *Monsanto plc* v *Tilly*

[2000] Env LR 313 a group of people protesting against the production of genetically modified (GM) crops entered the claimant's land in order to destroy some of the growing GM crops. As a defence against the trespass action, necessity was claimed on the grounds of protection of the environment. The Court of Appeal held that necessity did not apply here, where the primary objective had been obtaining publicity for their cause. Necessity was a very narrow defence, only applicable as a reasonable response to serious and immediate danger to life or property.

Summary

The above torts have in common the characteristics of being intentional, direct and actionable (with the exception of *Wilkinson* v *Downton*) without proof of damage. They serve as a good introduction to the law of tort, before proceeding to negligence, which is obviously more complex and wide-ranging.

Activities

Activity 3.1

Core comprehension – trespass to the person

In the Online Library read *Ashley* v *CC Sussex* [2008] UKHL 25.

a. **What were the possible grounds of liability for the defendants?**

b. **Why were the claimants concerned to proceed with one of these grounds, in particular, to the House of Lords?**

c. **What is said to be the difference between the functions of criminal law and of civil law; and what is the significance of this difference when considering defences?**

d. **In your own words, summarise the decision by the Law Lords.**

Activity 3.2

Applied comprehension – *Wilkinson* v *Downton*

In the Online Library read Hunt, C. '*Wilkinson* v *Downton* revisited – case and comment' (2015) 74 *CLJ* 392.

a. **Why was the action in *OPO* v *Rhodes* [2015] UKSC 32 not brought in**

   i. **negligence?**

   ii. **defamation?**

b. **In broad terms, what are the three components to be considered an action in *Wilkinson* v *Downton*?**

c. **What did the Supreme Court conclude regarding the book in question on the 'conduct' issue?**

d. **What is your understanding of the intention now required to found liability in *Wilkinson* v *Downton*?**

e. **In your own words, in tort what is the current state of the concept of 'imputing intention as a matter of law'?**

f. **What advice might you give to the claimant in this action?**

g. **What do you see as the effect of the decision in *OPO* upon future litigation?**

Part II: Negligence 1: defining the modern duty of care

4 Basic principles and duty of care

Contents

Introduction

Negligence is the most important modern tort. It is founded on a principle of wide and general application.

This chapter outlines some of the social and policy questions that have influenced the development of negligence. The basic structure of the tort and the organisation of the material in subsequent chapters is also described.

Negligence is now a tort of great size and complexity. This guide (as in most textbooks) sets out the questions of duty, breach, causation and remoteness in that order. This often means that some of the most complex issues are dealt with at great length under the heading of 'duty of care'.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **discuss the emergence of a unifying principle in the tort of negligence**
- **indicate some of the social and policy questions that have influenced the development of the tort**
- **define the principles which led to an expansion of negligence liability and the extent to which the courts have retreated from this expansion**
- **explain how negligence is structured on the concepts of duty of care, breach of duty and resulting non-remote damage**
- **discuss the 'neighbour principle' test**
- **explain the way in which the duty concept was expanded in subsequent cases**
- **discuss the current approach to the existence of a duty of care**
- **explain how duty acts as a control device.**

CORE TEXT

- **Giliker, Chapter 2 'Negligence: the duty of care', Sections 2-001 to 2-020.**

4.1 Elements of negligence

So, what is negligence? The Oxford dictionary defines negligence as a 'lack of proper care and attention' or 'carelessness' and carelessness is indeed the foundation of the tort of negligence. But, while carelessness is a necessary condition for the establishment of liability in the tort of negligence, it is not a sufficient condition.

In order to succeed in an action in negligence a claimant must prove all the elements of the tort outlined below. The defendant will succeed if any one of them is not proved, so will focus on the areas of weakness in the particular case. The leading case of *Hill* v *Chief Constable of West Yorkshire* [1989] AC 53 will serve to illustrate the operation of the following four elements of the negligence matrix.

1. That a duty was owed to the claimant by the defendant in respect of the loss or injury sustained.
2. That the defendant carelessly did something or carelessly omitted to do something, resulting in a breach of that duty.
3. That there is a causal link between the breach of duty and the damage or other loss that the claimant sustained.
4. That the damage or other loss sustained was of a type that could reasonably be expected to result from the breach of duty.

The claim was brought by the estate of Jacqueline Hill, the last victim of the mass murderer Peter Sutcliffe, known as the 'Yorkshire Ripper'. The claim for damages was made on the basis that the police had negligently failed to apprehend the murderer before the victim was killed. It was at least arguable that the police had failed to investigate the case effectively. If they had done so, they might well have caught Sutcliffe before his last offence.

The negligence question would be posed thus.

- Did the West Yorkshire police owe a duty to Jacqueline Hill to take care in the investigation of the case and thus avoid her injury? – The duty question.
- Was the investigation in fact flawed and was the flaw such that a reasonable person placed in the same circumstances as the defendant would have taken care to avoid this flaw? – The breach question.
- Was the flawed investigation the proximate cause of the death of Jacqueline Hill? – The causation question.
- Was death a form of injury or loss that could reasonably be foreseen as a result of the flawed investigation? – The remoteness question.

Notwithstanding that harm was reasonably foreseeable, the House of Lords held that there was insufficient proximity between the police and the victim. Sutcliffe's offences were fairly random. Any woman was at risk. However, public policy (discussed below) was also a factor in this decision. Their Lordships stated that a general duty of care to protect all members of the public from the consequences of crime would be impracticable and, on grounds of public policy, deeply damaging to police operations.

In *Robinson* v *Chief Constable of West Yorkshire Police* [2018] UKSC 4 a woman was injured by police action, when she passed an arrest taking place on the street. The Supreme Court dismissed arguments that *Hill* established a principle that public policy is capable of constituting a separate and independent ground for holding that liability in negligence should not be imposed. The absence of a duty of care on the police based on public policy was said to be a misunderstanding and misinterpretation of the law. The police, in common with everyone else, owe a duty of care to avoid causing foreseeable personal harm to another person, as in *Robinson*. The common law does not normally impose liability for omissions. Under the 'omissions principle', liability is not imposed for omissions to act, or more particularly, for a failure to prevent harm caused by the conduct of third parties.

The police, when discharging their functions of preventing and investigating crime, owe a duty of care to avoid causing foreseeable harm under the ordinary principles of negligence; they do not owe a duty to members of the public to prevent harm caused by others. Lord Reid, giving the lead judgment in *Robinson* summarised the position in the following way [34]:

> …public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson stated in *Michael*, 'the common law does not generally impose liability for pure omissions' (para 97). This 'omissions principle' has been helpfully summarised by Tofaris and Steel, 'Negligence Liability for Omissions and the Police' 2016 75 *CLJ* 128:
>
> > 'In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger.'

The Supreme Court ruling in *Robinson* marks a retreat by the Senior Courts from a policy-based justification for not imposing liability on public bodies; under the ordinary principles of negligence a duty to prevent harm by others will not be imposed (other than in the exceptional circumstances outlined above).

4.2 The modern tort of negligence

In the context of legal history, negligence is a relatively recent tort to emerge in its own right. The older torts are normally identified by the interests they protect. For example, trespass protects bodily integrity, defamation protects reputation and the tort of nuisance protects use and enjoyment of land. The tort of negligence is not usually concerned with intentionally inflicted harm; it is more concerned with protecting against accidental harm where the defendant has been at fault. Even before the emergence of negligence there had already been a large number of specific actions based on fault but there was no unifying principle of wide and general application.

Weir (2006, p.29) comments on the dominance of the tort of negligence today and its pervasiveness in controlling traffic accidents, professional liability and so much else. He notes that before the tort of negligence became prevalent:

> … there had long been certain specific situations not covered by trespass where liability was imposed if the claimant could prove that the defendant's misconduct had caused him harm – for example, if he was the patient of a careless doctor, or the victim of injury on the defendant's premises, or the owner of a thing damaged while in the defendant's possession – one could not properly speak of a coherent tort of negligence until these instances were generalized.

In *Donoghue* v *Stevenson* [1932] AC 562 (see Section 4.7) the House of Lords sought to unify these disparate duties of care by setting out the nature of the relationship between the claimant and the defendant in which a duty is imposed on the defendant to avoid causing injury to the claimant.

The underlying idea in a negligence action is very simple. If the claimant's injuries result from behaviour that falls short of socially acceptable standards, then there should be compensation. If they do not, then the victim should bear the loss without compensation. Since carelessness is not generally criminal, the tort of negligence is the means by which the law attaches consequences to unacceptable behaviour. Lord Diplock once described negligence as the 'application of common sense and common morality to the activities of the common man' (*Doughty* v *Turner Manufacturing Co* [1964] 1 QB 518). The claimant will in some circumstances be the only person to whom the duty was owed (a surgeon and patient for example); in others the claimant will be a member of a very large and possibly ill-defined class of persons to whom the duty was owed (a car driver and other road users).

4.3 Structure of the tort

Negligence of course means carelessness, but in 1934 Lord Wright said:

> In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.
>
> (*Lochgelly Iron & Coal Co* v *McMullan* [1934] AC 1 at 25)

This sentence encapsulates the traditional tripartite structure of negligence **as a tort**. It is a reminder that it is not enough to show that a defendant was careless: the tort involves a **breach** of **duty** that **causes** damage that is not too **remote**. Each of the emboldened words will in due course require detailed examination.

However, these propositions are not rigidly separate. They are convenient for the purpose of explaining the law, but the concepts of duty, breach and damage sometimes overlap and the separate elements frequently fail to provide a clear answer as to whether a claim should be allowed. In *Lamb* v *Camden LBC* [1981] QB 625 Lord Denning said: 'it is not every consequence of a wrongful act which is the subject of compensation'. Lines have to be drawn somewhere:

> Sometimes it is done by limiting the range of the persons to whom a duty is owed. Sometimes it is done by saying that there is a break in the chain of causation. At other times it is done by saying that the consequence is too remote to be a head of damage. All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide.

Occasionally, a court will indeed explicitly organise its judgment under the headings of duty, breach and damage. There is an example in *Al-Kandari* v *Brown* [1988] QB 665 but you will find other examples where a single set of facts can be analysed in different ways. In some cases, on the same set of facts, one judge might deny liability on the grounds that no duty was owed, and another judge might deny liability on the grounds that, although a duty was owed, it had not been breached.

4.4 Policy

The law of negligence has undergone enormous change and development in the last 50 years. Mostly, this has involved an expansion of liability, but quite often the courts have retreated and cut back on the extent of liability. This, in turn, leads to inconsistency and uncertainty. In *Woodland* v *Swimming Teachers Association* [2013] 3 WLR 1227, Baroness Hale of Richmond said at [28]:

> The common law is a dynamic instrument. It develops and adapts to meet new situations as they arise. Therein lies its strength. But therein also lies a danger, the danger of unbridled and unprincipled growth to match what the court perceives to be the merits of the particular case. So it must proceed with caution, incrementally by analogy with existing categories, and consistently with some underlying principle: see *Caparo Industries plc* v *Dickman* [1990] 2 AC 605.

We have seen in Chapter 2 that because of concerns about a floodgate of litigation and indeterminate liability, certain types of injury or loss (e.g. psychiatric injury and pure economic loss) are excluded or limited from the scope of negligence. You will also discover that certain groups of defendants, such as the police, fire services and local authorities (education and social services), are protected from negligence liability.

We have seen in Chapter 1 that judges have recently expressed concerns about the impact of negligence liability on socially beneficial activities such as school trips.

The reasons for this are complex, but they have in part to do with conflicting policy objectives. Policy considerations are not based on recognised legal principle; they are based on the wider social and economic implications of finding a defendant liable. The *Hill* principle was applied in a series of judgments in the House of Lords and the Court of Appeal but in *Robinson* the Supreme Court has now said that public policy for reasons of not imposing a duty on the police has been superseded by the return to the omission principle for non-liability.

Nevertheless, it is important to understand these policy objectives and the way they are contributing to the development of the duty of care in negligence. You will see that policy is also important in determining breach of duty, causation and remoteness of damage. We have already come across a number of cases where the House of Lords has based its conclusions for or against liability by reference to what people generally would regard as fair (see, for instance, *Tomlinson* in Chapter 1). However, the public's view of what is fair may change over time. One question to consider is how far the law correctly reflects a public sense of fairness.

4.5 Duty of care

4.5.1 Introduction

The requirement of a duty of care is always a precondition of liability in negligence. This chapter introduces this first element in establishing an action in negligence. Did the defendant owe the claimant a duty to take care?

Focusing on key cases, we will examine the development of the duty concept. Each element of the current duty of care test, as formulated in the case of *Caparo Industries Plc* v *Dickman* [1990] 2 AC 605, will be explored.

4.5.2 When can a duty of care be assumed to exist?

When can you avoid detailed analysis of the duty concept? First there are categories of relationship where it has long been established that a duty of care is owed. These are known as fixed duties.

4.5.3 Fixed duties

- An employer owes a duty of care toward their employees in respect of three distinct areas: place of work, system of work, plant and machinery. See Section 12.4.
- In a revolutionary move, the UK Supreme Court extended the categories of non-delegable duties to a local education authority that had outsourced the provision of swimming lessons to an independent contractor in *Woodland* v *Swimming Teachers Association* [2013] UKSC 66. The Council were in principle liable for harm suffered by a 10-year-old girl when independent contractors engaged to provide swimming lessons failed to ensure her safety. The girl had been entrusted into the school's care and control and swimming tuition was an integral part of the educational activities provided.

  Lord Sumption set out a five-stage test for determining when a non-delegable duty applies.

  1. The subject of the duty is a child, patient or other vulnerable person, dependent on the defendant's protection from harm.
  2. There must be a relationship of control between the defendant and the claimant which exists independently of the acts from which the allegations of negligence arise.
  3. The claimant must have no control over how the defendant performs their obligations/functions.
  4. The defendant must have delegated to a third party the functions which the defendant has a legal duty to perform.
  5. The third party is negligent in the performance of the particular function which the defendant has a legal duty to perform.
- An occupier of premises owes a duty of care to 'lawful visitors' under the Occupiers' Liability Act 1957 and, in some circumstances, to trespassers under the Occupiers' Liability Act 1984. At common law, and by virtue of statute, liability is imposed on a manufacturer and sometimes on a retailer in respect of injury caused by defective

products. Indeed, the modern law of negligence owes its existence to a decision on product liability at common law. Other relationships, such as parent/child; doctor/patient; motorist/other motorist/pedestrians are classes of relationships where a duty is usually not controversial.

4.5.4 Duties not 'fixed'

- In cases where the duty relationship is not 'fixed' in the above sense, it may yet be easily established. Generally, there is little difficulty in fixing a duty where physical damage to the person or property is caused by the direct act (not omission/not third party) of the defendant.

4.6 The function of the duty of care

As indicated in Chapter 2, the general philosophy underpinning tort law is that losses should lie where they fall. Only exceptionally should someone other than the party injured or suffering the loss in question bear those losses. The duty of care operates against this philosophical background, determining when it would be justifiable to depart from the principle and shift the loss from the innocent claimant to the defendant or spread the losses suffered by the innocent claimant among society at large. In *The wrongs of tort* Conaghan and Mansell express the position thus:

> The concept of a duty of care in negligence is an essential factor in determining whether it is proper to redistribute the plaintiff's loss to the defendant. This is, in turn, informed by the assumption that individuals should, in general, bear their misfortunes alone unless there is some good reason for shifting the loss on to someone else...
>
> (1998, p.11)

The duty question arises only after it is established that someone has suffered loss or injury allegedly at the hands of the defendant. It is not a question that is ever posed in the abstract. The duty question (is there a duty of care or not?) is one that proceeds on the basis that one person could cause serious harm to another and yet not be liable in tort because the person allegedly causing the harm had no duty or obligation to avoid causing such harm. In short, the function of the duty of care is to limit liability for careless conduct.

4.7 Development of the duty concept

In order to begin to evaluate how effectively the duty concept performs its principal function of limiting liability for carelessly inflicted loss, you must first understand the principles or criteria according to which a duty can be found. In the context of legal history, negligence is a comparatively recent tort and it is an area of law that is still developing. Traditionally, most tort claims required the claimant to prove an intentional and direct interference with their person or property but the courts began to recognise that, in the majority of cases, the harm suffered by the claimant was caused by careless conduct and not where the defendant's conduct was intentional. Liability for negligent conduct was recognised only in certain carefully defined circumstances such as the duty of care owed in a doctor and patient relationship or where fire damage resulted from negligence. Outside these relationships, there was no test for identifying an underlying principle of liability until *Donoghue* v *Stevenson* (1932) where the House of Lords set out a general rule of liability for harm caused by negligence.

4.7.1 Foresight, proximity and *Donoghue* v *Stevenson*

At this point we need to engage in a brief exposition of the key cases that have marked the development of the duty concept, identifying their specific contribution to our understanding of the concept today. We shall start by examining two of the principles – foresight and proximity – that were present at the earliest formulation of the duty concept, which was in the 1932 decision in *Donoghue* v *Stevenson*.

4.7.2 The neighbour principle

Donoghue v *Stevenson* concerned a defective product – a bottle of ginger beer – at the bottom of which was a decomposed snail, invisible to the consumer of the product because the glass was opaque. The person who consumed the ginger beer was not the purchaser of the beer, so suffered no financial loss and had no contractual remedy. But she did suffer damage – physical damage – gastroenteritis, in fact. The question, then, was whether she had any remedy for her loss. If any remedy was to be found it would be in the area of law governing liability for careless conduct – a very under-developed area of law.

The House of Lords, in a landmark decision, concluded that the claimant could recover damages for her loss. To the question whether the manufacturers owed the particular claimant a duty to take reasonable care in the manufacture of the product to ensure that products are safe, the Court replied in the affirmative, stating in summary that a manufacturer of goods which are intended to reach the ultimate consumer without opportunity for intermediate inspection owes a duty to ensure that the product does not cause injury.

But if that were the only contribution to the law from the case – if all we could say is that manufacturers owe consumers a duty of care in the manufacture of goods – we would have no general conception of negligence but merely a decision on a particular incidence of negligent conduct. The *ratio* of the decision does not alone tell us why the manufacturer is deemed liable, nor does it help the courts to determine whether solicitors who are careless and cause loss to their clients – or to beneficiaries – owe a duty to the client or beneficiary to take care, or whether police or security officers at large crowded events owe a duty to an individual injured as a result of a failure of crowd control to take reasonable care in their duties. To answer these extended questions of liability, principles were needed that could encompass factual scenarios and create legal relations beyond that of manufacturer and consumer, or as Lord Atkin, the presiding judge in *Donoghue* v *Stevenson*, put it:

> … in English Law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances…

Such a general conception must acknowledge that:

> acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured… to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

He then proceeded to set out this general conception of relations that would give rise to a duty of care in what has become a classic *obiter dicta* statement. The core of the duty concept as it is understood today is contained in the following passage:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

4.7.3 Foresight and proximity

From the above passage we see articulated the first two elements of the duty test that presently determines liability in negligence. It is only those acts which a defendant can reasonably foresee would be likely to injure a claimant which give rise to the duty to take care. But reasonable foresight is not sufficient. A defendant is not required to take care in relation to acts or omissions that are likely to cause harm to anyone, but only those acts or omissions likely to cause harm to a legal neighbour (the requirement we

now refer to as proximity). That is, the claimant must be someone who ought to be in the contemplation of the defendant when the act or omission that causes harm is being put into motion.

Let's apply these two principles to Donoghue's case. The first stage of the inquiry is to determine what loss or injury has been suffered – which is why we began with a general consideration of the concept of damage (Section 2.1.9). The duty question is used to determine whether damage that has clearly been suffered is damage for which a duty of care is owed. Donoghue suffered traumatic physical injury – a form of damage that, as you will recall, usually does not pose problems to the law merely by reason of the nature of the damage.

The duty question in relation to *Donoghue* would be posed thus: did the manufacturers (defendants) owe a duty to take reasonable care in the preparation of their product to avoid damage of the kind the claimant suffered? On the basis of Atkin's neighbour principle, the answer to that question requires an affirmative answer to two further questions: first, was it reasonably foreseeable that the claimant would suffer physical injury if a noxious substance were introduced into the product? Second, was the claimant someone that the manufacturer ought to have had in contemplation when preparing the product?

Both questions were answered in the affirmative: in *Donoghue*, the fact that the drink was contained in an opaque bottle meant that there was no possibility of the claimant being alerted to the defect in the product. This being so, it was reasonably foreseeable that a failure to take care would bring about injury of a kind that actually occurred. As to the question of neighbourhood, the court reasoned that since the intention was that the product would reach the consumer and be consumed by her or someone like her the manufacturer must have had the consumer in mind when creating the product.

4.7.4 The proximity test

We have seen that closely related to the notion of foresight and reasonable contemplation of harm, Lord Atkin emphasised the need for a relationship of proximity between the parties, but this does not necessarily mean that the claimant must be in a close physical or spatial relationship to the defendant. Proximity is used as a convenient label to describe the relationship between the parties and the facts giving rise to a duty of care. The case below illustrates that a duty of care is not owed in all cases in which it is foreseeable that in the absence of care someone may suffer physical injury. There must be proximity in the sense of a measure of control over, and responsibility for, the potentially dangerous situation.

Case law example

In *Sutradhar* v *NERC* [2006] UKHL 33 a villager, one of a large number of people in Bangladesh affected by arsenic contamination of his drinking water, alleged that the defendant caused or materially contributed to his illness, either by failing to draw attention to the presence of arsenic in the water or by issuing a report which represented that his water was safe to drink. The defendants had been commissioned by the Overseas Development Agency to test local water for minerals which might be harmful to fish. They had not been required to, nor did they ever consider, the testing of the water for arsenic. It was claimed that there was no arguable case that they were in a relationship of proximity with the population of Bangladesh which could make them liable on either of these grounds. The House of Lords (upholding the Court of Appeal decision) unanimously held there to be no relationship of proximity between the claimants and the defendant that would give rise to a positive duty to test for arsenic in the water. In the opinion of Lord Hoffmann, the claim was hopeless. He said at [38]:

> [The] principle is not that a duty of care is owed in all cases in which it is foreseeable that in the absence of care someone may suffer physical injury. There must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation. Such a principle does

> not help the Claimant... The [defendant] had no control whatever, whether in law or in practice, over the supply of drinking water in Bangladesh, nor was there any statute, contract or other arrangement which imposed upon it responsibility for ensuring that it was safe to drink.

Establishing the existence of a duty of care is the first hurdle in a negligence claim. This question is frequently argued as a preliminary issue before evidence is produced and the facts of the case determined. This is a useful means of filtering out hopeless claims such as, in this case, where Lord Hoffmann said: '[W]hen one considers the scale and cost of a trial, the case for stopping the proceedings now appears to me to be overwhelming.'

4.7.5 *Anns* v *London Borough of Merton*: legal principle and policy

Having considered the first two elements of the duty test, we now move to consider the origins of the just, fair and reasonable test (the three-stage test) for duty of care, which was added by the House of Lords in *Caparo Industries plc* v *Dickman* [1990] 2 AC 605.

Until the late 1970s, judges were content to determine the existence of a duty of care where damage was found to be reasonably foreseeable and where there was found to be a sufficient relationship of neighbourhood or proximity. Indeed, in 1970, Lord Reid in the case of *Home Office* v *Dorset Yacht Co Ltd* [1970] AC 1004 stated that in all negligence actions in which duty was in issue there should be a presumption that the Atkin test would apply and would be sufficient to determine the issue of duty or no duty.

By the late 1970s, however, it began to be felt that the Atkin test was not sufficient. The reason for concerns over the limitations of the Atkin formula was increasing recognition that claimants were suffering damage of a type that raised more complicated questions than did traumatic physical injury – the most common form of injury suffered as a result of careless conduct when the duty test was first formulated.

Economic losses resulting from negligent acts or negligent misstatements were particularly troubling at that time and it was felt that the twin concepts of foresight and proximity were insufficient in the face of such losses to enable the duty test to perform its primary function of limiting liability for negligently occasioned injury or loss. To put it another way, there was a danger that losses or injury of a kind that the tort system did not desire to provide compensation for would pass the foresight and proximity test.

Another element needed to be added to the Atkin test to allow the duty concept to continue to perform well as a limiting mechanism. Lord Wilberforce, presiding in the case of *Anns* v *Merton LBC* [1978] AC 728 (now no longer good law) attempted to add that missing element.

Lord Wilberforce stated:

> [The duty] question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity of neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise…

The first stage of the test in *Anns* incorporates Atkin's neighbour principle. The second stage envisages 'policy' factors negating, reducing or limiting a duty, which but for those policy reasons would be found.

There is a clear separation in Wilberforce's test between legal principle and policy. According to the test legal principle itself determines whether there is a duty of care (the first limb) and policy (the second limb) may then operate to limit or exclude the duty. Wilberforce's test was widely criticised by academics and judges alike.

The *Anns* test was criticised precisely because of the purported separation of principle and policy. This separation was said to result in two adverse circumstances: first, it created confusion over the question of the function of the duty concept. Reasoned from the point of view of the function of the duty of care, it would be impossible to say that policy did not itself inform the duty question. For if we accept that the function of the duty of care is to limit liability for reasons of policy, then it follows that the duty concept itself is constructed largely of policy elements. Wilberforce's test denies this.

- The first adverse consequence of the separation of principle and policy was not that policy was explicitly engaged in judicial decision-making, but that the test separates policy factors from the question of whether a duty is found. Judges both then and now acknowledge the importance of policy considerations to all elements of the duty test but contrary to Wilberforce's formulation it was felt that these policy factors go to determine whether there is a duty – there can be no question of a duty arising at all if policy factors strongly suggest that the case before the courts is not one in which it is justifiable to spread or shift the claimant's loss.
- The second adverse consequence perceived to come about as a result of Wilberforce's separation of principle and policy was that Wilberforce's approach to the duty question was felt to be liability expansive rather than liability restrictive. In short, it achieved the precise opposite of the intended result. More 'novel' negligence cases were successfully litigated. Indeed, during the period that *Anns* remained authoritative, liability in tort did expand towards pure economic loss, negligently inflicted. Since *Anns* was overruled by *Murphy* in 1990, liability for negligently inflicted pure economic loss has been severely curtailed.

It is important to emphasise that the second limb of the Wilberforce test essentially marks the conceptual origins of the just, fair and reasonable criteria by bringing about a more explicit engagement with policy factors in decision-making on the duty of care.

4.7.6 Just, fair and reasonable: *Caparo*

Mainly as a reaction to the expansive period of liability following the *Anns* decision, judges in the late 1980s and 1990s expressed scepticism over the very question that Lord Atkin posed in *Donoghue* v *Stevenson*. It is to be recalled that Atkin set out to find a 'general conception of relations giving rise to a duty of care of which the particular cases found in the books are but instances…'

Caparo Industries plc v *Dickman* [1990] 2 AC 605 is a case that will be considered in more detail in the chapter on negligent misstatement, however, it is very important for the establishment of what is known as the 'three-stage test'. In what we might regard as the 'wide ratio' of *Caparo*, Lord Bridge said:

> [I]n addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

Why did Lord Bridge consider that principles such as foresight and proximity, although significant to the development of the law of negligence, could no longer be relied upon to found new duty situations?

In his view (echoed by other judges in the case) such terms:

> are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope…

In summary the *Caparo* 'three-stage test' comprises:

- foreseeable harm to the claimant
- proximity or neighbourhood between the claimant and defendant and
- that it is 'fair, just and reasonable' to impose a duty of care in this situation.

It will be seen that it is only necessary to apply this 'three-stage test' in cases where a duty of care has not been previously established in a similar factual scenario.

4.7.7 Incrementalism

According to Lord Bridge and Lord Oliver (in *Caparo*), judges should not seek 'a single general principle' underlying the duty of care but rather should develop the duty of care incrementally.

Lord Bridge approved an Australian High Court judge who observed:

> It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.

What does incrementalism (as Lord Bridge's approach has come to be known) mean in practice? An incremental approach to the development of the duty of care has been taken to mean that judges (when faced with a question about whether a duty should be imposed or not in a given case) will be guided by underlying general principles – foresight and proximity – but, additionally, to the existence of these general principles must be added some relation or analogy between the situation or circumstance giving rise to harm or other loss that is before the judge and a situation that had in the past been judged to be one to which a duty of care should attach itself.

Looking at the subsequent development of case law, it can be seen that it is not always clear, even to judges, exactly what constitutes an analogous fact situation.

4.7.8 Application of *Caparo*

On the rare occasions when it is necessary to test for the existence of a duty of care, their Lordships in *Caparo* were firmly indicating that there must be a specific enquiry considering the precise facts and context, with each of the various factors being given appropriate weight. This will result in a specific ruling that can of course subsequently be applied by analogy to similar situations.

In *Marc Rich & Co* v *Bishop Rock Marine Co Ltd* [1995] 3 All ER 307, a vessel, 'The Nicholas H', developed a crack while carrying a cargo from South America to Italy. A surveyor employed by a marine classification society pronounced that, with temporary welding work, the vessel was fit to complete the voyage. A few days later the ship sank with a total loss of the cargo. The damage was physical harm (for which a duty is normally owed upon foresight of harm) rather than pure economic loss resulting from the surveyor's negligent statement that the vessel was seaworthy. However, the House of Lords held that this was insufficient to give rise to a duty of care and no duty was owed by the classification society to the cargo owners. A number of policy factors pointed against a decision in favour of the cargo owners: classification societies were independent non-profit making entities, operating for the sole purpose of promoting the collective welfare, namely, the safety of ships and lives at sea; a finding of liability might lead to classification societies adopting a more 'defensive position'; if a duty of care were to be recognised it would enable cargo owners, or their insurers, to upset the balance of the international conventions (the 'Hague Rules') governing shipowners' liability to cargo owners. In addition, another layer of insurance cover would be wastefully introduced into the structure.

However, in *Watson* v *British Boxing Board of Control* [2001] QB 1134 the fact that the British Boxing Board, the governing body of the sport in the UK, was a non-profit-

making organisation (like the defendant in the *Marc Rich* case) was not enough to deny the justice of finding liability. Here, a boxer who had suffered brain damage following a boxing match alleged that the Board had been negligent in not providing a better level of ringside medical care. Lord Phillips in the Court of Appeal described the case as unique because here, rather than preventing it, the causing of physical harm was the object of the activity. Taking account of the boxer's reliance on the Board to reduce the effects of injuries once they occurred the court concluded that in all the circumstances of the case it was fair, just and reasonable to impose a duty of care.

In *Robinson* v *Chief Constable of West Yorkshire* (2018) it was confirmed that the three-stage test should not be a routine consideration in determining duty of care in negligence. According to Lord Hughes [100]:

> …it is neither necessary nor appropriate to treat *Caparo Industries* v *Dickman*… as requiring the application of its familiar three-stage examination afresh to every action brought. Where the law is clear that a particular relationship, or recurrent factual situation, gives rise to a duty of care, there is no occasion to resort to Caparo, at least unless the court is being invited to depart from previous authority.

The applicability of the *Caparo* test was considered by the Supreme Court in *Darnley* v *Croydon Health Services* [2018] UKSC 50. A patient suffering from a head injury attended a hospital accident and emergency (A&E) department. He was told that the expected waiting time was 4–5 hours but the receptionist failed to add that he would be seen by a triage nurse within 30 minutes. The claimant left after 19 minutes and without treatment, his condition worsened and he was left with long-term disabilities, which would have been avoided with prompt treatment. In the Court of Appeal, the main issue was whether the scope of the duty of care owed to patients by reception staff included accurate notification of waiting times. To answer this, the Court of Appeal applied the *Caparo* test. The requirements of proximity and foreseeablity were present. However, it confirmed the view of the trial judge that it would not be fair, just, and reasonable to impose a duty of care on A&E reception staff to inform patients accurately of waiting times.

According to the Supreme Court, the lower courts had confused or conflated the issues of duty and breach. It was clear that the duty of care owed by a hospital to a patient included the duty to give reasonably accurate information regarding waiting times. Because this was not a novel situation, clearly within the scope of *Donoghue* v *Stevenson*, there had been no need to apply the *Caparo* test. The 'colossal pressure' that A&E departments work under was relevant, not to whether there was a duty of care, but rather to the question of breach. Applying the standard of 'an averagely competent and well-informed person performing the function of a receptionist at a department providing emergency medical care', the Court concluded that it had been negligent for the receptionist to fail to tell the claimant that he would be seen by a triage nurse within 30 minutes. Causation having been satisfied, liability was established.

Additional examples where the courts have had to determine duty of care in novel situations are: *Mulcahy* v *Ministry of Defence* [1996] QB 732 (liability of injuries to soldiers on active service); *Smith* v *Ministry of Defence* [2014] AC 52 (scope of combat immunity); *Vowles* v *Evans* [2003] EWCA Civ 318, [2003] 1 WLR 1607 (liability of rugby referee to an injured player).

Four tests for the existence of a duty:
- the neighbour principle
- a revised test (Lord Wilberforce)
- the current test: foresight, proximity and fairness
- an alternative test: assumption of responsibility.

4.7.9 An alternative test: assumption of responsibility

For some purposes, an alternative test has been developed, namely whether there had been a voluntary assumption of responsibility by the defendant for the claimant. See, for example, *Burgess* v *Lejonvarn* [2017] EWCA Civ 254 in Chapter 6.

This test, which raises issues of uncertainty and circularity, is particularly used in cases of liability for misstatements and for economic loss (as discussed in Chapter 6) and omissions (Chapter 8).

4.7.10 The current position

The existence of a duty of care does not depend on the application of a '*Caparo* test' to the facts of the particular case; it depends on the application of established principles of the law of negligence. According to Lord Reed in *Robinson* [29]:

> Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries.

4.7.11 Summary of the duty concept

Traditionally the duty concept has been seen as serving two separate functions:

- Is there a duty at the abstract level (the **notional duty** or duty in law): for example, does a motorist owe a duty of care to other road users? Do barristers owe a duty of care to their clients?
- Is the particular claimant within the **scope of the duty of care** (duty in fact or the problem of the unforeseeable claimant): for example, was this particular road user owed a duty by this particular motorist? In *Bourhill* v *Young* [1943] AC 92, the claimant heard, but did not see, a crash caused by the defendant motorcyclist's negligence. The claimant later saw part of the aftermath of the accident and suffered nervous shock. She failed to establish the existence of a duty of care to prevent nervous shock – she was an 'unforeseeable victim' claimant and too far removed from the scene of the accident to be a reasonably foreseeable victim.

These tests are of most use when the law is uncertain. These are concepts that judges use when deciding whether or not a duty of care ought to be recognised in new situations. More complex and developing examples of the duty concept arise in the context of special duty problems in negligence.

4.8 Duties of lawyers

Lawyers of course owe a duty of care to their clients, but until recently it was thought that no duty was owed by barristers (and later solicitors also) in respect of work closely connected with the presentation of their case in court. Putting it in terms of the *Caparo* test, it would be said that, while there was foresight and proximity, it was not fair, just and reasonable to impose liability. However, in *Arthur JS Hall* v *Simons* [2002] 1 AC 615, the House of Lords decided that in contemporary conditions there are no policy reasons sufficient to justify this immunity and it should be abolished. Here, in three separate cases, clients brought proceedings against their solicitors in which they alleged that the solicitors had been negligent. The judge, at first instance, struck out claims in negligence on the grounds that the defendants were entitled to rely on the advocates' immunity recognised by the House of Lords in *Rondel* v *Worsley* [1969] 1 AC 191 (which set out the public policy reasons for advocates' immunity from liability for the negligent conduct of a case in court). The Court of Appeal held that the claims should not have been struck out and the solicitors appealed against this decision. A seven-member House of Lords dismissed their appeals and held that because of the changes in society and in the law which have taken place since the decision in *Rondel* v *Worsley*, the propriety of maintaining such immunity could no longer be justified. The advantages which accrued to the public interest from advocates' immunity in negligence must be balanced with the normal right of an individual to be compensated for a legal wrong and there is no longer sufficient public interest to justify the maintenance of this immunity. Their Lordships were unanimous in their

decision to abolish the immunity in civil proceedings and (by a majority) to abolish it in criminal proceedings.

4.8.1 Duties of lawyers: scope of the duty

The circumstances in which a duty is owed and the scope of the duty are considered by the House of Lords in *Moy* v *Pettman Smith (A Firm)* [2005] UKHL 7. The claimant in this case underwent an operation which went wrong owing to the admitted negligence of the health authority concerned. A firm of solicitors and a barrister acted for him in his claim in negligence against the health authority. The health authority offered £150,000 in settlement and a waiver of the costs orders against the claimant but, on the barrister's advice, he rejected the offer. As the case subsequently progressed, the health authority's offer fell to £120,000 on the normal terms as to costs and, at this stage, the claimant was advised by the barrister to accept the offer as the best the health authority was willing to make. In an action in negligence against the barrister, the trial judge held that she had not been negligent in advising the claimant.

However, the Court of Appeal held that although her assessment of the prospects of success in the case was not negligent, the barrister had been negligent in failing to give the claimant sufficiently detailed advice in order that he might make an informed decision as to whether to accept the offer in settlement. The barrister's appeal to the House of Lords was allowed. Taking account of all the circumstances, the advice given by the barrister was held to fall within the range of that to be expected of reasonably competent counsel of her seniority and experience. Given the need for urgent advice under a situation of some pressure, it could not be said that her advice to the claimant had fallen below that to be expected of a reasonable practitioner. The Court of Appeal was said to have judged her actions too harshly.

***Steel* v *NRAM Ltd* [2018] UKSC 13**

The defendant, Ms Steel, was a solicitor who was acting for a customer in a sale of commercial property and she dealt directly with an unrepresented lender, Northern Rock. She made 'grossly negligent' assurances in an email to the lender about the nature of the proposed financial transaction. Due to its reliance on her assurances, the lender suffered substantial financial loss, which it attempted to recover from the solicitor. In its judgment, the Supreme Court reviewed a number of cases concerning *Hedley Byrne* v *Heller* (1964). It concluded that it had not been reasonable for the claimant to have relied on the assurances when it could have easily made inquiries of its own, which would have revealed the true situation. Furthermore, it would not have been reasonable for Ms Steel to foresee such reliance. On that basis, there was no special relationship and therefore no duty of care had existed on the defendant in favour of the claimant. There was no liability for this negligent misstatement.

4.9 Duty of care to unborn children

A doubt as to whether the common law recognised a duty of care to unborn children in respect of damage done before birth was resolved by statute: the Congenital Disabilities (Civil Liability) Act 1976. The Act originally envisaged a child being born with disabilities as the result of damage to the mother (or sometimes the father) occurring during pregnancy or sometimes before conception. Typical examples were physical injuries to a pregnant woman in, say, a car crash, or the side effects of drugs. It had to be amended in the light of advancing medical technology to deal with damage to stored sperm or eggs: Human Fertilisation and Embryology Act 1990.

These Acts impose liability only where the damage caused the disability from which the baby suffers when it is born. They do not allow an action where the negligence caused the baby to be born, but did not cause the disabilities. A doctor may, for example, negligently carry out a sterilisation procedure on either a man or a woman, or may fail to recommend an abortion: any child born as the result of this negligence has no claim. When the cause of action is failed sterilisation, the so-called 'wrongful conception' or 'wrongful birth' cases currently do not allow parents to claim for the

cost of bringing up a child, as determined in *McFarlane* v *Tayside Health Board* [2000] 2 AC 59. However, costs related to the pregnancy and birth will be awarded, along with a conventional sum of £15,000 in recognition of the interference with parental autonomy caused by the medical negligence; see *Rees* v *Darlington Memorial Hospital NHS Trust* [2003] UKHL 52.

4.10 Duty of care to employees

Employers' liability will be examined in more detail in Chapter 12.

The work environment is a significant locus for accidental injuries and deaths. It is not surprising, then, to find that there is an extensive framework of laws governing an employer's liability for injury to an employee. Many of these laws are now contained within various statutory provisions but this section is confined to a brief summary of common law rules. An employer's liability toward his employee is said to be non-delegable – meaning that an employer cannot escape liability for his employee's injury even where the employee has contracted another person or organisation in respect of the activity or general context which results in injury to the employee. The case of *Wilsons & Clyde Coal Ltd* v *English* [1938] AC 57 established that an employer has a duty to take reasonable care to ensure that their employee is not made unsafe by reason of unsafe premises, unsafe equipment or incompetent co-workers.

This is not an area of law that develops rapidly – hence the limited attention given to it in this chapter. However, a noteworthy development concerns recognition that the non-delegable duty extends to an employee's mental wellbeing as well as physical wellbeing. In *Walker* v *Northumberland County Council* [1995] 1 All ER 737 a social worker was owed a duty of care in respect of a nervous breakdown occasioned by over-work.

4.11 Duty concept: revisited

a. Certain types of defendant

A general exclusionary rule exists which exempts public authorities from liability in negligence. In such claims the courts take account of the consequences of creating a precedent which establishes a duty of care. This approach is justified on the basis of far-reaching implications about the allocation of resources and the risk of public authorities taking a defensive approach to carrying out their functions (discussed below). For now it should be noted that public policy is capable of constituting a separate and independent ground for holding that liability in negligence should not be imposed. For example, imposing a general duty of care to protect all members of the public from the consequences of crime would be impracticable and, on grounds of public policy, deeply damaging to police operations.

b. Particular types of loss or harm

Certain categories of damage such as pure economic loss and pure psychiatric harm are not treated on the same basis as physical injury. Liability in these areas poses particular problems concerning, for example, floodgates of liability: claims for physical damage caused by negligent conduct will be limited to those within the range of impact. However, psychiatric illness is capable of affecting a large number of potential claimants beyond the direct victim of negligent conduct, so the law seeks to protect defendants from crushing liability.

Where negligent words cause pure economic loss the courts take a restrictive approach, justified by Lord Pearce in *Hedley Byrne* on the basis that: '…words are more volatile than deeds, they travel fast and far afield, they are used without being expended.' We shall see below that claimants seeking compensation for either of these categories of harm will have particular hurdles to overcome to establish that the defendant was under a duty of care.

c. Applying the test

Once a duty situation is recognised, the test, in a sense, is irrelevant. So, in an examination context, there is no need to go through the *Caparo* test unless either the situation is a novel one, where there are no clear precedents, or you are trying to argue that the law ought to be changed (as was done by the House of Lords in respect to the liability of lawyers in *Arthur JS Hall* v *Simons* (2002), see Section 4.8). If the question you are answering is about a motorist knocking down a pedestrian, the duty of care is established by many previous cases and there is no need to go through the tests for establishing a duty afresh.

Activities

Activity 4.1

Core comprehension – duty, breach, damages

Find and read the case of *Al-Kandari* v *Brown* [1988] EWCA Civ 13, [1988] QB 665, [1988] 1 All ER 833, [1988] 2 WLR 671 and answer the following questions.

The paragraphs of this judgment are not numbered, therefore for ease of reference the questions follow the sequence of the judgment and are annotated with the heading of the relevant section. Note the partial dissent by Lord Bingham which follows the leading judgment.

a. **Who did Mrs Al-Kandari sue and why? Summarise in fewer than 70 words the facts of the case as stated in the introductory paragraphs of the judgment.**

b. **THE DUTY – Explain why the defendant's solicitors owed the claimant a duty of care.**

c. **THE BREACH – Identify the three reasons given for the finding of a breach of duty of care.**

d. **THE DAMAGE SUFFERED – Why did the Court hold that the damage suffered by the claimant was a natural and probable consequence of the breach?**

e. **DAMAGES – What type of loss did Mrs Al-Kandari suffer and on what grounds was the award for damages upheld? How much was she awarded?**

f. **ADDITIONAL RESEARCH – If you wish to know more about Mrs Al-Kandari's ordeal and her recognised loss, you will find this in the judgment of the lower court. Can you identify the relevant passages which detail the loss?**

Activity 4.2

Core comprehension – protection of the public against crime

Find and read the case of *Michael* v *Chief Constable of South Wales* [2015] UKSC 2 and answer the following questions.

This comprehension focuses on the claim in negligence.

a. **Which were the significant characteristics of the claimant victim in this case?**

b. **What is the general duty of care which the police owes to the public?**

c. **Explain why it was argued that Ms Michael had been identified to the police as an individual, rather than a member of the general public, to whom the police owed a particular duty of care.**

d. **What is the general rule in English law as regards the liability of defendants caused by the conduct of a third party?**

e. **Can you identify the two types of situation in which the common law may impose liability for a careless omission?**

Activity 4.3

Applied comprehension – police duty of care and crime prevention

In the Online Library find and read Tofaris, S. and S. Steel 'Negligence liability for omissions and the police' (2016) 75(1) *CLJ* 128. The original ideas for this article were contained in a Research Paper that was cited with approval by the Supreme Court in *Michael* v *Chief Constable of South Wales*. Answer the following questions.

a. **Summarise in your own words the authors' view on the 'diversion of police resources' argument.**

b. **Who was A.V. Dicey? What is the 'Diceyan' conception of rule of law?**

c. **What test for the existence of duty of care is applied by the authors as the basis for their arguments?**

d. **Explain what is meant by a 'status-based' test for proximity.**

e. **How do the authors deal with arguments against duty that are based on the influence of statutes?**

f. **Would you describe the authors' views as being in sympathy with those of Lady Hale, or not? Why?**

g. **According to the authors, what would be the impact of the *Bolam* test on their argument?**

5 Psychiatric harm

Contents

Introduction

This chapter explores the difficult questions which arise where the injury suffered as a result of negligence or any other tort is purely emotional or psychological. The limiting devices developed by the courts to restrict claims for psychiatric injury will be considered and the exceptional circumstances in which damages are recoverable will be explained.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **explain why there are problems with allowing recovery for psychiatric damage**
- **distinguish between primary and secondary victims**
- **identify circumstances in which damages for psychiatric injury may be recoverable**
- **explain uncertainties in this area of law and consider possible reforms.**

CORE TEXT

- **Giliker, Chapter 4 'Negligence: psychiatric illness'.**

5.1 Psychiatric injury

From Chapter 2, we know that psychological injury is a form of personal injury that poses particular problems to the law of tort, merely by nature of this particular form of injury, largely because of the privileging of traumatic physical injury in the law of tort and especially in the tort of negligence. *Page* v *Smith* tells us that psychological harm that is consequential on traumatic physical injury is recoverable, even if psychological harm is not itself foreseeable. We know that an individual who suffers nervous shock through witnessing traumatic physical injury to a stranger in circumstances where the witness is not in fear of traumatic physical injury cannot recover damages because they will be deemed to be an unforeseeable claimant, as in *Bourhill* v *Young* (1943).

What does all of this tell us about proximity in the duty of care? The proximity element is enormously important in denying or restricting a duty of care to claimants who suffer nervous shock. What writers have termed 'relational' and 'geographical/temporal' proximity have served to limit or exclude liability to claimants who witnesses traumatic injury to a person with whom they have a 'close relationship of love and affection' in circumstances where the person witnessing the injury is not themselves injured or placed in fear of injury. The insistence on geographical and temporal closeness ensures that the many hundreds or thousands of close family members who may potentially suffer such loss are transformed into a small and ascertainable class of victims able to recover.

Understanding the proximity requirements applicable to claims of psychological injury of so-called secondary victims of nervous shock (in contrast to the *Page* v *Smith* primary victim) is not only important in being able to advise in relation to this particular form of injury but is indispensable to an understanding of how important the concept of proximity is in enabling the duty concept to operate according to its primary function of limiting liability for carelessly inflicted injury or loss.

5.2 Liability for psychiatric injury

As a starting point, it must be made clear that emotional and psychological harm that is a consequence of actual traumatic physical injury is always recoverable. Claimants will normally recover for consequential psychological harm under the category of pain and suffering or loss of amenity. Loss of amenity essentially means loss of enjoyment in life. Such a loss of enjoyment may be occasioned by many causes, such as loss of a limb – but it will also cover emotional and psychological harm that results from a traumatic physical injury.

Difficult questions arise where the injury claimed to have been suffered as a result of negligence or any other tort is purely emotional or psychological. Those who are involved in traumatic situations may suffer psychiatric illness in one of three distinct categories.

1. They suffer physical injury and this leads to psychiatric harm.
2. Primary victims – they are in an area where they are at risk of physical injury, manage to avoid this but suffer psychiatric injury.
3. Secondary victims – they are not themselves at risk, but suffer psychiatric harm as a result of what they have seen and heard. It is in relation to this group that significant difficulties have arisen. A potentially enormous number of potential claimants means that the extent of liability needs to be managed as a matter of policy.

Where the claimant's injuries are psychiatric, and not physical, damages are recoverable only exceptionally. It is not enough to show that psychiatric injury was reasonably foreseeable. In *Victorian Railway Commissioners* v *Coultas* (1888) 13 App Cas 222 it was held that harm through nervous shock was not compensatable at all.

The first successful claim in England for damages for negligently inflicted psychiatric injury was in *Dulieu* v *White* [1901] 2 KB 669 which concerned a pregnant woman who was working behind the bar of a public house when the defendant ran his van and horses through the window. Although not physically injured, she was badly frightened and this resulted in the premature birth of her child. She experienced a real and immediate fear for her own safety and she was entitled to recover damages without the need for physical impact.

5.3 Policy considerations

Although knowledge of, and attitudes to, psychiatric illness have changed in the 20th and 21st centuries, the courts are reluctant to award damages on the same basis as for physical injuries.

Case law example

In *White* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455 Lord Steyn set out the policy reasons why such different rules have been created for the recovery of the two kinds of damage:

> there is equally no doubt that the public… draws a distinction between the neurotic and the cripple, between the man who loses his concentration and the man who loses his leg. It is widely felt that being frightened is less than being struck, that trauma to the mind is less than lesion to the body. Many people would consequently say that the duty to avoid injuring strangers is greater than the duty not to upset them. The law has reflected this distinction as one would expect, not only by refusing damages for grief altogether, but by granting recovery for other psychical harm only late and grudgingly, and then only in very clear cases. In tort, clear means close – close to the victim, close to the accident, close to the defendant.
>
> … Firstly, there is the complexity of drawing the line between acute grief and psychiatric harm… The symptoms may be the same. But there is greater diagnostic uncertainty in psychiatric injury cases than in physical injury cases. The classification of emotional injury is often controversial. In order to establish psychiatric harm expert evidence is required. That involves the calling of consultant psychiatrists on both sides. It is a costly and time consuming exercise. If claims for psychiatric harm were to be treated as generally on a par with physical injury it would have implications for the administration of justice.
>
> Secondly, there is the effect of the expansion of the availability of compensation on potential claimants who have witnessed gruesome events. I do not have in mind fraudulent or bogus claims. In general it ought to be possible for the administration of justice to expose such claims. But I do have in mind the *unconscious* effect of the prospect of compensation on potential claimants. Where there is generally no prospect of recovery, such as in the case of injuries sustained in sport, psychiatric harm appears not to obtrude often. On the other hand, in the case of industrial accidents, where there is often a prospect of recovery of compensation, psychiatric harm is repeatedly encountered and often endures until the process of claiming compensation comes to an end…
>
> The third factor is important. The abolition or a relaxation of the special rules governing the recovery of damages for psychiatric harm would greatly increase the class of persons who can recover damages in tort. It is true that compensation is routinely awarded for psychiatric harm where the plaintiff has suffered some physical harm. It is also well established that psychiatric harm resulting from the apprehension of physical harm is enough… In built in such situations are restrictions on the classes of plaintiff who can sue: the requirement of the infliction of some physical injury or apprehension of it introduces an element of immediacy which restricts the category of potential plaintiffs. But in cases of pure psychiatric harm there is potentially a wide class of plaintiffs involved.
>
> Fourthly, the imposition of liability for pure psychiatric harm in a wide range of situations may result in a burden of liability on defendants which may be disproportionate to tortious conduct involving perhaps momentary lapses of concentration, e.g. in a motor car accident.

5.4 Control devices

Proximity is the modern term that has gradually begun to be substituted for Lord Atkin's use of the concept of 'neighbour' as descriptive of a relationship between a defendant and a claimant that shows the requisite degree of closeness such that it could be said the defendant ought to have had the claimant in focus when (to quote from *Donoghue*) 'directing his mind to the acts of omissions which are called in question'. Other roughly generic labels used to describe this element of the duty of care include 'special relationship' or 'voluntary assumption of responsibility.'

What is common to all the cases is that application of the proximity concept works to make of a potentially wide and indeterminate number of putative claimants a very narrow and ascertainable class. In this and the next chapter we examine the proximity element of the duty test, drawing on the case law relating to claims in respect of nervous shock (this chapter) and pure economic loss (Chapter 6) as a means to provide practical illustration of the application of the element.

We shall now consider the limiting devices to restrict claims for psychiatric injury developed by the courts. There has been no intervention by Parliament: the Law Commission recommended some legislative changes in 1998 (see below), but these have not been implemented.

5.4.1 Recognisable psychiatric illness resulting from shock

Emotional or psychological harm that is medically recognised, such as conditions like post-traumatic stress disorder (PTSD), organic depression and pathological grief disorder, can be compensated for, provided that they arise as a result of a traumatic or shocking event – hence the legal term nervous shock. According to Lord Ackner in *Alcock* v *Chief Constable of South Yorkshire* [1992] 1 AC 310, shock 'involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind'. It must then manifest itself in some recognisable psychiatric or physical illness. Lord Ackner also made it clear that, as the law presently stands, there can be no recovery for psychiatric illness 'caused by the accumulation over a period of time of more gradual assaults on the nervous system'. However, we shall see below that later cases appear to have relaxed this requirement to some extent.

5.4.2 Circumstances in which the psychiatric injury is caused

The other restrictions relate to the circumstances in which the psychiatric injury is caused. For this purpose a distinction is drawn between primary and secondary victims but it must be noted that there is an increasing number of claims (some successful) that do not fit within these two categories as traditionally defined.

5.4.3 Primary victims

As we have seen, emotional and psychological harm suffered as a consequence of physical injury is recoverable. However, there are two other categories of victim of psychiatric injury.

The first category is those who were in the zone of danger during the traumatic event and managed to avoid physical injury but suffered psychiatric injury. This category of claimant is known as a 'primary victim' and, provided personal injury of some kind is foreseeable, the defendant is liable for the psychiatric injury, irrespective of whether psychiatric injury was foreseeable.

For example, in *Page* v *Smith* [1996] AC 155, the claimant was driving with due care when a car driven by the defendant turned into his path. This caused a relatively minor accident and, even though there was some damage to the cars, neither the plaintiff nor the occupants of the other car were physically harmed in the collision. However, prior to the accident the plaintiff had suffered from a chronic fatigue syndrome (known as ME) for 20 years.

At the time of the accident, the claimant was in remission from this condition and was planning to return to work as a teacher. Although he suffered no physical injury, he claimed that the accident triggered a reactivation of his illness, which became chronic and permanent to an extent that he was unlikely to be able to return to work.

The House of Lords held that there is no justification for regarding physical injury and psychiatric injury as different 'kinds' of injury. Once it is established that the defendant is under a duty of care to avoid causing personal injury to the claimant, it matters not whether the injury in fact sustained is physical, psychiatric or both. Applying this principle, notwithstanding that he suffered no physical harm, the plaintiff was allowed to recover damages for the psychiatric injury. Lord Lloyd, speaking for the majority said:

> The test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury. If so, then he comes under a duty of care to that plaintiff. If a working definition of 'personal injury' is needed, it can be found in section 38(1) of the Limitation Act 1980: '"Personal injuries" includes any disease and any impairment of a person's physical or mental condition...'.

However, more restrictively, physical injury (or the fear of it) is a **necessary** as well as a sufficient condition of liability: see *White* v *Chief Constable of South Yorkshire Police*.

5.4.4 Secondary victims: the *Alcock* criteria

The second category of victim concerns those who were not themselves at risk of physical injury during the traumatic event but who suffer psychiatric harm as the result of what they have seen or heard. A secondary victim suffers psychiatric injury not through any physical impact but through witnessing an event that causes or threatens death or serious injury to someone else.

This category of claimant is known as a 'secondary victim' and the *Alcock* case highlights the significant difficulties claims by secondary victims present for the courts in keeping the number of potential claims within manageable limits.

Alcock is the leading case that set out a series of criteria which secondary victims must satisfy in order to be regarded as foreseeable victims to whom a duty of care is owed.

Alcock v *Chief Constable of South Yorkshire* [1992] 1 AC 310

This case arose from the Hillsborough stadium disaster in which 96 football supporters were killed and another 400 injured when crowd control broke down and barriers collapsed at the beginning of a match in April 1989. The ensuing crush was horrifying for those involved in the tragedy and also for those watching. Relatives of those killed in the incident, who had not been in any physical danger themselves, sought compensation for the post-traumatic stress they suffered as a result of what they witnessed. The claims were made by people situated inside the stadium as the event took place; by people outside the stadium at the time; and by people who were at home when the accident happened. Some of the claimants had seen live or recorded television coverage of the disaster, while others had identified bodies of their loved ones in the makeshift mortuary that had been erected to deal with the emergency.

Alcock illustrates the potential for a large number of claims for psychiatric harm from those who witnessed traumatic physical injuries that others have either suffered or have been exposed to, which is one reason why the most restrictive rules on recovering compensation apply to psychological harm.

1. A close tie of love and affection

   The claimant must be in a close and loving relationship with the primary victim. In the case of parents and children and spouses (and engaged couples) this is presumed, in other cases it must be established. It is not necessarily easy to establish liability outside the categories where love is presumed. Brothers were unable to establish such relationship in *Alcock*.

2. Proximity in time and space

   The claimant must have perceived the events or their aftermath with their own unaided senses: it is not enough to be told about it later. The notion of the aftermath derives from *McLoughlin* v *O'Brian* [1983] 1 AC 410. The plaintiff's husband and three children were involved in a road traffic accident. She was told of the accident at home and travelled to the hospital, arriving about two hours after the accident, where she saw her family covered with dirt and blood and learned of the death of one of her daughters. As a consequence of what she saw, Mrs McLoughlin developed serious depression and a change of personality. Her negligence claim against the driver failed in the lower courts but, when she appealed to the House of Lords, she was successful. Her psychiatric injury was reasonably foreseeable because the victims were close members of her family and her proximity in time and space to the accident was established because she witnessed the 'immediate aftermath'. We will see that the scope of 'immediate aftermath' is uncertain and thus depends on all the circumstances of the case. In *Galli-Atkinson* v *Seghal* [2003] EWCA Civ 697, the Court of Appeal allowed a claim by a mother who went to the scene of what proved to be her daughter's fatal accident but after the body had been removed and then went to the mortuary. It was held that the aftermath could be made up of different component parts. In *Taylor* v *A Novo (UK) Ltd* [2013] EWCA Civ 194 the question of proximity or, alternatively, the timing of the 'immediate aftermath' were considered by the Court of Appeal. A daughter who was not present at the scene of a workplace accident in which her mother was injured was not allowed to recover for the psychiatric injury she suffered when her mother suddenly died of complications at home, three weeks later.

3. The means by which the shock is caused

   Additionally, the claimant must have suffered through an immediate sudden impact on their senses; 'a sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind'. The sudden shock requirement was not satisfied in *Sion* v *Hampstead Health Authority* [1994] 5 Med LR 170 where a father suffered psychiatric harm having stayed beside his son's bedside for 14 days watching him deteriorate and die as the result of the defendant's negligence. However, in *North Glamorgan NHS Trust* v *Walters* [2002] EWCA Civ 1792 a mother who suffered psychiatric harm as the result of the events she witnessed over the 36 hours during which her child deteriorated and died was allowed to recover. The period leading to her child's death was treated as a single prolonged shocking event.

   The reluctance of the courts to permit expansion of this head of liability was confirmed in *Liverpool Women's Hospital NHS Foundation Trust* v *Ronayne* [2015] EWCA Civ 588. The claimant alleged that he had suffered post-traumatic stress disorder when he saw the condition of his wife, who had suffered severe complications due to the hospital's negligence in her surgery. Some 10 days after the operation, his wife became extremely ill, attached to a ventilator and her body became (temporarily) distressingly swollen. Here, there had not been one sudden shocking event, or a seamless chain of events over 36 hours as in *Walters* but, rather, a series of events. Further, there was doubt as to whether what the claimant saw could be described as horrifying; after all he was aware that his wife was seriously ill and should have prepared himself mentally.

The claimant must not have a special sensitivity to shock: the shock must be foreseeable in a person of reasonable fortitude (*Bourhill* v *Young* [1943] AC 43). (However, so long as some psychiatric injury is foreseeable, its precise form or severity does not have to be foreseen.)

Attia v *British Gas* [1988] QB 304 is authority for the proposition that a person can claim in respect of a medically recognised psychiatric injury as a result of witnessing a traumatic event that involved not personal injury but damage to property – here the claimant witnessed her house being burnt down as a result of the alleged negligence of British Gas. It should be noted here, however, that the plaintiff in *Attia* could be

regarded as a primary victim due to suffering direct property damage, for which the defendants would have owed a simple duty of care based on the neighbour principle.

Where the defendant caused himself serious injuries by negligent driving (i.e. the defendant and the primary victim were in a sense the same person), he was not liable to his father who went to the scene as a member of the rescue services. For the policy reasons behind the decision, see *Greatorex* v *Greatorex* [2000] 1 WLR 1970.

5.5 Other cases

Although it was perhaps the intention of the courts that claimants could succeed only if they met the criteria either of primary victim or of secondary victim, there are many ways in which psychiatric injury can be caused. Some of these have come before the courts, and some have succeeded.

5.5.1 Childbirth

The after-effects of traumatic births have recently been the subject of clinical negligence actions. In *Wild* v *Southend University Hospital NHS Foundation Trust* [2014] EWHC 4053 (QB) a father failed in his action in respect of damage he suffered while observing the birth of his stillborn child. It was an extended process that began with the realisation that the foetus had died *in utero* and thus was distinguished from *Walters*. In *Wild* it was confirmed that when negligence occurs prior to birth, the mother and the baby are to be treated as one legal entity. Thus any injury to the baby is an injury to the mother and she would be regarded as the primary victim. In contrast, a grandmother did bring a successful claim following the negligent management of the delivery of her grandchild, which she witnessed as well as the immediate aftermath. In *Re (A Child) and others* v *Calderdale and Huddersfield NHS Foundation Trust* [2017] EWHC 824 (QB) she was treated as a secondary victim who satisfied the *Alcock* requirements, including that of a sudden and shocking event, in order to recover for the PTSD she suffered.

5.5.2 'Rescue' cases

At one time it was thought that a rescuer who suffered psychiatric injury as the result of participating in distressing scenes could recover damages: *Chadwick* v *British Railways Board* [1967] 1 WLR 912. In *White* v *Chief Constable of South Yorkshire* the House of Lords held, however, that rescuers are subject to the same requirements of the primary/secondary categories. Here, the claimants were police officers who suffered as the result of assisting victims at the same football match as affected the victims in the *Alcock* case. They could not succeed as secondary victims (because they had no ties of affection to any of the primary victims) and did not succeed as primary victims because they were not themselves in danger.

It had previously been thought that rescuers were a special class of primary victim (*Chadwick*). Has *White* therefore narrowed the law? Is this fair or arbitrary? Would society not be best served by rewarding altruism?

5.5.3 Employees

In the *White* case the claimants argued that they could claim as employees, since the negligence involved was that of the South Yorkshire Police. The House of Lords held that there were no special principles attaching to the employment relationship, and the claimants (despite that relationship) had to show that they were primary or secondary victims.

The fact that the claims of the families in *Alcock* had been dismissed was influential in *White* as it was considered unfair in these circumstances to allow the police officers to recover. Their Lordships acknowledged that the police officers were more than mere bystanders.

> They were all on duty at the stadium. They were all involved in assisting in the course of their duties in the aftermath of the terrible events. And they have suffered debilitating psychiatric harm. The police officers therefore argue, and are entitled to argue, that the law ought to provide compensation for the wrong which caused them harm. This

> argument cannot be lightly dismissed. But I am persuaded that a recognition of their claims would substantially expand the existing categories in which compensation can be recovered for pure psychiatric harm. Moreover, as the majority in the Court of Appeal was uncomfortably aware, the awarding of damages to these police officers sits uneasily with the denial of the claims of bereaved relatives by the decision of the House of Lords in the *Alcock* case…

There is, however, now extensive authority that employees may have claims against their employers in certain circumstances where they have been exposed to work-related stress. The relationship between such claims and psychiatric injury claims is unclear. In *Walker* v *Northumberland County Council* [1995] 1 All ER 737 and *Hatton* v *Sutherland* [2002] EWCA Civ 76 it was held that the special control mechanisms for psychiatric harm claims arising from accidents (as laid down in *Alcock*) do not apply to claims for psychiatric injury arising from occupational stress. According to Hale LJ in *Hatton*, an employer's duty:

> …is to take reasonable care. What is reasonable depends, as we all know, upon the foreseeability of harm, the magnitude of the risk of that harm occurring, the gravity of the harm which may take place, the cost and practicability of preventing it, and the justifications for running the risk…

Is it appropriate that the law should have developed different rules for psychiatric harm in employment cases?

See Chapter 12 for further consideration of employers' liability for workplace stress.

5.5.4 Assumption of responsibility: close relationship

There remain a number of isolated cases with (as yet) no clear principles. Should a defendant be liable for causing psychiatric injury by carelessly passing on wrong information, or by passing on correct information in a carelessly insensitive way? There may emerge a principle that a defendant should be liable if there is an assumption of responsibility to protect the claimant against psychiatric injury or if there is an ongoing relationship between the parties that entails such a responsibility. See *W* v *Essex County Council* [2001] 2 AC 592, 1 WLR 1881; *AB* v *Tameside and Glossop Health Authority* [1997] 8 Med LR 91.

In the *W* case Lord Slynn suggested that the primary and secondary victim categories could not accommodate all cases. The House of Lords refused to strike out a claim (in other words, the claim was held to be arguable) by parents to whom a local council, in breach of an undertaking, sent as a foster child a known sexual abuser. The foster child then abused the children of the family, causing psychiatric injury to the parents. They had some of the characteristics of secondary victims, except that they did not see the abuse taking place. On the other hand, unlike most secondary victim cases, there had been an ongoing relationship between the council and the parents as to their suitability as foster parents.

In *AB*, patients were told by letter (in a rather impersonal and uncaring way) that they had been exposed to the risk of HIV infection by a health worker. Although a duty of care was conceded by the defendants, there was no liability, both on the grounds that there had been no breach and also because the claimants were unable to prove that their injury was caused by the means of informing them rather than by the message itself.

5.5.5 No liability for 'risk of injury'

Grieves v *FT Everard & Sons Ltd* [2007] 3 WLR 876 involved a claimant who had been negligently exposed to asbestos in the course of his employment. In very exceptional cases, exposure to asbestos may cause life-threatening or fatal diseases and the knowledge that he might develop such an illness caused the claimant to suffer from anxiety and clinical depression. He had suffered no personal injury so the claimant's case was based on his fear that he might contract an asbestos-related disease. It was held that, if that event occurred, it could no doubt cause psychiatric as well as physical injury that would be recoverable. However, the event had not occurred. The psychiatric illness was caused by the claimant's fear that he might contract an asbestos-related disease and this fear was not in itself actionable. In *Grieves* the claim for psychiatric harm concerned the fear of an unfavourable event that had not actually

happened. In *Page* v *Smith* [1996] AC 155 the claim concerned psychiatric injury, which was triggered by an event that had already happened.

5.6 Proposals for reform

The Law Commission report *Liability for psychiatric illness* (1998) recommended that for primary victims the development of the law could be left to the courts. However, as regards some secondary victims (other than rescuers or 'involuntary participants') the Commission recommended legislation to remove what it regarded as unwarranted restrictions on liability for negligently inflicted psychiatric illness.

The main recommendations were that restrictions based on the physical and temporal proximity of the claimant to the event be removed; the requirement for sudden shock be removed; and the requirement for close ties of love and affection with the direct victim be maintained, but the category of those relationships in which these ties would be presumed be expanded.

In *White* it was also acknowledged that nowadays courts accepted that there was no rigid distinction between body and mind and in that sense there was no qualitative difference between physical and psychiatric harm. However, it would be an altogether different proposition to say that no distinction was made or ought to be made between principles governing the recovery of damages in tort for physical injury and psychiatric harm. Policy considerations had undoubtedly played a part in shaping the law in this area. To allow the claims of the police officers would substantially expand the existing categories in which compensation could be recovered for pure psychiatric harm. Moreover, the awarding of damages to them sat uneasily with the denial of the claims to bereaved relatives by the decision in *Alcock*. Lord Steyn observed: 'the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify', but the opportunity was not taken to reconsider the *Alcock* restrictions on liability.

Activities

Activity 5.1

Core comprehension – psychiatric injury

Read the Law Commission report 249 *Liability for psychiatric illness* (1998), Section C: Reform, available at www.lawcom.gov.uk/document/liability-for-psychiatric-illness/ and answer the following questions.

Pay particular attention to Part V: reform II: five general issues, Subsections 1 'A recognisable psychiatric illness' and 2 'Reasonable foreseeability of psychiatric illness and the test of reasonable fortitude'.

a. **What was the main consideration for reform and why was it rejected?**

b. **List the five issues which apply generally to liability for negligently inflicted psychiatric illness.**

c. **In the absence of a definition, what is the current understanding of what constitutes a 'recognisable psychiatric illness'?**

d. **How did the Law Commission's recommendation on the test of reasonable foreseeability differ from the approaches of three Australian jurisdictions?**

e. **What was the approach of the House of Lords in *Page* v *Smith* to the question whether foreseeability of psychiatric illness should be required where physical injury to the plaintiff was reasonably foreseeable?**

f. **Why is it argued that the *Page* v *Smith* judgment made the law simpler and more certain?**

g. **Outline the three main criticisms of the *Page* v *Smith* judgment.**

h. **Outline the fundamental distinction between primary and secondary victims.**

i. **What is meant by the 'reasonable fortitude test' and why is it relevant?**

j. **Does the normal 'egg-shell skull' rule of remoteness apply in cases of psychiatric illness?**

Activity 5.2

Core comprehension – secondary victims

This activity examines the use of the control mechanism of proximity and the determination of 'the relevant event' in claims for damages for psychiatric injury as secondary victims.

Find and read the case of *Crystal Taylor* v *A Novo (UK) Limited* [2013] EWCA Civ 194 and answer the following questions.

a. **Which issue was central to this case?**

b. **On the basis of the facts of the case, who was the primary victim in the workplace accident and how did the primary victim die?**

c. **Which recognised psychiatric injury did the daughter, Crystal Taylor, suffer, due to witnessing her mother's death on 19 March 2008?**

d. **What are the seven requirements which have to be satisfied for a secondary victim to succeed in a claim in negligence?**

e. **Explain in your own words why the issue of 'the relevant event' was crucial to this case.**

f. **Identify reasons which explain why a restrictive approach is applied to claims by secondary victims.**

g. **Why did the lower court judge, HHJ Halbert, favour the mother's death as the relevant event and not the earlier accident?**

h. Describe the test of proximity as established in *McLoughlin* v *O'Brian*.

i. Explain the flaw identified in the lower court's designation of the relevant event.

j. What is the meaning of the word 'proximity' in the context of secondary victim law?

6 Pure economic loss and negligent statements

Contents

Introduction

We have seen in Chapter 2 that one of the forms of tortious injury that does not occupy a privileged position within the conceptual framework of tort law is pure economic loss. Let us remind ourselves of what pure economic loss is: financial (monetary) losses that are not consequential upon traumatic physical injury to the person or physical damage to property. Damages are recoverable where the economic loss results from a negligent misstatement. Cases usually concern false and inaccurate advice – often financial or legal advice or a false and misleading reference. In such cases, because we are still dealing with damage that is not traumatic physical injury, the duty issue becomes relevant and again we see the proximity element of the duty test being used to curtail and delineate liability. Pure economic loss that results from a negligent act as opposed to a negligent misstatement cannot be recovered. There is a complete bar under English law, although the position is different in other jurisdictions.

There is a vital difference in the way that the concept of proximity operates in cases of psychiatric injury (see Chapter 5) when compared to cases of pure economic loss. In the former, proximity is conceived of in broad metaphysical terms: proximity is relational, spatial and temporal; in cases of pure economic loss that raise difficult policy questions, proximity is almost always conceived of through the model or metaphor of the contract. The application of the proximity element in cases of pure economic loss achieves the same end as does the application of the concept in cases of psychiatric injury – it works to narrow to a small and ascertainable class a potentially wide pool of claimants.

In this sense, proximity is relational but it is not evidence of close familial ties that judges look for but evidence of quasi-contractual ties. It is through the metaphor of the contract that judges construct the necessary relationship of proximity in such cases. It must be emphasised that proximity in these cases is not conditional on finding an actual contractual relationship. Indeed, where there is an actual contractual relationship, this might satisfy the proximity test but will cause problems in relation to the last element of the duty test for it would often be deemed not just, fair and reasonable to impose a duty of care where, on the same set of facts, a contractual remedy would lie.

Until the middle of the 20th century, the tort of negligence was very largely concerned with careless conduct resulting in personal injuries or damage to property. Most of the illustrative cases in Part I were of that kind. The law has developed differently in relation to 'consequential' economic loss. Any loss which is not linked to physical injury, death or property damage is 'pure' economic loss and not recoverable in tort. In this chapter you will study losses which are **only economic** in nature and learn how the duty of care is used as a device to control liability.

Learning outcomes

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **explain the reasons why the courts have been hesitant about allowing recovery of compensation for pure economic loss**
- **distinguish pure economic loss from other types of loss in negligence**
- **identify situations in which pure economic loss is not recoverable because it results from a defendant's act rather than a statement**
- **evaluate the circumstances in which a duty may arise in respect of negligent statements – drawing a distinction between cases in which the recipient of the statement suffers economic loss and those where the person who suffers economic loss is not the recipient of the statement**
- **explain and discuss the uncertainties that exist in this area of law and the scope for reform.**

Core text

- **Giliker, Chapter 3 'Negligence: economic loss'.**

6.1 Economic loss

We begin our examination of this category of damage with the same injunction that began our exploration of emotional or psychological injury. With one possible exception, economic loss (financial loss) that is consequential on physical injury to persons or physical damage to property is recoverable. So a person injured in a car accident is likely also to suffer financial loss as a result, for example, of having to take time off from work to recover from the injury. There is no doubt that such losses are recoverable. The one possible exception concerns claims for the cost of bringing up children in wrongful birth cases. *MacFarlane* v *Tayside Health Board* decided that such a claim would not be held in respect of a 'healthy' child, mainly on the basis that, 'the birth of a healthy child is a joy and a blessing'. Subsequent cases (*Rees*) established that where the child is born disabled or where the mother of a wrongful birth child is disabled then damages could be recovered to reflect only the additional costs attendant on bringing up a child with disabilities. This is only a possible exception to the general rule that consequential economic loss is recoverable because the whole question of wrongful birth is complicated by the question of whether the physical process associated with giving birth can be thought of in terms of an injury. If birth cannot be thought of in terms of injury, then the financial cost of bringing up a child amounts to pure economic loss and is thus subject to the more restrictive rules that are explained in the section below. If birth pain is a form of injury, then the *McFarlane* rule does constitute an exception to the general principle.

6.1.1 Pure economic loss

So, as you will have realised, difficult questions surround pure economic loss – financial loss that is not a consequence of physical damage to person or property. It is here that we see an immediate connection with the analysis in Chapter 2 of the distinction between a defect and damage. A defective property *per se* will almost certainly result in financial loss but this would not be recoverable financial loss because, since a defect is not damage, it does not arise as a consequence of damage to property. We shall see that *Murphy* v *Brentwood* [1991] 1 AC 398 stands as authority that such losses are not recoverable in the English law of torts – the position is very different in other common law jurisdictions, such as Australia and New Zealand. More generally, pure economic loss is not recoverable if it is a result of a negligent act as opposed to a negligent misstatement. Much time has been dedicated by tort scholars to attempting to understand why such a seemingly arbitrary distinction between acts and statements has been allowed to solidify, and to negotiate the almost impossible task of deciding whether specific causes of pure financial loss are act-causes or statement-causes.

6.1.2 What forms of pure economic loss are recoverable?

The general common law rule was that a defendant was not liable for purely economic loss caused by negligent statements.

Since 1964, the rules concerning recovery of economic loss have been somewhat relaxed. Financial loss that results from a negligent statement is recoverable but, as we shall see, only according to strict criteria. This principle was established in the cases of *Hedley Byrne* v *Heller* (1964) and *Caparo Industries plc* v *Dickman* (1990) the details of which are discussed below.

This does not, however, mean that all foreseeable economic loss is recoverable. The law still takes a restrictive view, as is explained in the following sections. It is helpful first to consider the policy reasons that restrict the right of recovery for economic loss. Many of these are developed and applied in the cases that follow.

6.1.3 Recovery of pure economic loss: policy considerations

Among the many policy arguments are these.

- Economic interests are intrinsically less worthy of protection than physical interests.
- If economic loss generally is recoverable, the burden on particular defendants will be unbearably high. (Imagine that the defendant carelessly pollutes a holiday beach. Holidaymakers stay away. All the business interests in the town suffer losses. Is the defendant to have to compensate them all?)
- A general rule against recovery of economic loss is clear and easy to apply.
- Claimants can often make good their economic loss in other ways than by claiming compensation: for example, if a factory has to shut down because of loss of power, it may be possible to make up for lost production by having extra shifts later.
- It may make more economic sense for potential claimants to insure against possible economic losses that they may suffer rather than for potential defendants to insure against economic losses that they may cause.
- Allowing economic loss to be recovered in tort muddles the boundary between contract and tort. The nature of this argument has changed because of the enactment of the Contracts (Rights of Third Parties) Act 1999. Before then, claimants sometimes tried to frame a claim in tort because the strict rules of privity of contract prevented them from suing for breach of contract. There is an example of this discussion in the case of *White* v *Jones* (below) where Lord Goff points out that some legal systems would allow the claimants in that case an action to enforce the contract, but English law does not, even (probably) after the Act.

For a time after the decision in *Hedley Byrne* it was thought that damages for economic loss might be recoverable as readily as for physical damage, but this did not happen. The pattern of cases is described below.

6.2 Economic loss cases (i): negligent acts

Case law example

A good illustration of the distinction between pure economic loss and economic loss that results from physical damage to person or property can be seen in the case of *Spartan Steel & Alloys Ltd* v *Martin & Co* [1973] QB 27. In this case, the defendant contractor, in the course of digging the road, negligently cut a power cable that supplied electricity to the plaintiff's factory. This caused a 14-hour power cut, which meant that the plaintiff's smelting works had to be shut down. At the time of the power cut, there was a 'melt' in progress and to stop the steel solidifying it had to be drawn out of the furnace.

The plaintiff suffered losses under three headings:

1. the reduced value of metal that had to be removed from a furnace before it solidified and damaged machinery
2. profit that would have been made from that 'melt' had it been completed
3. profit from four other future 'melts' that would have been made but for the 14-hour power cut.

The Court of Appeal, by a majority, held that only the first two heads of damage, the reduction in the value of the solidified melt and the profits they would have made from its sale, justified compensation. The plaintiff obtained nothing for the loss of profits on the four further melts, which could have been processed before the electricity was restored because this constituted pure economic loss: it did not flow directly from physical damage to the claimant's property. Lord Denning reviewed the policy justifications behind the reluctance to impose liability for pure economic loss and emphasised the fact that negligence law is concerned with physical and property damage. He said:

> ... the risk of economic loss should be suffered by the whole community who suffer the losses, usually many but comparatively small losses, rather than on the one pair of shoulders...

In *Anns* v *Merton LBC* [1978] AC 728, the plaintiffs were lessees of flats that they claimed suffered structural deterioration through being built on foundations of insufficient depth. They sued in negligence against the local authority on the basis that it had negligently failed to inspect the foundations or negligently carried out an inspection. Lord Wilberforce considered that an imminent risk of injury constituted material physical damage. In considering when the cause of action arises he said:

> We can leave aside cases of personal injury or damage to other property as presenting no difficulty. It is only the damage for the house which requires consideration... It can only arise when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it.

However, in *Murphy* v *Brentwood DC* [1991] 1 AC 398, a seven-member House of Lords found it necessary to overrule their own earlier decision in *Anns* and held that a defect in property that causes damage merely to the thing itself is not damage for the purposes of the law because this would be equivalent to introducing a non-contractual remedy as to fitness for purpose. To be recoverable, damage must be to 'other property', as illustrated in *D&F Estates* v *Church Commissioners* discussed in Chapter 14.

Finally, on this point and as stated earlier, a defective property that causes actual damage to other property is recoverable and a defect that causes physical injury to persons is also recoverable. However, the defective property must cause actual physical injury to the person. In Murphy (overruling *Anns*) the House of Lords made it clear that an 'imminent risk' to the health and safety of occupants of a defective property is not sufficient to found an action in the tort of negligence.

6.3 Economic loss cases (ii): negligent statements

6.3.1 Recovery of pure economic loss: *Hedley Byrne*

The starting point for the discussion of forms of pure economic loss which are recoverable is *Hedley Byrne & Co* v *Heller & Partners Ltd* [1964] AC 465. The claimants, through their bankers, asked the defendants for advice about the creditworthiness of one of the latter's customers. The defendants gave a reasonably favourable reply, and the claimants extended credit to the customers and suffered losses in consequence. The House of Lords held that in principle the defendants owed a duty of care to the claimants and would have been liable to them for the resulting losses if they had

not given the advice 'without responsibility on our part'. (The defendants excluded liability because of the 'without responsibility' clause but such a clause would now be subject to s.11 of the Unfair Contract Terms Act 1977 and would need to satisfy the test of reasonableness.)

The case profoundly changed the law in two respects:

1. the defendants were held to owe a duty to take care in the advice or information that they gave
2. that duty extended to purely economic losses.

A claimant who suffers loss by relying on inaccurate statements could and can bring a claim in the **tort of deceit,** but in *Derry* v *Peek* (1889) 14 App Cas 337 the House of Lords held that to establish liability in that tort the claimant had to prove that the defendants either knew that what they were saying was false or were reckless as to whether what they were saying was true or false. It was assumed until 1964 that the result of *Derry* v *Peek* was that there could be no liability where the defendant had not lied or been reckless, but had merely spoken carelessly. The *Hedley Byrne* case put an end to that view.

6.3.2 When does the duty arise?

The House of Lords did **not** decide in *Hedley Byrne* that a person had a duty to take care in making statements whenever damage or loss was foreseeable. Once a statement is put into circulation it may be broadcast and relied on in different ways by many different people; therefore the criterion of reasonable foreseeability of the loss was rejected as giving rise to potentially too wide a liability. In order to establish a duty of care, proximity must exist in the context of a 'special relationship' between the parties. It is, however, not easy to explain in a few words what relationship (sometimes called a special relationship) there has to be between the speaker and hearer before a duty of care arises. This can only be understood by reading the case and the commentaries on it in the textbooks. The following passage from Lord Morris (at 503) gives a flavour of it:

> If, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful enquiry… a person takes it on himself to give information or advice to or allows his information or advice to be passed on to another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.

So the requirements for the existence of a 'special relationship' appeared to be:

- the existence of a relationship based on professional or other skill or expertise
- a reliance by the claimant on the defendant's special skill and judgement
- knowledge, or reasonable expectation of knowledge on the part of the defendant, that the claimant was relying on the statement
- that it was reasonable in the circumstances for the claimant to rely on the defendant
- in some cases that the relationship was close to being contractual (since liability in contract for negligent advice is well-established).

The ambit of the special relationship and *Hedley Byrne* liability was discussed in some detail by the Supreme Court in *Steel* v *NRAM Ltd* [2018] UKSC 13. The defendant was a solicitor who was acting for a customer in a sale of commercial property and she dealt directly with an unrepresented lender bank. She made 'grossly negligent' assurances in an email to the lender about the nature of the proposed financial transaction. Due to its reliance on her assurances, the lender suffered substantial financial loss that it attempted to recover from the solicitor. In its judgment, the Supreme Court reviewed a number of cases concerning *Hedley Byrne* liability. It concluded that it had not been reasonable for the claimant to have relied on the assurances, when it could have easily made inquiries of its own, which would have revealed the true situation. Furthermore,

it would not have been reasonable for the defendant to foresee such reliance. On that basis, there was no special relationship and therefore no duty of care had existed on the defendant in favour of the claimant. There was no liability for this negligent misstatement.

The speaker is usually giving advice in a serious, business or professional context. They may be in the business of giving advice or they may be especially knowledgeable (and therefore specially to be trusted) about the subject on which they speak. It is unusual, although not impossible, for the duty to arise between friends in a relatively social context.

Case law example

In *Chaudhry* v *Prabhakar* [1988] 3 All ER 718 it was clear that considered advice was being sought when the plaintiff asked a friend who had some knowledge of cars to find a suitable car that had not been involved in an accident. The defendant found her a car which he recommended but which was subsequently discovered to have been involved in a serious accident, and poorly repaired. The Court of Appeal imposed liability, because counsel for the defendant had (perhaps wrongly) conceded that duty existed. However, Stocker LJ stated that:

> … in the absence of other factors giving rise to such a duty, the giving of advice sought in the context of family, domestic or social relationships will not in itself give rise to any duty in respect of such advice.

In such situations there would not be reasonable reliance.

A duty was held to exist in another case, with some characteristics of the social relationship.

Determining a preliminary issue, in *Burgess* v *Lejonvarn* ([2017] EWCA Civ 254) the Court of Appeal held that a duty of care in tort existed on the basis of assumption of responsibility. For about 10 years prior to the events giving rise to this dispute, the claimants (the Burgesses) and the defendant (Mrs Lejonvarn) were good friends. The claimants believed the quote in excess of £150,000 plus VAT from a well-known landscape gardener to carry out earthworks and hard landscaping to be too expensive and they sought professional assistance from their friend and former neighbour, the defendant. The defendant secured the contractor to carry out the work with the intention that she would provide subsequent design input, for which she would charge a fee. However, the project went badly wrong and the Burgesses sued Mrs Lejonvarn both in contract and in tort. The court found it quite impossible to find any clear form of offer or acceptance and concluded that there was no contract between the parties. However, the claim in tort was successful. Although there was no contract, and the parties were personal friends, when Mrs Lejonvarn agreed to use her special skill in landscape architecture to provide a service for the Burgesses, she had assumed a duty to perform this with reasonable care and skill.

The case was then remitted to the High Court for determination of the issue of whether this duty had been breached (see *Burgess* v *Lejonvarn* [2018] EWHC 3166 (TCC)). Here, the judge found in favour of the defendant, finding that the claims of negligent design and project management were 'threadbare' and 'lacked credibility and conviction'. This case is a useful reminder to students that a finding that one element of negligence exists (here, duty) by no means assures success for a claimant.

6.3.3 'A voluntary assumption of responsibility'

The concept of 'a voluntary assumption of responsibility' has been increasingly used to establish proximity in determining the existence of a duty of care. This arises from an undertaking either expressed or implied that the defendant will exercise care in giving information or advice. However, doubt has been expressed as to whether this criterion was necessary or useful. In *Smith* v *Bush* [1990] 1 AC 831 Lord Griffiths suggested that it is not a helpful or realistic test for liability, but in *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145 Lord Goff said that the criticism of the concept of a voluntary assumption of responsibility in *Smith* v *Bush* was misplaced.

6.3.4 When is there liability?

The discussion of negligent statements tends to focus on the existence of the duty, but you must not forget that the defendant is liable only if there is a lack of care. Much advice on economic matters turns out to be wrong without being careless. The defendant has the opportunity to explain the limits of their knowledge and the amount of research they have undertaken and is to be judged according to what they promised to do.

It also has to be shown that the negligent advice or information was a cause of the claimant's loss.

6.3.5 To whom is there liability?

The loss may be suffered by someone other than those to whom the advice or information was addressed. Two decisions of the House of Lords can be contrasted: *Smith* v *Bush* and *Caparo Industries* v *Dickman* (1990).

These deal with important social situations. In *Smith* a house purchaser, who wished to obtain mortgage finance from a bank, sued a surveyor who had been commissioned by the lending institution to provide a report (paid for by the purchaser) to the bank about the state of the property. The surveyor was held to owe a duty to the purchaser and not just to the bank, even though the purchaser had been advised about the desirability of obtaining her own survey but had not done so. In *Caparo* a firm of accountants who had carried out a statutory audit of a company were held to owe a duty to the shareholders as owners of the company but not to the claimants who launched a take-over bid for the company on the strength of the accounts.

Lord Bridge said that an essential ingredient of the required proximity in situations where a statement is put into more or less general circulation is to prove that:

> the defendant knew that his statement would be communicated to the claimant, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind… and that the claimant would be very likely to rely on it…

You must ask yourself why different approaches were adopted in these cases. Consider especially (i) the number of potential claimants in the two situations and (ii) the social significance of each of the two situations.

6.3.6 The *Caparo* test

A duty may arise in a *Caparo*-type situation if the relationship between the claim and the purpose for which the auditors' report was prepared is close enough. The decision has been interpreted as identifying a set of criteria which can be articulated into a three stage checklist, known as the *Caparo* test. Under this test, for a duty of care to arise:

1. the loss must be reasonably foreseeable
2. there must be a relationship of proximity between the parties, and
3. it must be fair, just and reasonable that the law should impose a duty – this enables the court to take account of any underlying policy concerns.

In *Caparo* the report was intended to enable the shareholders, as owners of the company, to decide whether they were satisfied with the management of the company by the board of directors on the basis of the company's past performance. It was not intended as a basis for a decision to invest in the shares of the company. Advice on this would be based on different criteria. There was no voluntary assumption of responsibility towards potential investors, nor would it be reasonable for such an investor to rely on this report for that purpose.

See: *James McNaughton Paper Group Ltd* v *Hicks Anderson & Co* [1991] 2 QB 113, *Morgan Crucible Co plc* v *Hill Samuel Bank & Co Ltd* [1991] Ch 295, *Law Society* v *KPMG Peat Marwick* [2000] 1 WLR 1921.

6.3.7 Reliance by a third party

The advice may be relied on by one person but the loss suffered by someone else: *Ministry of Housing* v *Sharp* [1970] 2 QB 223, *Spring* v *Guardian Assurance Ltd* [1995] 2 AC 296.

In *Spring* the writer of a reference about a former employee seeking a job was held to owe a duty of care to the employee and not merely to the prospective employer who relied on it. Notice that the defendant was obliged (through the rules of the regulatory system for financial institutions) to provide a reference. The reference supplied by the defendant was damning and mistakenly alleged that the plaintiff was dishonest. He suffered financial loss through not being able to find gainful employment. Even though the reference was defamatory the plaintiff would not have succeeded in an action for defamation since, in the absence of malice, the defendant would have been able to establish a defence of qualified privilege. The plaintiff instead sued in negligence. The defendant argued:

1. to give a cause of action in negligence would distort and subvert the tort of defamation, and
2. if the plaintiff won, employers fearful of liability would be reluctant to write references or supply only bland references that conveyed no relevant information.

The House of Lords agreed that the preservation of the law of defamation would not be sufficient to deny the plaintiff a remedy and the defendant was liable. The majority (Lord Keith dissenting) decided that the two torts were different. Defamation exists to protect reputation but a negligent reference can do harm without affecting a person's reputation.

In *McKie* v *Swindon College* [2011] EWHC 469 (QB) an unsolicited email (not a reference) containing largely erroneous and untrue statements sent by the former employer of a lecturer led to his dismissal from a new job. Although the email was not a reference, applying the *Caparo* test, the defendant was nevertheless liable for the negligent statement.

6.4 Economic loss cases (iii): performance of a service

The *Hedley Byrne* case was long thought of as being concerned with advice or information on which the claimant relied. Later it was interpreted more widely and an 'extended *Hedley Byrne* principle' was recognised: the defendant can be liable where there has been a voluntary assumption of responsibility by the defendant towards the claimant either generally or for the purposes of a specific transaction. On this view, liability for negligent misstatements is merely an example of a wider principle and **reliance** is not a necessary ingredient of liability.

In *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145, a number of claims arising out of the near-collapse of the Lloyd's of London insurance market were taken by Lloyd's syndicates (known as 'Names') alleging negligence on the part of the agents who organised the syndicates. The agents argued that the position with the Names should be governed by the terms of the contracts between the parties and not by the law of tort (which favoured some of the Names because of the more advantageous limitation period in tort). The House of Lords held that the agents had assumed a direct responsibility to the Names and a *prima facie* duty of care arose. Accordingly, sub-agents acting on behalf of indirect Lloyd's Names owed a duty of care to the Names because they had assumed such responsibility. The existence of a contractual relationship does not preclude liability in tort: their Lordships held that assumption of responsibility can be the basis of recovery in tort where the defendant undertakes a professional task. In *Customs and Excise Commissioners* v *Barclays Bank* (below) Lord Hoffmann said the use of the concept of assumption of responsibility in this case, while perfectly legitimate, was less illuminating.

> The question was not whether the defendant had assumed responsibility for the accuracy of a particular statement but a much more general responsibility for the consequences of their conduct of the underwriting. To say that the managing agents assumed a responsibility to the Names to take care not to accept unreasonable risks is little different from saying that a manufacturer of ginger beer assumes a responsibility to consumers to take care to keep snails out of his bottles.

The scope of the extended principle was explained by Lord Steyn in *Williams* v *Natural Life Health Foods* [1998] 1 WLR 830, where the plaintiffs entered a contract with a company to franchise a health food store. The plaintiff's business was not a success and they sought to prove that the defendant had personally assumed responsibility for the negligent advice provided by the company (which had subsequently been wound up). Although it was held in this case that the defendants had not personally assumed responsibility to the plaintiff, Lord Steyn said that the extended *Hedley Byrne* principle established in *Henderson* does not merely apply to negligent statements, but also covers the negligent performance of services and can even found a tort duty concurrently with contract.

Henderson was applied in *West Bromwich Albion Football Club* v *El-Safty* [2006] EWCA Civ 1299 where a duty of care to the patient was not accompanied by an assumption of a duty to a third party not to cause financial loss. In this case the football club brought an action against a consultant surgeon for the financial losses suffered by the club when one of its valuable players was negligently prescribed treatment by the defendant. Although a degree of foreseeability and proximity was found to exist between the consultant and club (which had paid for the treatment) the *Caparo* test was applied. The Court of Appeal said that it would not be fair, just and reasonable to impose a duty to the club on the ground that such a duty could conflict with the doctor's primary duty to care for his patient.

We have seen the *ratio* in *Henderson* was applied in *Burgess* v *Lejonvarn* [2017] EWCA Civ 254, above. The claim in tort was successful: the defendant possessed a special skill and she had assumed a responsibility in respect of both the advice and service on which her friends relied.

There is an important example of the extended *Hedley Byrne* principle in *White* v *Jones* [1995] 2 AC 207 where the assumption of responsibility by a solicitor towards his clients was extended to the intended beneficiary of the client's will who, as the result of the failure by the solicitor to execute the will before the client's death, was deprived of the intended legacy. The case is striking because the claimant did not suffer a loss, but merely failed to get a financial benefit that the deceased testator had intended her to have. The main reason for extending the responsibility of the solicitor was that otherwise there would be no sanction against a failure by the solicitor: the deceased's estate would have a contract action against the solicitor, but the estate had suffered no loss. Reliance on the statement by the claimant is not essential to establish a duty of care. Their Lordships held that by accepting instructions to draw up a will, a solicitor came into a 'special relationship with those intended to benefit under it' and this, in consequence, imposed a duty on the solicitor to act with due expedition and care on behalf of the beneficiaries.

Another example of the scope of an extended assumption of responsibility can be found in *Gorham* v *British Telecommunications plc* [2000] 4 All ER 867 where the Court of Appeal confirmed that *White* v *Jones* is not confined to claims relating to wills. In this case, Mr Gorham was sold a personal pension without being advised that BT's occupational pension might be better for him. Although, even if he had joined the BT scheme when he was informed that it might be better, his family would not have been entitled to a pension because he would not have been a member of the scheme for two years before his death. They would, however, have been entitled to a lump sum and it was clear that Mr Gorham had intended to create a benefit for his dependent wife and family and therefore a duty of care was owed to them by the insurance company.

6.5 Slogans or practical guides?

Are 'proximate', 'fair, just and reasonable' and 'assumption of responsibility' used as slogans rather than practical guides to whether a duty should exist?

In *Customs and Excise Commissioners* v *Barclays Bank Plc* [2006] UKHL 28, the claimants had obtained a 'freezing order' against the assets of two companies in order to protect VAT payments which were owed to the claimants. The orders should have alerted the bank not to allow the companies to withdraw money from their accounts. Nevertheless, the companies managed to withdraw large sums and the Commissioners were then unable to recover the money they were owed. The judge at first instance held that the defendant bank had not owed a duty of care to the Commissioners but the Court of Appeal held that they were owed a duty of care on the basis of an assumption of responsibility by the bank as soon as the freezing order was served and by the application of the *Caparo* 'fair, just and reasonable' test. When considering whether there is sufficient proximity the courts look for a much closer relationship in the shape of the 'special relationship' but how that is characterised depends on the particular context and, as pointed out by Lord Bingham, the same result seemed to be reached whatever formulation was adopted.

The House of Lords reversed the Court of Appeal finding of liability and restored the trial judge's original decision; no common law duty of care could be said to arise out of the freezing order itself. The *Hedley Byrne* special relationship was not easily established on the basis of reliance because the Commissioners did not rely on the defendants to comply with the order. The Commissioners relied on the courts to enforce the order. A degree of voluntariness is essential to an 'assumption' of responsibility but in this case the defendants had the freezing order 'thrust upon them' by the court. If the 'voluntary assumption of responsibility' is present then it may suffice to impose a duty, but this is not a necessary condition of liability. Where the voluntary assumption of responsibility test does not provide a clear statement of duty then the *Caparo* three-stage test may be applied and policy issues considered. Lord Bingham said:

> I think it is correct to regard an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further enquiry. If answered negatively, further consideration is called for.

According to Lord Hoffmann ([35], [36]):

> There is a tendency, which has been remarked upon by many judges, for phrases like 'proximate', 'fair, just and reasonable' and 'assumption of responsibility' to be used as slogans rather than practical guides to whether a duty should exist or not. These phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance… The answer does not depend upon what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case. The purpose of the inquiry is to establish whether there was, in relation to the loss in question, the necessary relationship (or 'proximity') between the parties and… the existence of that relationship and the foreseeability of economic loss will make it unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability. In truth, the case is one in which, but for the alleged absence of the necessary relationship, there would be no dispute that a duty to take care existed and the relationship is what makes it fair, just and reasonable to impose the duty.

Then, as was done in the *West Bromwich Albion* case (above), the *Caparo* three-part test was applied. Foreseeability of possible loss by the claimants was present, but proximity between the parties was doubtful. Most importantly, it would not be fair, just and reasonable to impose a duty of care. Such a duty would make banks liable for potentially huge sums in response to minor mistakes on their part; additionally there are better means than the law of tort for maintaining strict standards of propriety in banking.

6.6 Scope of damage

When there has been the negligent performance of a service leading to pure economic loss, there may be a question to be determined about the extent of recoverable loss. This was the issue in *Kahn* v *Meadows* [2021] UKSC 21 and *Manchester Building Society* v *Grant Thornton* [2021] UKSC 20. Although the former was a medical case and the latter concerned auditors' liability, they were intended to be read together because they both addressed the key question of scope of liability and the consequential affect on damages. The claimants were a small building society that inquired of the defendant accounting firm which style of accounting could be used, for strategic business purposes, in preparing its accounts. The defendants gave an answer that was incorrect and correcting the effects of the error cost the claimants over £32 million.

A seven-strong Supreme Court unanimously upheld the first-instance decision (reversing that of the Court of Appeal), although damages were reduced on the grounds of 50 per cent contributory negligence. It played down the practical importance of any distinction between the giving of advice or information; this is a wide and fluid spectrum. According to Lord Hodge and Lord Sales:

> In the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk.

Kahn and *Manchester* provided guideline questions for future courts to assist in the application of the basic principle laid down in the key case of S*outh Australia Asset Management Corp* v *York Montague* [1996] 43 All ER 365 (*SAAMCO*).

The guidelines are as follows:

1. Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence?
2. What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care?
3. Did the defendant breach his or her duty by his or her act or omission?
4. Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission?
5. Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above?
6. Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid?

Activities

Activity 6.1

Core comprehension – limitations to the 'special relationship'

In the Online Library find and read *Patchett* v *Swimming Pool & Allied Trades Assn Ltd* [2009] EWCA Civ 717. Answer the following questions.

a. **Explain why the claimants brought a tort, rather than contract, action.**
b. **What were the aims and purpose of the SPATA website?**
c. **Summarise Arden LJ's view of assumption of responsibility.**
d. **What were the strengths of the claimant's case?**
e. **What were the weaknesses of the claimant's case?**
f. **If there had been held to be a duty of care to the claimant, would he then have been successful in his tort action?**

Activity 6.2

Applied comprehension – tests for duty of care for negligent misstatement

In the Online Library find and read Stanton, K. 'Professional negligence: duty of care methodology in the twenty first century' (2006) 22(3) PN 134–50. Answer the following questions.

a. **Summarise the author's view on the usefulness of the basic *Hedley Byrne* test for duty of care.**

b. **Does the author prefer the *Caparo* test? Give details.**

c. **How does the author imagine that the 'knowledge' test would operate?**

d. **Illustrate the impact of 'assumption of responsibility' on the outcome of Customs & Excise.**

e. **Incrementalism is seen as problematic by the author. Give an example of one case which he uses to illustrate his point.**

f. **What might determine the way a judge approaches a duty of care question?**

g. **What is meant by the situation of 'pockets of liability' and what might its impact be?**

Notes

7 Liability of public bodies

Contents

Introduction

Controversially, public bodies, such as police and local authorities and rescue services, are unlikely to be held responsible in tort for a mere failure to act (save in circumstances where they may be liable under the tort of breach of statutory duty which we do not cover in this module). In this chapter we examine the underlying policy considerations and the principles that govern liability in negligence for public bodies.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **evaluate the scope of liability in negligence on public bodies, such as police and local authorities and rescue services**
- **describe the public policy considerations underlying the decisions in claims against public bodies**
- **explain the impact of the European Convention on Human Rights (ECHR) on the liability of such bodies**
- **explain the circumstances when a public body may create an assumption of responsibility to a specific individual.**

CORE TEXT

- **Giliker, Chapter 2 'Negligence: the duty of care', Sections 2-030 to 2-066.**

7.1 Liability of public bodies

To a large extent, the law of negligence applies to public officials and public bodies in the same way as it does to private individuals and commercial bodies. In the context of public bodies, such as police and local authorities and rescue services, the question that has concerned the courts is whether the just, fair and reasonable test (*Caparo*-style or assumption of responsibility) could be utilised so that the functions of the state are to be regarded as carried out not just for the public as a whole, but as entailing a duty of care to individual citizens. In *Robinson* v *Chief Constable of South Yorkshire* the Supreme Court held the question of liability to private individuals in these circumstances does not depend on 'policy' considerations because liability can be justified on the basis of the general principles of negligence. Could victims of crime sue the police for failing to protect them, or could an abused child sue the local council whose social services department failed to provide appropriate care? Other than in the exceptional circumstances outlined below, under the ordinary principles of negligence, a duty to prevent harm by others will not be imposed.

7.2 What policy issues are relevant?

The approach set down in *Robinson* is that courts must consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question of whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law and weigh up the reasons for and against imposing liability. Among the policy arguments that have been considered are:

- Will any damages payable come out of public funds? Is this the best use of public funds?
- Many cases raise issues that are problematic even when only private parties are involved: omissions, liability for acts of third parties, economic loss.
- The public authority often has a difficult job in balancing conflicting interests. For example, a body has the job of licensing drugs. It has some indication that a drug may have harmful side effects. If it acts too slowly in banning it, new patients may have it prescribed and suffer ill effects. If it acts too quickly on what turn out to be inaccurate indications, it will harm the profits of the drug company and disadvantage patients who would benefit from receiving the drug. Similar arguments apply to social workers who have to decide whether a child is suffering abuse and should be taken into care: the interests of the child and those of the parents have to be reconciled.
- Imposing a duty of care may lead to an over-defensive attitude on the part of the public body.
- There may be other remedies available – an action for judicial review, a claim under the Human Rights Act, a complaint to an ombudsman – and these may provide justice without recourse to a tort claim.

7.3 Relevance of statutes

Many of the cases concern functions conferred by statute. A statute may impose a duty (a council **shall** do something) or confer a power (a council **may** do something). However, most of the duties are expressed in very general terms (a duty to provide suitable education) and so, in respect of duties and powers, the public authority has a very wide discretion as to how to act. There is a separate tort (i.e. distinct from negligence) called **breach of statutory duty** but this is of virtually no relevance to the liability of public authorities.

The basic question is this: how far can a common law tort of negligence arise from or run alongside the statutory functions (powers or duties)? The general answer is that

such a duty may (but does not necessarily) arise so long as it is not inconsistent with, and does not cut across, the statutory regime. The detailed answer is more complex but is becoming simpler.

7.4 General illustrations of the question

The list below is a tentative set of illustrations of the main issues indicating where matters are reasonably clear. There is recent authority that a statutory function will seldom, if ever, bring about the sort of proximity between citizen and public authority that would satisfy the second limb of the *Caparo* test. See the views of Sedley LJ in *Home Office* v *Mohammed* [2011] EWCA Civ 351, striking out a negligence claim by Iraqi Kurds whose applications for indefinite leave to remain in the UK had been successful only after very long delays because of administrative failures identified in judicial review proceedings.

Nevertheless, there are situations where a duty of care can exist so that there is liability for damage caused by the way a duty or power was carried out:

- There may be, between the public authority and the claimant, a pre-existing duty of care so that either the improper exercise of a power or a failure to properly exercise a power may be a breach of that duty (e.g. the duty of an employer to protect an employee from stress; in *Connor* v *Surrey County Council* [2010] EWCA Civ 286, [2010] 3 WLR 1302 the common law duty and the statutory power were consistent with each other).
- The public authority may carry out its duty or exercise its powers to set up some permanent organisation which then owes a duty of care to those who use it. See the examples of the ambulance service and the educational psychologists below.
- The public authority may be treated as having assumed responsibility to a particular individual: *Barrett* v *Enfield London Borough Council* [2001] 2 AC 550; *Swinney* v *Chief Constable of Northumbria Police* [1997] QB 464.
- Where the statutory function is intended to benefit one group of people, there is great reluctance to accept a duty of care to other groups who may be affected by an erroneous decision. For example, the parents wrongly suspected of abuse (*JD* v *East Berkshire Community NHS Trust* [2005] UKHL 23) or the owners of a residential home wrongly suspected of mistreating residents (*Jain* v *Trent Strategic Health Authority* [2009] UKHL 4).
- There are particular problems in imposing liability where the authority is alleged to have caused damage by failing to use its powers (as opposed to misusing them). See below.

7.5 The impact of the Human Rights Act 1998

The most relevant articles of the European Convention on Human Rights (ECHR) are Articles 2 (right to life), 3 (protection from torture and inhuman and degrading treatment) and 8 (respect for private and family life). These impose obligations on public authorities, including at least some positive obligations. Article 2, for example, does not merely prevent public authorities from killing people but also requires the state to provide at least some protection against being killed by others.

Many violations of Convention rights are of course clearly also torts. But where they are not, the domestic courts can respond in two different ways.

1. They can develop or expand the common law of tort to provide a remedy for the violation of the Convention right.
2. They can leave the common law unchanged and let the victim seek a direct action for breach of the Convention right under ss.7 and 8 of the Human Rights Act 1998. Such an action differs from the common law action in three ways: (a) they must be

brought within one year (although this may be extended (s.7(5)); (b) damages are discretionary (s.8(3)); (c) the measure of damages is likely to be lower than under the common law rules.

At first the court was willing to create a duty of care to avoid a conflict with the requirements of the ECHR (see the early social work cases below). More recently, they have refused to do so and left the claimant to pursue a remedy under the 1998 Act. For instance, see *Jain* v *Trent Strategic Health Authority* (above) where the House of Lords declined to recognise a common law duty on the part of the health authority because it might have a distorting effect on the nature of the duty of care even where public authorities were not involved.

Commissioner of Police of the Metropolis v *DSD and another* [2018] UKSC 11 concerned an alleged violation of the respondents' rights under Article 3 of the European Convention on Human Rights. This case concerned two victims of Worboys, a serial sex offender in London known as the Black Cab Rapist who committed sexual offences against many women. DSD, one of his first victims, attacked in 2003, claimed that failure to carry out effective investigations into her complaints amounted to inhuman or degrading treatment contrary to Article 3. Following a police review of sexual assault cases in February 2008, which resulted in a media appeal, Worboys was convicted of 19 counts of sexual assault, including the assault on NBV. Both women brought proceedings against the police, alleging failure to conduct effective investigations into Worboys' crimes constituted a violation of their rights under Article 3.

The Supreme Court ruled that Article 3 imposed a positive duty on police forces to investigate allegations of inhuman or degrading treatment by private individuals in a timely and efficient manner. The Court emphasised that errors must be serious to give rise to a breach of this duty and the circumstances in which the police may be held liable for failing to investigate crime are stringent, the outcome of this decision will nevertheless create an additional burden on police forces when resources are already extremely stretched.

Smith v *Ministry of Defence* [2013] UKSC 41 provides an example of the impact of the ECHR on 'combat immunity' in negligence of the Ministry of Defence to members of the armed forces. Here, the Supreme Court narrowed the scope of 'combat immunity' in a claim brought by the families of servicemen killed from a 'friendly fire' incident in Iraq (not on the field of battle). The claimants alleged that the Ministry of Defence had breached its duty of care in failing to provide available equipment and technology to protect against the risk of friendly fire and to provide adequate vehicle recognition training pre-deployment and in theatre.

The Supreme Court held that although decisions about training, procurement or the conduct of operations at a high level of command are closely linked to the exercise of political judgement and policy issues, positive obligations under Article 2 of the ECHR should be given effect.

The doctrine of combat immunity was therefore given a narrow definition, restricting it to acts of war applying only to actual or imminent armed conflict and not to failures at the earlier stage of planning and preparation for active operations against the enemy.

7.6 Specific scenarios

These principles of liability have been worked out in the following situations.

7.6.1 Protection of the public against crime

We have seen in Section 6.1 the retreat by the Senior Courts from a policy-based justification against a general duty of care on the police to protect all members the public from consequences of crime. The public policy reasons against negligence liability originated in *Hill* v *Chief Constable of West Yorkshire* [1989] AC 53 where the House of Lords held that, in general, the police owed no duty of care to individual members of the public to identify and arrest a serial killer before he struck again.

Their Lordships further stated that a general duty of care to protect all members of the public from the consequences of crime would be impracticable and, on grounds of public policy, deeply damaging to police operations. This principle was restated by the House of Lords in *Brooks* v *Commissioner of Police of the Metropolis* [2005] UKHL 24, where the claimant who witnessed the racist murder of his friend suffered post-traumatic stress as the result of the way he was treated by the police. Following the murder he was first treated as a suspect and later as a witness, but not as the victim of crime. In rejecting a claim in negligence against the police the approach in *Hill* was applied. According to Lord Steyn:

> [T]he core principle of *Hill* has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in *Hill*, arose for decision today I have no doubt that it would be decided in the same way. It is, of course, desirable that police officers should treat victims and witnesses properly and with respect… But to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far.

Some years after *Hill,* the principle was applied in *Osman* v *Ferguson* [1993] 4 All ER 344, where the identity of the suspect was known and the identity of the likely targets was also known. Here, there were fatal consequences when police failed to act on warnings that a teacher, who developed a disturbing infatuation with one of his students, was likely to commit serious offences. The teacher conducted a campaign of harassment against the Osman family, which culminated in his killing the student's father and injuring the student. Although the Court of Appeal was prepared to accept that this case was different from *Hill* in that there was a sufficient relationship of proximity between the plaintiff's family and the police, the *Hill* immunity was applied and the case failed on grounds of public policy. The Court of Appeal held that the claim should be struck out as disclosing no cause of action, that is, even if all the facts alleged by the claimant could be proved to be true, the claim was bound to fail in law. The police were said rather inaccurately to have an 'immunity'.

Following the rejection of their claim an action was then brought before the European Court of Human Rights: *Osman* v *UK* [1999] 1 FLR 193. That Court held that there was no breach of Article 2 (right to life) and laid down a rather narrow rule as to the circumstances in which a state might violate the right to life by failing to protect the public (this has been relied on in subsequent domestic cases):

> It must be established… that the authorities knew or ought to have known at the time of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

The court also held, relying on the reference to 'police immunity', that there was a violation of Article 6 (right to a fair trial). This had for a time some influence on subsequent domestic cases, but it is now accepted that this was a misunderstanding and need not be further considered.

However, all these cases will need to be considered in the context of the Supreme Court decision *Robinson* v *Chief Constable of West Yorkshire Police* [2018] UKSC 4, which held that the rules of tort apply similarly to public bodies and private persons alike. In *Robinson* an elderly woman sustained injuries when she was knocked to the ground during a police attempt to arrest a suspected drug dealer. The decision to arrest the suspect at the time and place in question involved a foreseeable risk that the claimant would be injured. Nevertheless, although the police were found to be negligent, the trial judge held that under the *Hill* principle they were protected against claims in negligence. In this landmark decision, the Supreme Court considered the line of cases that had applied the *Hill* principle and upon which the Court of Appeal had relied to find that a duty of care did not exist in this case.

The Court unanimously found the police liable for the injuries caused to the claimant. In attempting to the arrest the suspect, the conduct of the police was a positive act and, in these circumstances, they were subject to liability in accordance with the

general principles of negligence. The reasonable foreseeability of risk of harm to the claimant was sufficient to impose a duty of care on the police. Where the police attempt an arrest that is negligently performed (as in this case), they are liable for the foreseeable consequences of their negligent actions.

This duty of care in respect of positive actions must be distinguished from the imposition of liability for omissions to act. The common law does not normally impose liability for an omission to act or failure to prevent harm caused by the conduct of third parties (other than in exceptional circumstances).

7.6.2 *Hill* policy justifications superseded

These principles have been considered in the important cases noted below involving alleged failures to protect victims or witnesses by the police or other public authorities. These cases involved a claim in negligence or under the ECHR or both and need to be read in full. All the claims failed: they contain important accounts of the policy justifications that need to be carefully considered.

- *Brooks* v *Commissioner of Police of the Metropolis* (above).
- *Michael* v *Chief Constable of South Wales Police* [2015] UKSC 2.
- *Van Colle* v *Chief Constable of Hertfordshire* and *Smith* v *Chief Constable of the Sussex Police* [2008] UKHL 50.

A distressing case involving extreme domestic violence, *Michael* v *Chief Constable of South Wales Police* resulted in a controversial Supreme Court decision in which five of the seven Justices upheld the policies behind *Hill*. The claimant was attacked at home by her ex-partner. He left, saying he would return to kill her. She then made two phone calls to the police, who were only five or six minutes away. These calls were mishandled and when the police finally attended her home some 20 minutes later, she had been killed. An action in her name was brought against the police, in both negligence and under Article 2 of the ECHR.

The ultimate ruling in favour of the police defendants was based on two main points. First, there was not a duty of care owed because the situation did not fall under any of the exceptions to the basic rule against tort liability for omissions – specifically, the call handler had not said anything to the deceased that indicated a particular assumption of responsibility for her safety. Second, duties owed under the Human Rights Act are owed to the public at large and do not automatically give rise to individual actions in private law. In a view that predicted the future decision in *Robinson* (2018), Lord Toulson doubted the usefulness of the *Caparo* three-part test in such situations. The element of proximity, for instance, often operates in a circular sense – with the framing of the question determining its answer. Neither did he believe that the concept of 'immunity' was helpful in such police cases; this was nothing more than an application of the general principle that a person should not be liable for failing to control the actions of another.

In *Van Colle* the Chief Constable appealed against the finding that the police had been under a duty to take preventive measures to protect a witness who was being threatened and was subsequently shot dead days before he was to give evidence. This claim relied on Article 2 of the ECHR. The claimant in *Smith* brought an action under the common law. He had repeatedly informed the police that his former partner had threatened to kill him, and that the police had ample evidence of these threats. He claimed that the police had no excuse for not preventing his partner from carrying out the threatened hammer attack which caused him serious injuries. The issue was whether the Court of Appeal had been correct to find that the police were not immune from negligence liability in these two cases.

In both cases appeals against liability were allowed. In *Van Colle* the *Osman* test, that the police knew or ought to have known 'at the time' of the shooting of 'a real and immediate risk to the life' of an identified individual from the criminal acts of a third party was not met. In respect of Smith's claim, the balance of advantage in this difficult

area lay in preserving the principle set out in *Hill* whereby, in the absence of special circumstances, the police owed no common law duty of care to protect individuals against harm caused by criminals. In *Smith*, the Court of Appeal remarked that in cases involving the police the very proximity of the parties can not only create a duty of care, but can overcome the public policy considerations which would otherwise bar the claim (as in Swinney, below) and said that whether under Article 2 or at common law, it cannot be a valid ground of distinction that an informer is entitled to protection while a witness is not. Does this indicate that the justification for the *Hill* immunity against police liability in negligence is becoming more tenuous?

- *Mitchell* v *Glasgow City Council* [2009] 1 AC 874.

In *Mitchell*, the question for the House of Lords was whether the local authority had assumed a responsibility to protect one of its social housing tenants who, following a long campaign of abuse and threats, was murdered by a fellow tenant. Although the local authority had been aware that the victim's neighbour might resort to violence after being informed that he risked being evicted, the required element of a relationship of responsibility was absent, as it would not be 'fair, just and reasonable' to impose this duty on a public authority coping with an onerous burden of anti social behaviour among tenants. In *Robinson* the Supreme Court cited *Mitchell* to illustrate that public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party.

7.7 Other public policy considerations

The immunity in negligence in respect of police activities in the investigation and suppression of crime may be displaced by other considerations of public policy. In *Swinney* v *Chief Constable of Northumbria* (1997), the plaintiff supplied information to the police relating to serious crime and had been subjected to threats of violence and arson when the defendant negligently allowed her name as a police informant to fall into the wrong hands. She sued the police in negligence on the basis that they had been under a duty of care to keep her details confidential. The defence sought to have the case 'struck out' arguing that, based on *Hill*, it disclosed no cause of action. However, the Court of Appeal found the required foreseeability and proximity.

When it came to the policy stage of the test the plaintiff was found to have at least an arguable case on grounds of public policy because the fight against crime is daily dependent upon information fed to the police by members of the public. Therefore, in spite of *Hill*, the plaintiff had an arguable case in negligence: there was a sufficient degree of proximity as she was not merely a member of the public, but had a special relationship with the police which rendered her distinguishable from the general public.

When the case proceeded to trial it was held that the police, in leaving the information in a locked briefcase in a locked car, had not been negligent. So, even though a duty of care was established there had been no breach of duty. *Swinney* v *Chief Constable of Northumbria (No 2)* (1999) 11 Admin LR 811.

7.8 Education and social work

The House of Lords decided a large number of cases involving social workers and the education services. They are all reported together as *X* v *Bedfordshire County Council* [1995] 2 AC 633.

Some of the cases involved failures by educational psychologists employed by the council to correctly diagnose learning difficulties such as dyslexia. The House held that these claims should not be struck out.

Two of the cases involved social services. In one (the *Bedfordshire* case) social workers failed to take children into care although they had many reports from teachers, neighbours and so forth that they were being abused. In the other (the *Newham*

case) social workers took a child away from her mother into care because, through confusion about two men with the same name, they thought she was being abused by her mother's boyfriend. The House held that there could be no duty of care in either case. Both cases were then taken to the European Court of Human Rights.

In addition to their claim in common law negligence, the children brought an action for breach of statutory duty, claiming that their injury resulted from breaches of the Children Act 1989 by their local authority. Their Lordships held that in the light of the other range of remedies under the Act (e.g. the statutory appeals procedure in the education cases) it was inconceivable that Parliament intended an additional right of action for breach of statutory duty. A tortious duty of care was incompatible with these remedies and would also cut across a complex statutory framework (e.g. educational bodies, doctors, police, etc.) established by Parliament for the protection of children at risk.

In the *Bedfordshire* case the court ruled that there was a breach by the UK of Article 3 ECHR in that the authorities had failed to save the children from inhuman treatment: *Z* v *UK* [2001] 2 FLR 612.

In the *Newham* case the European Court held that there was a breach of Article 8 in that the mother had not had access to documents which would have revealed the confusion: *TP and KM* v *UK* [2001] 2 FLR 549.

Subsequently, the House of Lords has held that a council was vicariously liable for the failure of its employed educational psychologist: *Phelps* v *Hillingdon London Borough Council* [2001] 2 AC 619. The employee, though exercising a statutory function, was providing a service like any other salaried professional. The decision was based on the fact that an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child, and it is clear that parents and teachers will follow that advice. Educational psychologists assume a duty of care to pupils but, according to Lord Slynn,

> That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility… The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law.

There have been a number of other social work cases. In one case the Court of Appeal held that, in order to comply with the rulings of the European Court of Human Rights, it was necessary to follow *Z* v *UK* rather than *X* v *Bedfordshire* and to hold that a duty was owed to the child but was not owed to the parents suspected of abuse whose interests might conflict with those of their children. There was an appeal to the House of Lords only by the parents: the House agreed that there was no duty (*JD* v *East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373).

7.9 Failure to exercise a power

The general principle is that a mere failure to exercise a power at all is a simple omission and does not give rise to liability. The problem was fully considered in *Stovin* v *Wise* [1996] AC 923 where a majority held that a council's failure to exercise its powers to remove an obstruction from private land which interfered with a motorist's view at a dangerous junction could not give rise to liability. This was further considered and qualified in *Gorringe* v *Calderdale MBC* [2004] UKHL 15, [2004] 2 All ER 326.

There are, however, some qualifications to this.

A council may bring itself under an obligation to use its powers to deal with a danger on the highway where its own actions have brought about the danger: *Kane* v *New Forest District Council* [2001] 3 All ER 914; *Yetkin* v *Mahmood* [2010] EWCA Civ 776, [2011] 2 WLR 1073.

7.10 Liability in certain circumstances

There are situations where the duty has been held only not to make matters worse than they would have been if the local authority had done nothing. Contrast *Capital & Counties plc* v *Hampshire County Council* [1997] QB 1004 (fire service) and *Kent* v *Griffiths* [2000] 2 All ER 474 (ambulance service) outlined below.

In *Capital & Counties* a number of consolidated appeals were heard in respect of claims in negligence against the fire brigade. In one case, the fire officer at the scene had ordered the sprinkler system in a burning building to be switched off. If the sprinkler had not been switched off the damage caused by the fire would have been far less extensive. There was liability because of the act of the officer, which worsened the claimants' position. In the second case, the fire brigade attended the fire and then left the scene believing that the fire was out. It failed, however, to notice smouldering debris which reignited and caused further damage. The third case involved the failure of the fire service to inspect and maintain hydrants and ensure that an adequate supply of water was available at the scene of the fire. The Court of Appeal held that there is no proximity of relationship between the fire brigade and a building owner in respect of negligence in the tackling of a fire: policy considerations including the possibility of defensive fire-fighting were relevant. Liability in negligence in the tackling of a fire would not arise unless the fire service negligently increased the damage or caused additional damage.

In *Kent* v *Griffiths* an emergency situation arose. The doctor called the ambulance service and requested that an ambulance be sent to the pregnant patient's home as a matter of urgency. Despite a number of further calls, the ambulance did not finally arrive until 38 minutes after the original call. Although the claimant was given oxygen on the way to the hospital, she suffered respiratory arrest which resulted in brain damage and a miscarriage. The Court of Appeal held that in certain circumstances an ambulance service could be liable in negligence: although no duty is owed to the public at large to respond to a call for help, once a 999 call in a serious emergency had been accepted, the ambulance service did have an obligation to provide the service for a named individual at a specified address. See also the general duty of care expected of civilian receptionists in *Darnley* v *Croydon Health Services NHS Trust* (see Section 4.7.8).

7.11 Reform

The Law Commission Consultation Paper No 187 *Administrative redress: public bodies and the citizen* (2008) sought views on a proposal for a comprehensive review of the liability of public authorities including a new tort imposing liability where there was really serious fault. The Law Commission abandoned its views after Law Com 322 (May 2010). Sedley LJ had some harsh things to say about this in *Home Office* v *Mohammed* [2011] EWCA Civ 351.

Activities

ACTIVITY 7.1

CORE COMPREHENSION – WRONGLY SUSPECTED PARENTS

This core comprehension activity considers the issue of 'wrongly suspected parents' in child abuse cases and the approach of the court to the question whether affected parents should be entitled to claim for damages in negligence. The questions focus on Lord Nicholls' judgment ([52]–[88]).

Find and read the case of *JD* v *East Berkshire Community Health NHS Trust* [2005] UKHL 23.

a. **Identify the primary question and the parallel question which the House of Lords considered.**

b. **Three cases against public authorities were conjoined in the *JD* case, namely (1) the *East Berkshire* case; (2) the *Dewsbury* case and (3) the *Oldham* case. For each of these cases identify (i) the suspicion of child abuse which had been alleged against family members; and (ii) the correct diagnosis.**

c. **What was the main reason given for dismissing the claims of psychiatric damage caused to the parents in the lower courts?**

d. **Identify the principle which governs the actions of doctors and social workers when they suspect that a child is being wilfully harmed by its parents.**

e. **Which two countervailing interests have to be weighed up when parental child abuse issues are raised?**

Activity 7.2

Applied comprehension – public authority liability in child abuse cases

This applied comprehension activity continues the consideration of the issue of 'wrongly suspected parents' in child abuse cases and examines the public policy reasons which restrict public authority liability in such cases. The questions focus on Lord Nicholls' judgment ([72]–[88]) and then on Lord Bingham's dissenting opinion ([31]–[44]) in *JD* v *East Berkshire*.

Lord Nicholls

a. **Paraphrase in fewer than 30 words why children as victims of crime deserve special protection.**

b. **How does Article 8 of the Human Rights Act protect families from interference in their family life by public authorities?**

c. **Identify a crucial element which is necessary in the law of negligence to successfully argue misfeasance in public office.**

d. **Why does the distress suffered by 'wrongly accused parents' not support the argument that damages should be awarded for their distress?**

e. **Explain, in fewer than 50 words, why Lord Nicholls rejects the argument that the duty to exercise due skill and care in investigating the possibility of abuse has the same content in terms of the duty to parents and the duty to the child.**

Lord Bingham – dissenting opinion

f. **Identify the main argument of Lord Bingham's dissent with regard to the first two policy reasons relied on to deny a duty of care as outlined in [31]–[33].**

g. **Why does Lord Bingham reject the established policy ground of the 'defensive approach' to protect healthcare professionals from claims made by parents in this context?**

h. **Explain how children and their parents are affected by the consequences stemming from misdiagnosis of child abuse in terms of a breach of duty of care.**

i. **Outline (i) the steps which professional healthcare workers should take when suspicions of child abuse are raised, and (ii) explain a potential weakness in the system if no duty is owed to the parents.**

SAMPLE EXAMINATION QUESTION

Because of complaints about difficulty in finding competent builders, electricians and other tradespersons in the area, Gammashire County Council started a register of approved tradespersons accessible through the council's website. In the council newsletter circulated free of charge in the county, there is a section entitled, 'What your council does for you.' In this section the following item has appeared regularly: 'No more hassle or worry about shoddy builders or dodgy electricians. For a decent service, just go to our website, and click on "Tradewatch". You'll find all the information you need.'

In February 2015 Stella, needing an electrician, found Trevor's name through the council website. Trevor carried out electrical work in her house. When she next switched on an electrical appliance, there was an explosion and fire broke out. A neighbour phoned for a fire engine, but the driver misunderstood his instructions and went to the wrong address. The house was gutted.

Three people had complained to the council about Trevor's workmanship between November 2014 and February 2015, but, because of staff shortages, these complaints had not been investigated and the website had not been updated since the beginning of 2015.

Advise Stella.

Advice on answering the question

An obvious claim is against Trevor on an ordinary negligence basis for carrying out his work carelessly. The more interesting claims are against the public authorities. There are policy issues about the liability of the public authority. It has tried to help people who live in the area by providing a list of tradespersons who can carry out work. Should they be deterred from this useful service by the possibility of liability? (NB: There is no suggestion that Trevor is or is held out as an employee of the council and so no question of vicarious liability, as in Chapter 4, can arise.) It appears to be voluntary, but there would be difficulties with liability even if they were exercising statutory powers. The strongest argument against the council is that by expressing themselves so strongly in the newsletter they will be held to have assumed responsibility to visitors to the site. However, most cases of assumption of responsibility envisage liability to a single person.

NOTES

8 Liability for omissions

Contents

Introduction

In his well-known statement of the neighbour principle in *Donoghue* v *Stevenson* Lord Atkin said: '… acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief.' On the other hand, there is often said to be no liability for omissions in English law.

What do these statements mean? They seem to have in mind omissions as part of an activity. A driver of a car may be just as careless in omitting to apply the brake as in pressing the accelerator too hard. A doctor may be careless in omitting to test for allergies before giving an injection. These situations would not be treated in law as omissions, but rather just as one aspect of negligent conduct. Cases involving claims of omission (sometimes referred to as nonfeasance) are often looking at a defendant's failure to protect the claimant from a risk of harm caused by a third party or by the claimant him or herself. English law, unlike many other systems, does not impose on people a general duty to take positive action to assist people in difficulties or to avert harm, even if they are physically well capable of doing so: an able-bodied person may stand by and watch someone drown in shallow water. Between these two extremes, however, there is a very wide area of uncertainty which will be considered in this chapter. Tort law concerning omissions overlaps significantly with that concerning liability of public bodies so it is important to read this chapter in conjunction with Chapter 7.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **distinguish between acts and omissions**
- **evaluate the exceptions to the general exclusionary rule on liability for an omission to act**
- **explain the circumstances in which people may be liable for the acts of third parties**
- **describe the content of that duty, should it arise.**

CORE TEXT

- **Giliker, Chapter 2 'Negligence: the duty of care', Sections 2-022 to 2-029.**

8.1 No liability for an omission to act

If there is a moral obligation to assist people in difficulty or danger, why is there no legal obligation?

The reluctance of the courts to impose liability for omissions or failures to act is based on the following arguments: invasion of freedom; 'why pick on me?' and economic inefficiency. Note Lord Hoffmann's comments in *Stovin* v *Wise*.

Stovin v *Wise* [1996] AC 923 involved an **omission** to act. A road verge on which a bank of earth obstructed drivers' views had been responsible for several accidents. Norfolk County Council, which was aware of the problem, had a power (under the Highways Act 1980) to improve a road junction by removing the bank of earth which obstructed visibility on the highway. A decision to remove the hazard was taken but the authority then failed to exercise its statutory power to require the landowner to remove the obstruction. Wise negligently drove out from a side road and claimed that the dangerous junction had significantly contributed to the accident. In applying the principle that there is no liability where a breach consists of a pure omission and the defendant has not created the harm suffered the House of Lords (by a bare majority) held that the local authority owed no duty of care to road users for failure to exercise its powers to take positive steps to remove the bank. Lord Hoffmann (in the majority) suggests that there are political, moral and economic reasons for this decision. He explained it in the following way:

> There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties (like Mrs. Wise) or natural causes. One can put the matter in political, moral or economic terms. In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be called the 'why pick on me?' argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call 'externalities,') the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities. But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else. Except in special cases (such as marine salvage) English law does not reward someone who voluntarily confers a benefit on another. So there must be some special reason why he should have to put his hand in his pocket.

Lord Nicholls (in the minority) gave his views on the correct general approach to the imposition of liability for omissions. He agreed that although there could often be uncertainty about categorising omissions, it was correct that there should be a presumption against duty of care in these cases. He said:

> … the recognised legal position is that the bystander does not owe the drowning child or the heedless pedestrian a duty to take steps to save him. Something more is required than being a bystander. There must be some additional reason why it is fair and reasonable that one person should be regarded as his brother's keeper and have legal obligations in that regard. When this additional reason exists, there is said to be sufficient proximity. That is the customary label.

The 'omissions principle' was reaffirmed by the Supreme Court in *Robinson* v *Chief Constable of West Yorkshire Police* [2018] UKSC 4 (see Chapter 7).

As stated by Lord Reed:

> The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes.

8.2 When does English law impose liability for an omission to act?

There are a number of exceptions to the general exclusionary rule on liability for an omission to act. There is a duty to act positively if there is a special relationship or a relationship of power or control between the parties. In determining the circumstances in which the general rule should be departed from, the following questions are considered:

- Has the defendant entered into a relationship with the claimant in which the law attaches positive duties to see that harm does not befall the claimant?

  Examples of such relationships are duties owed by a parent to a child, by an occupier of premises to a visitor, by an employer to employees in the workplace (liability in these relationships will be considered in Part II). See generally: *The Ogopogo* [1971] 2 Lloyd's Rep 410 (Canadian case) where the defendant had invited the claimant to be a guest on his yacht. The claimant accidentally fell overboard. Did the relationship of host and guest carry a legal obligation to assist? The defendant was not a mere bystander and was held to have a duty to take reasonable care to save the claimant.

- Has the defendant assumed responsibility for the welfare of the claimant in some respect?

  In *Phelps* v *Hillingdon* LBC [2001] 2 AC 619 the House of Lords held that an educational psychologist, employed by the local authority, was under a duty of care to Miss Phelps for failing to diagnose her dyslexia. The decision was based on the fact that an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child, and it is clear that parents and teachers will follow that advice. Educational psychologists assume a duty of care to pupils but according to Lord Slynn:

  > That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility… The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law.

  A further example of assumption of a duty of care can be seen in *Barrett* v *Ministry of Defence* [1995] 3 All ER 87. A sufficiently close proximity between the defendant's conduct and the claimant's harm created an assumption of responsibility for the claimant's wellbeing. Here, there had been a pattern of excessive drinking among soldiers at a remote Navy base, where drinks were very cheap. One night, after a bout of heavy drinking, a soldier became unconscious. The duty officer arranged for him to be taken to his room where he was left unchecked. He later died due to choking on his own vomit and his widow brought an action in negligence against

the Ministry of Defence. The Navy was not liable for preventing the deceased from excessive drinking or for anything that happened prior to his collapse. However, when he collapsed the defendant assumed responsibility for him and the measures taken fell short of the standard reasonably to be expected. There must be proximity in the sense of a measure of control over, and responsibility for, the potentially dangerous situation. We have seen in *Sutradhar* v *NERC* (Chapter 4) that the House of Lords unanimously held the defendant could not be liable for what they did not do. There was no relationship of proximity between the claimants and the defendant that would give rise to a positive duty to test for arsenic in the water.

- Has the defendant been thrust into a position of danger or risk that they fail to address?

  A defendant may be liable to remove or abate a source of danger of which they are aware, even when they are not at fault for its creation. In *Goldman* v *Hargrave* [1967] 1 AC 645, the defendant's redgum tree, 100 feet high, was struck by lightning and caught fire. The defendant caused the land around the burning tree to be cleared and the tree was then cut down. He did not extinguish the fire after doing this in the belief that the fire would eventually burn itself out. However, it kept smouldering and subsequently the wind increased and the fire spread to his neighbour's land. The defendant was negligent for failing to take adequate precautions to extinguish the fire in the face of foreseeable risk. (Notice that in such a case the defendant may not have to show the care of a reasonable person, but only have to do what he is capable of, given his health and resources.)

  In *Capital & Counties plc* v *Hampshire County Council* (see Chapter 7) a fire officer attending a fire had ordered that the sprinkler system be turned off, which then led to a worsening of the damage caused when the fire failed to be extinguished. Although there was no liability for failing to extinguish the fire, liability was imposed for this positive act, which worsened the claimant's situation.

8.3 Liability for acts of third parties

The general rule is that there is no duty of care to prevent third parties from harming others or causing damage by their deliberate wrongdoing. However, where there is an existing relationship with the wrongdoer that involves control, a duty of care may arise. The question which arises in respect of liability for acts of third parties is closely related to the questions considered in the context of liability for omissions.

- Does a relationship of control exist between the defendant and a third party?

  In *Home Office* v *Dorset Yacht Co Ltd* [1970] AC 1004 some borstal trainees escaped from custody during the night when, it was alleged, the three officers in charge of them were asleep. The escapees went aboard a yacht and caused damage to the plaintiff's yacht which was moored close by. It was argued by the Home Office that it would be contrary to public policy to hold it (or its officers) liable to a member of the public for the acts of a third party (the borstal trainees) by failing to restrain them. The issue here was also an **omission**; the failure of the prison authorities to prevent the boys' escape. A majority of the House of Lords concluded that a duty of care was owed on the grounds that the relationship between the Home Office and the borstal boys and the relationship between the Home Office and the yacht owners was sufficiently proximate to give rise to a duty of care. The borstal boys were under the control of the officers and control imports responsibility.

  See also *Carmarthenshire County Council* v *Lewis* [1955] AC 549 where a young child ran from his nursery school premises onto a busy road and caused an accident. The House of Lords confirmed the responsibility of parents and teachers for the behaviour of children and held that the defendants were under a duty to take reasonable steps to prevent the child becoming a danger to others.

  In *Rabone* v *Pennine Care NHS Foundation Trust* [2012] UKSC 2, the Supreme Court ruled a positive duty was owed to a patient known to be at risk of suicide. The

hospital trust was liable for allowing the patient to go home (against the wishes of her parents) when she had previously attempted suicide. This claim was based on a breach of Article 2 of the European Convention on Human Rights (everyone's right to life shall be protected by law).

8.3.1 What is the content of the duty?

Once it is decided that the defendant had a positive duty towards the claimants, you must then ask what the content of that duty was.

In *Smith* v *Littlewoods Organisation Ltd* [1987] AC 241 the defendants purchased a cinema which remained empty and unattended for over a month while waiting to be demolished and rebuilt as a supermarket. During this time it was regularly being broken into, mainly by child vandals. Contractors employed by Littlewoods knew about the vandals but neither the defendant nor the police were informed about them. Finally, a fire was deliberately started by the vandals which spread and caused serious damage to the plaintiff's property. Since the vandals would not be worth suing the plaintiffs sought compensation from Littlewoods, claiming that the defendants should have prevented the vandals gaining access to the cinema. The plaintiff's claim failed. Lord Goff dealt with the matter in terms of pure omission and held that there is no general duty of care to prevent a third party from causing damage. However, he expressed the view that liability would arise where 'the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it…'

The content of that duty, should it arise, was also considered: the risk has to be weighed against the measures necessary to eliminate it and short of posting a 24-hour guard over the property the defendants would not have been in a position to prevent the vandals getting in. To require such a measure would impose an intolerable burden.

In *Mitchell* v *Glasgow City Council* (2009), discussed in Chapter 7, the House of Lords held that liability for the criminal act of a third party would arise only where the person who was said to be under that duty had by their words or conduct assumed responsibility for the safety of the person who was at risk. The question here was whether the local authority had assumed a positive duty to protect one of its social housing tenants who, following a long campaign of abuse and threats, was murdered by a fellow tenant. Although the local authority had been aware that the victim's neighbour might resort to violence after being informed that he risked being evicted, the required element of a relationship of responsibility was absent; it would not be 'fair, just and reasonable' to impose this duty on a public authority coping with an onerous burden of anti-social behaviour among tenants.

See also *Banque Financiere de la Cite SA* v *Westgate Insurance Co* [1991] 2 AC 249; *Reeves* v *Commissioner of Police of the Metropolis* [2000] 1 AC 360.

Activities

Activity 8.1

Core comprehension – liability for omissions

This core comprehension activity focuses on the duty of care owed to the public by a variety of rescue services. This comprehension supports your understanding of the topic of liability for omissions.

Find and read the case of *Capital and Counties Plc* v *Hampshire County Council* [1997] QB 1004. Answer the following questions.

a. **Identify the three circumstances which may give rise to duties of affirmative action.**

b. **The umbrella term 'rescue services' includes a variety of services; name a few examples of the types of rescue services which owe a duty of care to the public.**

c. **Outline the two approaches to attaching liability to the rescue services as advanced by the plaintiffs in the *Capital and Counties Plc* case.**

d. **Which 'peculiarity' is an important distinguishing feature of cases involving the duty of care of rescue services?**

e. **Which negligent act of Station Officer Mitchell created 'the danger which caused the plaintiff's injury'?**

Activity 8.2

Applied comprehension

In the online library find and read Morgan, J. 'Nonfeasance and the end of policy? Reflections on the revolution in public authority liability' (2019) 35(1) *PN* 32. Answer the following questions.

a. **Does the author see *Robinson* as a case of misfeasance or nonfeasance?**

b. **According to the author, what is the problem with the 'established categories' approach to decision-making? What might be another name for this approach?**

c. **In your own words, explain the principle/policy distinction.**

d. **What is meant by 'defensive administration'? Give examples. What does the author believe are some of the pitfalls it brings with it?**

e. **Is it right that public bodies be given the benefit of the 'omissions principle' in the same way as private citizens?**

NOTES

Part III: Negligence 2: vicarious liability

9 Breach of duty

Contents

Introduction

We have seen that the first step in establishing a claim in negligence is to show that the defendant owed a duty of care to the claimant. The next question is whether there has been a breach of that duty. Has the defendant actually been negligent?

As a practical matter, this is very important. It will often be a major issue between the claimant's advisers and the defendant's advisers or insurers in attempting to reach a settlement.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **explain the standard of care in negligence**
- **analyse the balancing factors which judges use to determine the standard of care required in the circumstances**
- **evaluate how the reasonable man test is modified in the case of professionals**
- **outline the attempts to address the deterrent effect of potential liability in setting the standard of care too high.**

CORE TEXT

- **Giliker, Chapter 5 'Negligence: breach of duty'.**

9.1 Breach of duty

The definition of what constitutes a breach of duty has not changed since the decision in *Blyth* v *Birmingham Waterworks* (1856) 11 Exch 781. Here it was said that to avoid breach (or 'negligence') the defendant must conform to the standard of care expected of a reasonable person.

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

From this it can be seen that there are two stages to the breach of duty enquiry.

1. We must determine the standard against which the defendant's conduct in an action for negligence is judged – this is a question of law.
2. We must weigh the factors that go to determine whether the defendant has fallen below the standard of care – this is largely a question of fact, although case law provides us with some guidance over the factors that courts are especially persuaded by when addressing the second stage of the breach of duty enquiry.

9.1.1 The reasonable man and the objective man

Whether the defendant in question is judged as a reasonable average man or a reasonable skilled man, the law applies an objective test of reasonableness. This means that any characteristics of the defendant or any characteristics shared among a particular class of defendants (for example, inexperience among trainees), which might affect their capacity to carry out a task to a reasonable standard, are not taken into account when determining whether the defendant has fallen below the standard of care.

In an oft-cited passage, Lord Macmillan in *Glasgow Corporation* v *Muir* [1943] AC 448 said:

> the standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.

It is an objective test. The abstract reasonable person is put into the shoes of the defendant, who is expected to have the same general knowledge and understanding of risks (say, that icy roads are slippery or that children may get up to mischief) as the reasonable person. The actual defendant may be more stupid or more ignorant, or may be cleverer or more knowledgeable, but is still judged by this abstract impersonal standard. Whether the reasonable man test is truly objective and, if so, whether an objective test is justifiable within a fault-based system of liability, is one of the most enduringly controversial questions that surround the tort of negligence.

9.1.2 The standard of care

It is important to remember that the defendant is to be judged by how a reasonable person would have behaved at the same time and in the same circumstances. The defendant must not be judged with the benefit of hindsight (making use of knowledge not available at the time of the alleged tort) and allowance must be made for any special circumstances affecting the defendant (e.g. having to act under pressure or with limited time for full consideration). However, no concessions have been made to personal characteristics such as clumsiness, ordinary illness or even old age.

Many cases involve car drivers. The only standard of care is that of a reasonable driver, whether the actual driver is highly experienced, newly qualified or even just a learner. It is irrelevant that the learner driver defendant was doing as well as they could, given their lack of experience, if a reasonable driver would have done better.

Case law example
In *Nettleship* v *Weston* [1971] 2 QB 691 the plaintiff was teaching the defendant to drive. During the course of the defendant's third lesson, she panicked and steered the car into a lamp-post and the plaintiff suffered a broken knee cap. At first instance the trial judge decided that the plaintiff had not been at fault because she had been doing her best to control the car. However, the Court of Appeal disagreed with the trial judge and held that the standard of care required of a learner driver is the same as that of the ordinary qualified driver. The defendant's driving had fallen below this standard and it was irrelevant that this was because of her inexperience. According to Lord Denning: 'A learner driver may be doing his best but his incompetent best is not good enough'.

9.1.3 Defendants with special skills or qualifications

Most of the difficult reported cases, however, involve defendants with special skills or qualifications. It would be silly to ask whether a reasonable 'person' would have removed the appendix or designed the building in the same way as the actual surgeon or architect who is being sued. In such cases the defendant is to be compared to a reasonable person with the relevant skill or qualification. This is not always easy.

1. There is sometimes doubt as to exactly what skill or qualifications the defendant professes to have.
2. There may be doubt as to whether a large group (say car drivers or doctors) should be sub-divided into smaller categories for the purpose of comparison with reasonable members of the group.

The case of *Bolam* v *Friern Hospital Management Committee* [1957] 2 All ER 118 is the leading authority on the standard of care applicable to defendants who possess (or claim to possess) a special skill.

9.1.4 The '*Bolam* test'

The plaintiff in *Bolam* agreed to undergo electro-convulsive therapy (ECT) during which he suffered a fracture to the pelvis. The issue was whether the doctor was negligent in failing to give a relaxant drug before the treatment, or in failing to provide means of restraint during the procedure. Evidence was given of the practices of various doctors in the use of relaxant drugs before ECT treatment. One body of medical opinion favoured the use of relaxant drugs, but another body of opinion took the view that they should not be used because of the risk of fractures. According to McNair J at 586:

> In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

9.1.5 The *Bolam* test applied

The *Bolam* test has been applied in a number of professional contexts. For examples, see: *Luxmoore-May* v *Messenger, May Baverstock* [1990] 1 All ER 1067; and *Moy* v *Pettman Smith* [2005] UKHL 7.

Often, the problem is one of defining the group to which the defendant belongs, i.e. what skill did they hold themselves out as having? In *Phillips* v *Whiteley* [1938] 1 All ER 566 did the defendant, who had pierced the claimant's ears, have to show the care of a reasonable surgeon or that of a reasonable jeweller?

In *Shakoor* v *Situ* [2000] 4 All ER 181 there is an interesting analysis of how to treat a practitioner of traditional Chinese medicine working in England. Was he to be compared to a reasonable orthodox doctor, a reasonable traditional doctor practising in China or a reasonable traditional doctor practising in England?

In *Wilsher* v *Essex Area Health Authority* [1988] 1 All ER 871, the Court of Appeal rejected the argument that an inexperienced junior doctor owed a lower duty of care. Glidewell LJ commented:

> the law requires the trainee or learner to be judged by the same standard as his more experienced colleagues. If it did not, inexperience would frequently be urged as a defence to an action for professional negligence.

In *FB* v *Princess Alexandra Hospital NHS Trust* [2017] EWCA Civ 334 the approach to the medical standard of care in *Wilsher* was endorsed and applied where the delay in proper diagnosis and treatment of a child's condition resulted in brain damage. According to Lord Justice Jackson [59]:

> Whether doctors are performing their normal role or 'acting up', they are judged by reference to the post which they are fulfilling at the material time. The health authority or health trust is liable if the doctor whom it puts into a particular position does not possess (and therefore does not exercise) the requisite degree of skill for the task in hand.

9.1.6 Children

Children may be liable in negligence and are judged by what might be expected of a reasonable child of the defendant's age, and the courts appear to be indulgent towards high spirits and horseplay. In *Mullin* v *Richards* [1998] 1 All ER 920 two 15-year-old schoolgirls were 'fencing' with plastic rulers when one of the rulers snapped and caused a serious eye injury in one of the girls. The girls were judged against the standard of the ordinary 15-year-old and in the circumstances (such games were common at the school and were not prohibited) the Court of Appeal found the risk of injury was not reasonably foreseeable.

9.2 Falling below the standard of care

Lord Macmillan in *Glasgow Corporation* v *Muir* [1943] AC 448:

> It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation… Here there is room for diversity of view… What to one judge may seem far-fetched may seem to another both natural and probable.

The outcome is therefore to that extent unpredictable even in the tiny minority of cases that are resolved in court.

9.2.1 Eliminating harm must be proportional to the danger

A defendant is not required to eliminate all risk of harm even when it is foreseeable: to do so might be out of all proportion to the danger. The defendant must do something only if a reasonable person would have thought it right to do so. In deciding what precautions have to be taken to minimise a perceived risk, the following guidelines may be taken into account:

- How likely was it that injury would occur?

  In *Bolton* v *Stone* [1951] AC 850 the plaintiff was standing in a quiet road when she was struck by a cricket ball which had been driven from the defendants' cricket ground. It was rare for balls to be hit out of the ground; only on about six occasions in 28 years had balls been hit out and no injury had resulted on these occasions. Even though the risk of such an accident was foreseeable the chance that it would actually occur was very small. The House of Lords held the defendants were not liable because in the circumstances it was reasonable to ignore such a small risk.

However, in *Miller* v *Jackson* [1977] QB 966 where cricket balls were hit out of their ground eight or nine times a season and, on numerous occasions, had damaged the plaintiff's property, a majority in the Court of Appeal held that the risk of harm was so great that the defendants were liable in both negligence and nuisance.

- How serious was the injury likely to be if it did occur?

  Paris v *Stepney BC* [1951] AC 367 illustrates that the obligations of a potential defendant may increase where the risk to a claimant is of greater damage than normal. Here, the defendants knew that the plaintiff was blind in one eye. He was working in conditions which involved some risk of eye injury but the likelihood of this injury was not sufficient to call upon the defendants to provide goggles to a normal two-eyed workman. The plaintiff was rendered totally blind when a chip of metal entered his good eye. The House of Lords ruled that the duty of employers was owed to each **particular** employee and they were negligent in failing to provide goggles to the plaintiff. The risk to a two-eyed workman was the loss of one eye but in this case the plaintiff risked the much greater injury of total blindness.

- How difficult and/or expensive would it be to eliminate the risk?

  Where a risk is slight, failure to take a precaution which is prohibitively expensive may not be negligent. In *Latimer* v *AEC* [1953] 2 All ER 499, after a heavy rainfall the defendants' factory was flooded and the water mixed with an oily liquid which usually collected in channels in the floor. When the mixture drained away it left the floor very slippery. Sawdust was spread over most, but not all, of the surface. A workman was injured when he slipped on the untreated part of the floor. The trial judge had found the defendants liable on the ground that they had not closed down the factory. The House of Lords held that the defendants were not liable; they had acted as a reasonable employer would have acted. The danger was not such as to impose on the employer an obligation to close down the factory.

9.2.2 Emergencies

The focus of the question here is on how important or urgent the action of the defendant was. The risk has to be balanced against the end to be achieved and, if sufficiently important, justifies the assumption of abnormal risk.

In *Watt* v *Hertfordshire CC* [1954] 2 All ER 368, a fireman was called out to an emergency where a woman was trapped under a lorry. A heavy lifting jack was urgently required but, since a vehicle designed to carry this was not available, it was loaded onto a lorry which was not equipped to secure it. On the way to the scene of the accident the lorry had to brake suddenly and the fireman was injured when the jack slipped. In these circumstances the Court of Appeal found that the fire authorities had not been negligent. The risk had to be balanced against the end to be achieved and the saving of life or limb justifies taking considerable risk. Lord Denning took the view that if the accident had happened in a commercial venture without any emergency the plaintiff would have succeeded, but 'the commercial end to make profit is very different from the human end to save life or limb.'

9.2.3 Statutory provisions

We have seen in Chapter 2 that concerns about the emergence of a compensation culture led to enactment of the Compensation Act 2006. Section 1 of the Act deals with the deterrent effect of potential liability and provides:

> A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—
>
> (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
>
> (b) discourage persons from undertaking functions in connection with a desirable activity.

The Act was introduced to address a **perception** of a compensation culture but since the senior courts were already addressing the deterrent effect of liability, it is unclear what s.1 adds to the existing approach.

In determining negligence claims, the Social Action, Responsibility and Heroism Act 2015 also requires judges to take into account factors such as whether the alleged tort took place when the defendant was acting 'for the benefit of society' and when the defendant was acting 'heroically by intervening in an emergency'. This statute is widely seen as redundant and has had little, if any, influence on the law.

9.3 Professional defendants and standard practices

The most significant and controversial of factors that the courts take account of in deciding whether or not the defendant has reached the standard of the reasonable man is the question as to whether the defendant has acted in accordance with a standard practice. There is often no single 'right' way of proceeding. Faced with a particular patient, one doctor might recommend surgery, but another might prefer treatment with drugs. The courts do not insist that one of these approaches must be right and the other wrong: they require that the defendant has acted in a way that would be supported by 'a body of respectable medical opinion'.

What is often dubbed the standard practice defence emerges from the second limb of the *Bolam* test where it was said:

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art… a doctor is not negligent… merely because there is a body of opinion which takes the contrary view.

9.3.1 The standard practice defence applied

In an obstretric case, *Whitehouse* v *Jordan* [1981] 1 WLR 246, the Court of Appeal observed the implications of placing an unrealistically high standard upon doctors. The trial judge had imposed liability for the severe brain damage that the plaintiff suffered but, on appeal, it was found that the evidence did not establish that the doctor had departed from accepted practice and he was therefore not negligent. The House of Lords emphatically restated the *Bolam* test and rejected the argument that there was a difference between an error of judgment and negligence. In the Court of Appeal Lord Denning had argued: 'When I give a judgment and it is afterwards reversed by the House of Lords, is it to be said that I was negligent?'

The *Bolam* test allowed the medical profession to some extent to determine for itself the circumstances in which it can be said one of its members has fallen below the appropriate standard of care, but the courts have developed the right to strike down a medical practice as unreasonable. In *Bolitho* v *City and Hackney Health Authority* [1998] AC 232 the *Bolam* test was applied to determine what a doctor should have done had she attended a two-year-old boy. The medical experts had disagreed as to whether she ought to have intubated the child. The House of Lords emphasised that ultimately it was for the court, and not for medical opinion, to decide the standard of care required in each case: the court had to be satisfied that the prevailing opinion in this case had a logical basis, which would involve the weighing of risks against benefits, in order to reach a defensible conclusion.

9.3.2 *Bolam* test: diagnosis

The *Bolam* test applies to making a diagnosis and where there is conflicting medical opinion a doctor is not negligent merely because there is a body of opinion that takes a contrary view. In *Maynard* v *West Midlands Regional Health Authority* [1984] 1 WLR 634 a consultant physician and a surgeon were uncertain whether the plaintiff was suffering from tuberculosis or from Hodgkin's disease. Hodgkin's disease can be fatal unless treated early so they carried out an operation before obtaining test results which would have determined her illness. The operation carries an inherent risk of damage

to the vocal cords and this risk materialised in the plaintiff. She claimed that the consultants were negligent in carrying out the operation before the test results were available. The House of Lords held the defendants had not been negligent. Although there was a body of competent opinion which said that the consultants' decision was wrong there was an equally competent body which supported their approach. Lord Scarman stated the justification for the *Bolam* test in the following terms:

> … a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence.

9.3.3 *Bolam* test: warning of risks

The most controversial application of the *Bolam* test occurs where it is alleged that the doctor fails to give the patient sufficient warning of the risks of the proposed treatment (or possibly of the risks of not having the treatment). In *Sidaway* v *Bethlem Royal Hospital Governors* [1985] AC 871, the House of Lords adhered strictly to the *Bolam* test in finding that a surgeon, who had followed the approved practice of a responsible body of neurosurgeons in not disclosing the risk of damage to the spinal cord, had not been negligent.

However, in *Montgomery* v *Lanarkshire Health Board* [2015] UKSC 11 a seven-member Supreme Court held that the doctrine of 'informed consent' which operates in other jurisdictions and allows the patient access to full and frank information about treatment was now firmly part of English law. Here, the claimant's pregnancy required intensive monitoring and she was at an increased risk of experiencing problems with delivery of her baby. As a result of complications during the birth her son was born with severe disabilities. The claimant argued that she ought to have been given full information about the risks involved in vaginal birth, and of the alternative possibility of delivery by elective caesarean section. According to Lady Hale, pregnancy is a particularly powerful illustration of patient autonomy [109]:

> … it is not possible to consider a particular medical procedure in isolation from its alternatives. Most decisions about medical care are not simple yes/no answers. There are choices to be made, arguments for and against each of the options to be considered, and sufficient information must be given so that this can be done.

In *Webster* v *Burton Hospitals NHS Foundation Trust* [2017] EWCA Civ 62 the claimant argued that his mother should have been given the choice of continuing her pregnancy and with reasonable medical advice she would have opted for an induced birth. It was uncontested that the harm from which the child suffered was caused by a delayed delivery at birth. The trial judge had denied liability, having applied the *Bolam* standard of 'a responsible body of expert (consultant obstetrician) opinion' and based his judgment on whether the doctor acted in accordance with a responsible body of expert medical opinion.

The ruling of the Supreme Court in *Montgomery* v *Lanarkshire Health Board* (2015), which was decided after the *Webster* trial, brought about a change to what had previously been understood to be the nature of a doctor's duty to advise in respect of treatment (the *Bolam* approach). The Court of Appeal reversed the first instance decision. It is now clear from *Montgomery* that the approach taken by the trial judge in *Webster* is no longer correct. According to Simon LJ [35]:

> …the doctor's obligation (apart from in cases where this would damage the patient's welfare) is to present the material risks and uncertainties of different treatments, and to allow patients to make decisions that will affect their health and well-being on proper information. The significance of the risks and uncertainties, including the possibility of alternative treatment, being sensitive to the characteristics of the patient.

9.4 Are decisions on breach questions of fact or law?

Everything in the last few paragraphs involves propositions of law which are binding on the courts. Once these principles have been applied, however, the decision on the particular facts of a case does not constitute a binding precedent. The fact, say, that it was held in a particular case that an employer was negligent in failing to ensure that an employee wore a particular kind of safety equipment does not mean that all other employers will also be held negligent if they behave in the same way. The issue will have to be decided in the light of the particular facts each time it occurs. See *Qualcast* v *Haynes* [1959] AC 743.

This approach is not very helpful to potential defendants such as building contractors, who do not want to know that they have to take reasonable care, but do want to know exactly what instructions, equipment and so on they have to supply. So it is very common for regulations under the authority of various Acts of Parliament to set out detailed rules on such matters.

Summary

The actual defendant is to be compared with how a reasonable person would have acted in the same circumstances. Where a particular skill (driving for example) or professional expertise (medical for example) is involved, the appropriate comparison is with a person with the same skill or expertise.

Activities

Activity 9.1

Core comprehension – breach of duty

Find and read the case of *Mullin* v *Richards* [1997] EWCA Civ 2662, [1998] 1 WLR 1304, [1998] 1 All ER 920, then answer the following questions.

a. **How old were both the claimant and the defendant? Describe the injury Teresa Mullin suffered.**

b. **How did the judge in the lower court apportion blame between the two schoolgirls?**

c. **In the Appeal Court the judge identified foreseeability as the central argument. Which question did the Court have to answer?**

d. **Is the standard of care an objective or subjective standard?**

e. **Which subjective elements may children rely upon in their defence?**

f. **Against which standard is the conduct of a child to be measured?**

g. **Why did the Appeal Court reverse the decision of the lower court?**

h. **Identify a social utility argument as related to the risks of children playing.**

Activity 9.2

Applied comprehension – the *Bolitho* gloss

Using the Online Library, find and read Mulheron, R. 'Trumping *Bolam*: a critical legal analysis of *Bolitho*'s "gloss"' (2010) 69(3) *CLJ* 609, then answer the following questions.

I. **Introduction**

   a. **Paraphrase the impact of the *Bolitho* decision on the *Bolam* test of breach as stated in the first two paragraphs of the Introduction section, in fewer than 50 words.**

II. **The emergence of *Bolitho***

   b. **Summarise the arguments advanced in section 'A. The perceived "deficiencies" of *Bolam*' into two succinct headings and explain briefly (fewer than 40 words) the main thrust of each argument.**

   c. **Describe the two-step procedure in English law which is used to determine the question of alleged medical breach.**

   d. **Mulheron identifies three scenarios which may restrict the reach of the *Bolam* test; what are they?**

   e. **On what basis does Mulheron assert that the *Bolitho* test has produced an imbalance between the parties in medical negligence litigation?**

III. **The post-*Bolitho* analytical review**

   f. **Identify the seven *Bolitho* factors.**

   g. **In the case of *Nationwide Organ Retention Group Litigation*, which common practice was held to be 'unreasonable' despite being 'a blanket practice carried out by virtually all clinicians'? (Judgment at [237])**

Conclusion

   h. **Reflect on the author's conclusion. Do you agree that clarification of the *Bolitho* gloss is of great significance for professional negligence law?**

10 Causation and remoteness of damage

Contents

Introduction

Negligence is one of those torts in which damage must be proved (see Chapter 2). Once a breach of duty has been established, the claimant must then also show that the breach has resulted in injury or damage (the **causation** issue) and that the injury or damage is sufficiently closely connected to the breach (the **remoteness** issue).

Causation and remoteness are the essential links between the breach of the obligation imposed by law and the damage. It is commonly said that causation is essentially a factual and logical question, but that remoteness is a legal question, based on policy considerations about the appropriate extent of a defendant's liability. In broad terms this is true, but Lord Hoffmann has stated that 'the rules laying down causal requirements are… creatures of the law' and that 'it is possible to explain their content on the grounds of fairness and justice in exactly the same way as the other conditions of liability' (*Fairchild* v *Glenhaven Funeral Services Ltd* [2002] UKHL 22 at [54]).

You must therefore consider the policy reasons behind most of the decisions in this chapter.

Learning outcomes

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **discuss the 'but for' test of causation**
- **evaluate the approach of the courts when the 'but for' test is insufficient**
- **explain the circumstances when chain of causation may be broken by unreasonable or unforeseeable acts or events (*novus actus interveniens*)**
- **explain the distinction between causation in fact and causation in law.**

Core text

- **Giliker, Chapter 6 'Causation and remoteness'.**

10.1 Causation

Causation is relevant to all torts in which proof of damage is essential. The problem is usually discussed in detail in the context of negligence, but the principles apply more broadly, and some of the cases referred to in this section involve claims in other torts as well as in negligence. You must always remember to link the **tort** (i.e. the breach of duty in the case of negligence), and not merely the **defendant,** to the damage. An example will illustrate the importance of this.

A baby has brain damage: it has recently been vaccinated. If there is a claim for compensation, it will always be necessary to establish (on scientific evidence) that it is more likely than not that the vaccine caused the damage. If the claim can be brought within a tort of strict liability (which means there is no need to establish fault on the part of the defendant), nothing more need be proved in terms of causation. This is not so if the claim is in negligence (e.g. alleging that a doctor in breach of the duty of care failed to carry out proper tests to discover whether the baby had an allergy to the vaccine). It will then be necessary, in addition to showing that the **vaccine** caused the damage, to show that the **breach of duty** caused the damage. If the proper tests carefully administered would not have revealed the allergy, then the baby would still have been damaged and the breach of duty would not be a cause of the brain damage.

You will find that the causation issue sometimes (though exceptionally) gives rise to difficult questions, but the underlying idea is very simple. We use the language of causation every day without much difficulty, and we understand that the language of causation is used in different ways in different contexts. We may for instance say, 'I was late for work today **because** the 7.30 train was cancelled'. Here we know that the cancellation made lateness inevitable. But we do not know for certain that we would have been on time if the train had been running. Something else might have happened to delay us. On the other hand we often hear about research into the **causes** of disease. Advertisements for cigarettes may carry a warning that 'smoking **causes** lung cancer', but we know that here there is no inevitability: many non-smokers develop cancer and many smokers do not. We need more information before we can talk of the cause of the disease in any particular sufferer. You should make use of your knowledge of the ordinary usage of the language of causation in analysing problems.

10.2 The basic rule

The basic rule may be stated positively or negatively. If the damage would still have occurred, even if the defendant had not broken the duty of care, then the breach did not cause the damage. If the damage would not have occurred **but for** the defendant's breach of duty, then the breach of duty is a cause of the damage.

10.2.1 The 'but for' test

In *Barnett* v *Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, the plaintiff's husband was one of three night watchmen who went to the defendant's hospital complaining of vomiting after drinking some tea. The nurse on duty consulted the casualty doctor by telephone and was instructed by him to tell the three men to go home to bed and to call their own doctors. Soon afterwards the plaintiff's husband died of arsenic poisoning. It was discovered that arsenic had been put into the tea of the workmen by persons unknown. There was no dispute that in failing to examine the plaintiff the doctor was negligent. The issue to be decided was whether the doctor's breach of duty had caused the man's death. The claim failed because the hospital was able to produce evidence to show that even if the deceased had been examined and treated with proper care he would still have died. Since the death would have occurred in any event the defendant's breach of duty was not a factual cause. For this reason, the basic rule is often referred to as the 'but for' test. Its main purpose is to exclude things that have no bearing on the damage. It is for the claimant to show that the breach of duty was the cause of the damage, and not for the defendant to show that the breach of duty was not the cause of the damage.

We know in a common sense way that it is rarely possible to be absolutely certain about such matters, and the law does not demand such certainty. It is sufficient to show that on a balance of probabilities the breach was the cause of the damage, or that it is more likely than not that the breach was a cause of the damage. In principle it is an 'all or nothing' question. If it is more probable than not that negligently administered drugs caused the claimant's deafness, then the claimant recovers in full for the deafness. If it is not more probable than not, even if it is a possibility, then the claimant recovers nothing.

10.3 Causation: situations to consider

There may be doubt about what the natural course of events would have been if the defendant had behaved properly. For example:

- The defendant doctor failed to diagnose the claimant as having an illness in need of treatment. Was it so serious that the defendant would have died even if the proper diagnosis or treatment had been given? See *Barnett* v *Chelsea and Kensington Hospital* (above).
- The claimant fell overboard into icy water. The defendant's rescue effort was inadequate. Would the claimant have perished in the cold water before even a competent rescuer could have saved her? See *The Ogopogo* [1971] 2 Lloyd's Rep 410.
- There may be doubt about how the **defendant** would subsequently have behaved if he had done what he should have done in performance of the duty.

> **Case law example**
> In *Bolitho* v *City and Hackney HA* [1998] AC 232 (see Chapters 2 and 9) the doctor, in breach of her duty, failed to attend a two-year-old patient who suffered respiratory failure and cardiac arrest from which he subsequently died. It was accepted that, having been called on more than one occasion by a nursing sister, the doctor was in breach of her duty to attend the child. The issue before the Court was causation; did this breach of duty cause the plaintiff's injuries? Whether the doctor's failure to attend caused the plaintiff's damage depended on what she would have done had she turned up. If the plaintiff had been intubated (to provide an airway) the respiratory difficulties would not have resulted in cardiac arrest. The doctor successfully argued that if she had attended she would not have intubated. This action would not have been negligent (because it was in accordance with a respectable body of professional opinion) and would not have saved the patient. The child would still have been dead even if she had performed her duty by attending. Therefore her culpable failure to attend was not a cause of the death.

- There may be doubt about how the **claimant** would subsequently have behaved if the defendant had done what should have been done.

> **Case law examples**
> In *McWilliams* v *Sir William Arrol* [1962] 1 All ER 623 the focus of the question was on how the deceased steelworker would have behaved. His employer had been negligent in failing to provide a safety harness and he fell to his death. It was clearly established that, had the defendant provided a safety harness, the steelworker would not have worn it. But for the defendant's breach, the damage would still have occurred and so there was no liability on the part of the employer.
>
> In *Perry* v *Raleys Solicitors* [2019] UKSC 5 the hypothetical conduct to be considered was also that of the claimant. The Supreme Court restored the finding of the trial judge that the claimant had needed to prove to the court on the balance of probabilities that he would have made an honest personal injuries claim had he received appropriate advice from the defendants. The court was not satisfied that he had discharged that burden of proof.

- The defendant doctor may have failed to warn the patient about the risks of treatment: would the patient have decided to have the treatment anyway? If so, the failure to warn cannot be a cause of the damage if one of the risks occurs.

Case law example

This issue has been considered by the House of Lords in *Chester* v *Afshar* [2004] UKHL 41, [2005] 1 AC 134 where a majority of the House of Lords took a view very favourable to the claimant. The surgeon had advised the claimant to undergo surgery but in breach of duty had failed to advise her of the risk. The claimant did not show that she would probably never have had the operation, but she did show that she would have taken her time and consulted friends and therefore would not have had the actual operation on the particular day that she did have it. The House of Lords accepted that she had therefore established that the breach of duty was a cause of her injury. This case illustrates the role of tort in vindicating rights. Lord Steyn thought the claimant's right of autonomy and dignity ought to be vindicated by a narrow and modest departure from traditional causation principles. The majority decision in favour of the claimant could not be based on conventional causation principles because the risk of which she should have been warned was not created or increased by the failure to warn.

The clinical negligence claim in *Correia* v *University Hospital of North Staffordshire NHS Trust* [2017] EWCA Civ 356 was based on the advice given at the claimant's consultation with the doctor and the performance of the operation. A further claim in respect of the nature of the claimant's consent to the operation was made. She had consented to a three-stage surgical procedure but, in her case, the third stage was negligently omitted by the surgeon. The trial judge found that, although the operation had been performed negligently, that negligence had not caused the claimant's pain or suffering. However, she argued that if she had known of the risks associated with the third-stage omission, she would not have gone ahead with the operation. In rejecting her claim, the Court of Appeal reviewed the decision in *Chester* v *Afshar* and endorsed its *ratio*: the judge was entitled to find that the claimant had failed to prove that the surgeon's negligence caused or 'materially contributed' to her pain and suffering.

Duce v *Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307 sheds more light on the application of *Chester* v *Afshar* in relation to causation and the issue of informed consent. The claimant suffered ongoing serious pain following a hysterectomy performed by an employee of the defendant. Her action was based on an alleged failure to apply the *Montgomery* standard of care (see Section 9.3.3) and that *Chester* eliminated the need for the 'but for' test on causation.

The Court of Appeal held that *Montgomery* had not been avoided but that the risks of pain as an effect of the procedure were not known at the relevant time. Further, it upheld the first instance decision that the claimant had not proved on a balance of probabilities that she would not have had the operation had she been warned of the risks. The court believed that she would have proceeded, even if fully warned, and so causation was not established. It appears that *Chester* did not herald a new and generous approach to the 'but for' test but is likely to be distinguished as pertaining to its own particular facts.

See also *Diamond* v *Royal Devon & Exeter NHS Foundation Trust* [2019] EWCA Civ 585, another clinical negligence case in which the claimant failed to satisfy the 'but for' test. *Diamond* also confirmed that *Chester* created no standalone right to damages for loss of autonomy.

10.4 Deficiencies in the 'but for' test

The 'but for' test is generally a good test as to whether the breach of duty was the cause of the harm, but it has limitations. Problems in the application of the 'but for' test arise when the answer to the question leads to an unjust or contradictory result, such as, for example, where the damage could have been caused by the fault of more

than one defendant. This situation arose in the Canadian case of *Cook* v *Lewis* [1951] SCR 830, when two hunters negligently fired their guns in the direction of the claimant. One bullet hit him, but it was not established which gun had fired that bullet. In the absence of the required proof, it was held that both defendants should be liable (Lord Nicholls makes reference to this case in the extract below).

Further problems with the 'but for' test will be seen in the cases below, where there are multiple potential causes of the harm and where the claimant has contracted a disease and the medical evidence as to the cause is inconclusive.

10.5 Material contribution to the harm

In *Bonnington Castings Ltd* v *Wardlaw* [1956] AC 613 a steel worker who was exposed to noxious dust over a period of years, as the result of his employer's negligence, contracted a progressive disease. However, some of the dust to which he was exposed was from a 'non-negligent' source and there was no evidence of the proportions of negligent and non-negligent exposure to the dust, so the 'but for' test could not be satisfied. The House of Lords held that in these circumstances causation could be established because the employer's act or omission made a 'material contribution' to the harm which constituted an application of, or an exception to, the 'but for' test. The application of this principle has more recently been demonstrated in *Bailey* v *Ministry of Defence* [2008] EWCA Civ 883 and the Privy Council case of *Williams* v *The Bermuda Hospitals Board* [2016] UKPC 4.

10.6 Material increase in risk

If the claimant cannot positively prove that the defendant's breach of duty caused the damage, the court may ask if the defendant's negligence has materially increased the risk of damage occurring. In such cases it is sufficient for the claimant to show that the defendant's negligent conduct made the injury more probable.

In *McGhee* v *National Coal Board* [1973] 1 WLR 1, the plaintiff worked at the defendant's brick kilns where the conditions were hot and dusty. The brick dust adhered to his sweaty skin and, because his employer failed to provide washing facilities, the plaintiff had to cycle home with his body still caked in brick dust. He contracted dermatitis and alleged that if washing facilities had been provided he would not have developed the disease. The medical evidence was unable to show that had washing facilities been provided the plaintiff would have escaped the disease. However, the evidence did show that the provision of showers would have materially reduced the risk of dermatitis. The House of Lords held the defendants liable on the ground that it was sufficient for a plaintiff to show that their breach of duty made the risk of injury more probable even though it was uncertain whether it was the actual cause.

McGhee was distinguished in *Wilsher* v *Essex Area Health Authority* [1988] 1 All ER 871, where a premature baby was negligently given excessive oxygen. It is known that excessive oxygen given to premature babies can lead to blindness and the plaintiff alleged that this was the cause of his blindness. But there were up to five possible causes of the plaintiff's injury, any one of which might have caused his blindness. The House of Lords held that the burden of proof remained with the plaintiff, who must establish that the defendant's breach of duty was at least a material contributory cause of the harm. Showing the defendant's negligence to be one out of five possible causes of the plaintiff's blindness was not evidence that it was the cause. In *McGhee* the plaintiff had established his disease was caused by the brick dust; the only question was whether the additional period of exposure to the brick dust had contributed to his dermatitis.

10.6.1 Material increase in risk: the *Fairchild* principle

In *Fairchild* v *Glenhaven Funeral Services Ltd* [2002] UKHL 22, the approach in *McGhee* was followed. The claimants had all worked for more than one employer over many years.

The employers, in breach of their duty, exposed the claimants to asbestos fibres which caused asbestos-induced mesothelioma (a form of cancer). It was impossible to form any view about whose fibres had triggered the cancer. Some of the employers had gone out of business and could not now be sued. The Court of Appeal held that none of the employers were liable because the claimants could not prove against any of them that their fibres had caused the cancer; the House of Lords held that they were all liable, so long as the evidence remained inconclusive. On the balance of probabilities each defendant's wrong-doing had materially increased the risk of the claimants contracting the disease and this was to be treated as proof that each defendant had materially contributed to it. The decision in *McGhee* was applied; the ordinary 'but for' approach to causation was varied.

These appeals raised conflicting policy considerations but their Lordships found the injustice of denying a remedy to employees who had suffered grave harm to outweigh the potential unfairness in imposing liability on successive employers who could not be proved to have caused the harm. According to Lord Nicholls at [40] and [41]:

> This balancing exercise involves a value judgment. This is not at variance with basic principles in this area of the law. The extent to which the law requires a defendant to assume responsibility for loss following upon his wrongful conduct always involves a value judgment. The law habitually *limits* the extent of the damage for which a defendant is held responsible, even when the damage passes the threshold 'but for' test. The converse is also true. On occasions the threshold 'but for' test of causal connection may be over-exclusionary. Where justice so requires, the threshold itself may be lowered. In this way the scope of a defendant's liability may be *extended*. The circumstances where this is appropriate will be exceptional, because of the adverse consequences which the lowering of the threshold will have for a defendant. He will be held responsible for a loss the plaintiff might have suffered even if the defendant had not been involved at all. To impose liability on a defendant in such circumstances normally runs counter to ordinary perceptions of responsibility. Normally this is unacceptable. But there are circumstances, of which the two hunters' case is an example, where this unattractiveness is outweighed by leaving the plaintiff without a remedy.
>
> The present appeals are another example of such circumstances, where good policy reasons exist for departing from the usual threshold 'but for' test of causal connection. Inhalation of asbestos dust carries a risk of mesothelioma. That is one of the very risks from which an employer's duty of care is intended to protect employees. Tragically, each claimant acquired this fatal disease from wrongful exposure to asbestos dust in the course of his employment. A former employee's inability to identify which particular period of wrongful exposure brought about the onset of his disease ought not, in all justice, to preclude recovery of compensation.

You must study this case carefully and identify the facts. There are five speeches all reaching the same result. Lord Hutton's reasoning was, however, rather different from that of the other judges. The other speeches, though differing in detail, are very similar in approach.

10.6.2 Material increase in risk: Compensation Act 2006 (s.3)

Barker v *Corus UK Ltd* [2006] UKHL 20 concerned exposure to asbestos on three separate occasions. One of these exposures was for six weeks with an employer who was insolvent and uninsured and the second exposure was for six months with a different employer. The negligence for the third exposure was that of the claimant himself during short periods when he worked as a self-employed plasterer. The facts here differed from those in *Fairchild* in that one of the periods of the claimant's exposure to asbestos was when he was self-employed. The question arose as to whether the *Fairchild* approach to proof of causation could apply in these circumstances and whether the defendants were liable for all the damage suffered or only for its contribution to the risk that materialised.

The House of Lords partially reversed the ruling in *Fairchild* to the extent that it held that liability was several rather than joint. As a consequence, although a defendant

could still be liable without proof of causation, his liability could only extend to the relative proportion to which he could have contributed to the chance of the outcome. The defendant's liability was therefore limited to the extent that its negligence exposed the claimant to the risk of contracting the disease. There was a 20 per cent discount on the overall amount of damages to reflect the claimant's contributory negligence. This decision was seen as a victory for insurers but it met with strong resistance from trade unions and victim support groups.

The adverse publicity surrounding claimants who were sick and dying being required to spend much of their remaining time trying to establish the relative extent of liability of former employers led to the introduction of emergency legislation to restore the *Fairchild* position of joint and several liability in cases of mesothelioma. The Compensation Act 2006 (s.3) provides that where the employee has contracted mesothelioma as a result of exposure to asbestos causation can be established by showing that the exposure made 'a material contribution to the risk'.

10.6.3 Material increase in risk: tortious and environmental exposure to asbestos

In cases where there was a tortious as well as an environmental exposure to asbestos, it is not necessary for a claimant to show that the risk arising from the tortious exposure was more than twice the risk arising from the non-tortious causes. It is sufficient to show that the tortious exposure materially increased the **risk** of contracting mesothelioma.

In *Sienkiewicz* v *Greif (UK) Ltd* [2009] EWCA Civ 1159 there was only one employer, but the deceased had also been exposed to asbestos dust in the environment of the town where she lived. Her estate could not, therefore, prove that the disease had probably been caused by the workplace exposure, because there was another potential cause which did not arise from the tort of the employer. The trial judge said that since there was only one employer the claimant should have to prove causation on the normal balance of probabilities test and he found that she failed to discharge this test.

However, the Court of Appeal allowed the claimant's appeal and said that in mesothelioma cases a claimant could establish causation by showing that the workplace exposure to asbestos had materially increased the risk of the employee developing the disease. Interpreting s.3(1) of the Compensation Act 2006, the Court said the intention of Parliament was to reflect the common law requirements of causation in mesothelioma cases, which required proof of causation by reference to a material increase in risk.

10.7 Consecutive causes of the same damage

Where two independent events cause the damage and the second defendant's breach produces the same damage as that caused by the first defendant, should the first event be treated as the cause?

The House of Lords has considered this problem in *Baker* v *Willoughby* [1970] AC 467 and *Jobling* v *Associated Dairies* [1982] AC 794.

Damages are assessed once and for all, so that if they are calculated and the case disposed of by settlement or by litigation before the second event occurs, the assessment will not be reopened.

Jobling had been injured in an industrial accident and permanently disabled. This led to a 50 per cent reduction in his earning capacity. Some years later, before damages had been assessed, he was found to be suffering from a disabling disease that rendered him unfit for work. The House decided that the defendant was not required to compensate for the losses after the onset of this disease. The House was critical of (but did not overrule) the earlier decision in *Baker*.

Baker's leg had been permanently damaged in a road accident. He had to change his job and was shot by robbers (who were of course tortfeasors but were never found) and as a result his leg was amputated. The defendant admitted negligence but argued that his responsibility ended when the plaintiff was shot and therefore all losses from the date of the shooting flowed from the robbery. The House had held that the

damage was not subsumed in the new tort, but the negligent motorist continued to be answerable for the damage to the leg (and its continuing economic and other consequences). There would be an obvious harshness if Baker were to lose his damages because he was the victim of two torts and not just one, but it is not easy to formulate a principle explaining why Baker's claim was not extinguished, but Jobling's was.

It is necessary to stress again that both cases were concerned with continuing liability for the consequences of the original injury and **not** with liability for the **additional consequences** of the second injury. It was not, for instance, argued that the defendant in *Baker* was liable for the amputation. We will consider that kind of situation later.

10.8 Damages for loss of a chance

So far it has been assumed that we know what is meant by 'the damage'. There is sometimes room for argument on this point. This is illustrated by *Hotson* v *East Berkshire Health Authority* [1987] AC 750.

Hotson injured his hip in a fall (no tort was involved). The hospital failed correctly to diagnose and treat his injury for some days. In due course he suffered a wasting (necrosis) of the hip leading to permanent disability. This was caused by the original injury, but was it caused by the negligent failure to treat him immediately? The judge (unusually) assessed the chances. There was a 25 per cent chance that he would have recovered if treated properly, but a 75 per cent chance that he would not. The Court of Appeal awarded him 25 per cent of the damages that would have been payable if the hospital had caused the necrosis. The House of Lords disagreed and awarded him nothing (apart from a small sum for the pain suffered during the days of delay).

A majority of the House of Lords in *Gregg* v *Scott* [2005] 2 WLR 268 reaffirmed the general approach in Hotson's case that liability for loss of chance of a more favourable outcome should not be introduced into personal injury claims. Here, the misdiagnosis of the appellant's condition by a medical practitioner had reduced his chances of surviving for more than 10 years from 42 per cent to 25 per cent. The judge dismissed his claim because the delay had not deprived him of the prospect of a cure; at the time of his misdiagnosis, the appellant had less than a 50 per cent chance of surviving more than 10 years anyway. These cases illustrate the reluctance of the courts to allow 'loss of a chance' to substitute for the all-or-nothing requirement that causation be proved on a balance of probabilities.

10.8.1 When are damages for loss of a chance recoverable?

Sometimes this is allowed in breach of contract actions (*Chaplin* v *Hicks* [1911] 2 KB 786). It is also clear that, when the courts have identified an **item** of damage as being caused by a tort, then the **measure** of damages (the amount of money awarded in compensation) reflects the loss of future chances. For instance, if the claimant has proved that the tort caused physical injuries leading to permanent unemployment, then the amount of money paid in compensation will be based on the chances of future employment, and not on proof that on a balance of probabilities he would have had a particular career. See *Allied Maples Group Ltd* v *Simmons & Simmons* [1995] 1 WLR 1602 where the loss was economic rather than physical damage.

Causation in fact: if 'but for' the defendant's negligent conduct the damage would not have happened then that negligence is the cause of the damage.
Causation in law: liability may still be avoided if the defendant can show that the damage suffered was too remote a consequence of the breach of duty.

10.9 New and intervening cause

In certain circumstances, where one act follows another the defendant is released from liability to the extent that the damage is held to flow from the second act (the 'new intervening act'). The law will say that the second act is to be regarded as the true cause of the damage because it has broken the chain of causation and has extinguished the effect of the first act. The rationale of the rule is fairness, and whether the 'new intervening act' has broken the chain of causation is a question for the courts to decide in all the circumstances of the case.

10.9.1 Intervening criminal conduct

The following cases are relevant: *Lamb* v *Camden LBC* [1981] QB 625; *Perl* v *Camden LBC* [1984] QB 342; *Smith* v *Littlewoods* [1987] AC 241. In all these cases the claim failed. The *Littlewoods* case is particularly instructive as a striking example of a case in which the Court of Appeal went through each of the elements of the negligence action (i.e. duty, breach and remoteness) one after the other. Note that there were two leading speeches, those of Lord Mackay and Lord Goff, but they follow different lines of reasoning. Lord Goff's was considered under the heading of liability for omissions. Lord Mackay's reasoning relates more closely to the issues discussed in this chapter.

Sometimes intervening criminal conduct, even though surprising, is not too remote if it is closely related to the risk posed by the defendant's conduct: *Al-Kandari* v *Brown* [1988] QB 665.

10.9.2 Intervening negligent conduct

There could be many situations in which the subsequent carelessness of some third party has caused new injuries. One example is *Knightley* v *Johns* [1982] 1 WLR 349 where the defendant's negligent driving caused the blocking of a busy road tunnel. A police inspector sent the plaintiff police constable to drive back against the traffic flow to close the tunnel entrance. As he was driving back into the tunnel the plaintiff was injured by a car being driven in the opposite direction. The defendant was not liable. The Court of Appeal held that while it might be natural, probable and foreseeable that police would come to deal with the accident and that there might be risk-taking, there were so many errors before the plaintiff was sent back into the tunnel that the police inspector's negligent behaviour was the cause of the plaintiff's injuries. Where the subsequent event is the intervening act of a third party, negligent conduct is more likely to break the chain of causation than non-negligent conduct.

10.9.3 Intervening conduct by the claimant

So far it has been assumed that the new and intervening acts were perpetrated by a third party: sometimes, however, subsequent conduct by the claimant is in issue. Where the defendant is being asked to take responsibility for the claimant's own failures, there are several conceptual mechanisms to be considered.

- Did the defendant owe a duty to protect the claimant against the claimant's own unreasonable conduct?
- Did the claimant's own conduct break the chain of causation? It is certainly likely that, where the defendant had a duty to protect the claimant against an identified risk (e.g. that the claimant would commit suicide), then the risk, if it materialises, cannot be a new and intervening cause (see the *Reeves* and *Corr* cases below).
- Are any of the defences of voluntary assumption of risk, contributory negligence or illegality available so as to defeat the claim or reduce the damages available?

Examples of where the claimant's subsequent actions are careless are *McKew* v *Holland & Hannen & Cubitts* [1969] 3 All ER 1621; *Wieland* v *Cyril Lord Carpets* [1969] 3 All ER 1006.

In *McKew* the defendants' negligence caused the plaintiff to suffer an injury and for a short time afterwards he occasionally lost control of his leg. He went to inspect a flat and, without asking for assistance, he attempted to descend a steep flight of stairs with no handrail. When his leg gave way without warning he fell and sustained further injuries. The defendants were not liable for his additional injury. The House of Lords held that the plaintiff's own act broke the chain of causation: by placing himself in a position which might involve such a risk his own conduct had been unreasonable.

Similar facts arose in *Wieland* v *Cyril Lord Carpets* where the plaintiff had been negligently injured and forced to wear a surgical collar. This restricted her ability to focus her bifocal glasses and as a result she sustained further injuries when she fell down some steps. But here the defendants were found liable because the plaintiff had not acted unreasonably in attempting to descend the steps.

In *Spencer* v *Wincanton Holdings Ltd* [2010] PIQR P8, the employer admitted liability for the first accident but sought to rely on *McKew*, arguing that there was no liability to pay damages for the second accident because it had been caused by the employee's unreasonable conduct in attempting to fill his car with petrol without wearing his prosthesis or using his sticks. In dismissing the employer's appeal against liability, the Court of Appeal held there was no *novus actus interveniens* that broke the chain of causation. The employee's contributory conduct towards the second accident had been below the standard of unreasonableness required to break the chain of causation: contributory negligence was available to deal with the sharing of responsibility.

10.9.4 Claimant's subsequent deliberate conduct

An example of where the claimant's subsequent actions are deliberate is provided by *Corr* v *IBC Vehicles* [2008] 2 WLR 499, where the House of Lords held that depression as a result of the accident was within the compensable damage flowing from the injury. The deceased's act was not entirely unreasonable in the circumstances. The chain of causation had not been broken by the intentional act of suicide: it was not unreasonable to hold the defendant responsible for the consequences of its breach of duty.

In *Reeves* v *Commissioner of Police of the Metropolis* [2000] 1 AC 360 it was held that a deliberate and informed act of suicide while of sound mind can amount to a *novus actus interveniens*, but where the defendant is under a specific legal duty to guard against the commission of that very act, suicide does not break the chain of causation. See also: *Kirkham* v *Chief Constable of Greater Manchester* [1990] 2 QB 283.

10.10 Remoteness of damage: the basic rule

Even if the tort caused the damage, that is not the end of the story. A breach of duty may considerably change the course of subsequent events, but the defendant will not be liable for everything that can be traced back to the original wrongdoing. The **remoteness** issue limits the extent of the defendant's liability. This too can be illustrated by our ordinary use of language.

Claudia travels to work in London: the only convenient way is by train from her local station. One day she finds that her train has been derailed outside the station and blocked the line. She therefore has to return home. During the morning an intruder breaks in and shoots her in the leg. It would be natural for her to say, 'I was absent from work yesterday because my train was derailed'. But it would not be natural for her to say, 'I was shot in the leg yesterday because my train was derailed'. Yet it is true that, if there had been no derailment, she would not have been at home and would not have been shot. There is, however, a feeling that the link between the shooting and the derailment is not close enough. In legal language, the shooting is **too remote a consequence** of the derailment.

The main purpose of the rules of causation is to exclude those things that are not the cause of the damage. If the same damage would have been suffered even if there had been no breach of a duty of care, then the claimant loses. But the opposite is not true. Even if the damage would not have been suffered without the breach of duty (i.e. the breach of duty is a cause of the damage), it does not follow that the defendant is liable. The breach of duty may initiate a whole chain of further events – but some of these will be treated as too 'remote' from the original negligence for it to be appropriate to hold the defendant answerable for those distant outcomes.

Like causation, the remoteness issue is relevant to all torts in which proof of damage is essential, or in which the claimant is seeking compensation for specific losses.

At one time, the test of remoteness of damage in the tort of negligence was said to be whether the damage was the **direct** consequence of the breach of duty. If it was merely indirect, particularly if there was something which 'broke the chain of

causation', then the defendant was not liable. This test was particularly associated with the decision of the Court of Appeal in *Re Polemis* [1921] 3 KB 560.

10.10.1 The acceptable test: foreseeable consequences

Since 1964, the accepted test has been that the defendant is liable for damage only if it was the **foreseeable** consequence of the breach of duty. The Privy Council so decided in *The Wagon Mound (No 1)* [1961] AC 388.

Furnace oil had been negligently spilled from a ship in Sydney Harbour. The oil had been carried to nearby docks where welding operations were in progress. A piece of cotton waste caught fire, the temperature was raised sufficiently to ignite the oil and the resulting fire destroyed the docks and ships moored there. The New South Wales courts, applying the English rule of the time, held that (on the evidence presented) the great fire was not foreseeable, but that it was the direct consequence of the spillage and therefore the defendants were liable. The Privy Council disagreed. The defendants should be liable only for what could reasonably have been foreseen. The Privy Council gave two reasons. A test of foreseeability was (1) simpler and (2) more just, because it was unfair to hold a careless defendant liable for more than could have been foreseen when and if he thought about the consequences before committing the act of negligence. 'It is hoped that the law will thereby be simplified and that, in some cases at least, palpable injustice will be avoided' (*per* Viscount Simonds).

10.10.2 Qualifications of the basic test

Viscount Simonds certainly thought that the substitution of the new test would not affect the outcome of many cases. Foresight is not a term that can be applied mechanically. The way it is used can be understood only by examining a selection of cases in which it has been considered. A very narrow test would mean that the defendant would be liable only if the very thing which happened was what would be expected and therefore foreseen: a very wide interpretation would suggest that the defendant would be liable for everything that you could imagine happening unless it was utterly far-fetched. The approach in the cases decided since 1961 falls between these two extremes, but is probably closer to the latter. The following are reasons why the effect has not been great.

a. How much is foreseeable?

The significance of the new test was considered by the House of Lords in *Hughes* v *Lord Advocate* [1963] AC 837 where employees of the Post Office negligently left an open manhole unattended in the street. It was covered by a canvas tent and surrounded by paraffin warning lamps. Out of curiosity two young boys entered the tent and the plaintiff, a boy aged eight, took one of the lamps in with him. The lamp was knocked into the hole and caused a violent explosion in which the plaintiff suffered severe burns. The defendants were liable. Even though in the circumstances the explosion was unforeseeable the kind of damage which occurred, burns, was of a type which was foreseeable.

Doughty v *Turner Manufacturing Co* [1964] 1 QB 518 illustrates the difficulty in drawing the line. Here, an asbestos cover was knocked into a cauldron of molten liquid. A minute or two later, due to a chemical reaction which was unforeseeable at the time, the liquid erupted and the plaintiff suffered burns. *Hughes* was distinguished by the Court of Appeal on the ground that a splash causing burns was foreseeable but the damage which occurred was of an entirely different kind.

More recently the House has again considered the problem and analysed both the *Wagon Mound (No 1)* and *Hughes* cases in *Jolley* v *Sutton London Borough Council* [2000] 1 WLR 1082. This is in fact a case based on the Occupiers' Liability Acts (studied in Chapter 15), but the common law principles were discussed and applied.

These cases show that it is not necessary to foresee precisely what happened. In particular, it is not necessary to foresee either (1) the severity of the damage or (2) the

precise manner in which it occurred. It is sufficient if the injury is of the type that could be foreseen, even it came about in an unexpected way or was much more severe than expected.

This can be illustrated by the facts of *Jolley*. The defendant council had, in breach of duty, failed after several months to remove a derelict cabin cruiser that had been abandoned on its land. The issue was whether the council could foresee only that small children would be injured by clambering over it, or whether (as actually happened) teenaged children would be injured by jacking it up and working underneath it in order to make it seaworthy. This is in the end a matter of judgment – the Court of Appeal unanimously held that the accident was not foreseeable, the House of Lords unanimously held that it was.

b. The 'egg-shell skull' cases

Before 1961 the courts had recognised what was called the 'egg-shell skull' cases, and, after some hesitation, it has been held that the principle of these cases survived the introduction of the new rule for remoteness.

It is important to note that the egg-shell skull rule principle relates to the level of damages recoverable once liability has been established (the existence of a duty of care and breach of that duty). Our present rule may be expressed this way:

- where (1) the defendant is in breach of duty to the claimant
- and (2) it was foreseeable that the claimant would suffer some physical injury
- and (3) the particular claimant has a particular susceptibility or abnormality and as a result suffers more serious injury or injury of a different type from that which was foreseen, then the defendant is liable for that further injury.

The obvious situation is this: the defendant has carelessly struck the claimant on the head. It is foreseeable that the claimant will suffer cuts and/or bruises. The particular claimant however has an exceptionally thin skull (an 'egg-shell' skull) and sustains a fractured skill and serious brain damage. That was not foreseeable, but the defendant is still liable for it.

Case law example

There is a good example in *Robinson* v *Post Office* [1974] 2 All ER 737. Notice that this case involves both a true causation point and an egg-shell skull point. The defendant was liable for the negligent grazing of the claimant's shin. The claimant had an unforeseeable allergy. The hospital administered an anti-tetanus injection without carrying out the appropriate tests. Robinson had an allergy to the injection and the reaction caused brain damage. There were two elements to the decision.

1. The evidence was that, even if the proper tests had been carried out, the allergy would not have been detected. Therefore the hospital's negligence was not a cause of the brain damage (i.e. the 'but for' test was not satisfied).
2. Once the hospital's negligence was out of the way, the allergy was the equivalent of an egg-shell skull and, though it was unforeseeable, the defendant was nevertheless liable for it.

c. Financial weaknesses

What happens if the claimant has a financial rather than a physical weakness?

If the defendant injures a claimant who happens, however unforeseeably, to be a leading soccer star whose career is ruined, then the defendant has, as with the egg-shell skull cases, 'to take the victim as he finds him' (i.e. to compensate the claimant for his actual loss). What has to be foreseen is physical injuries that were to result in loss of employment. Once that has happened, the defendant has to compensate for the actual loss suffered.

The position used to be less clear where the claimant suffers additional damage because of poverty. The leading case was *Liesbosch Dredger* v *SS Edison* [1933] AC 449 where the defendant's negligence led to the sinking of the plaintiff's dredger. The plaintiff could not afford to buy a new dredger and a replacement dredger was hired at an inflated price to fulfil a contractual obligation. The additional costs of hiring the dredger were held to result from the plaintiff's financial circumstances and therefore were too remote. Many attempts have been made to explain and distinguish this case but the House of Lords has now decided that *dicta* in the *Liesbosch* case should not be followed. See also *Lagden* v *O'Connor* [2003] UKHL 64, [2004] 1 All ER 277 (see from [45]–[62]).

Activities

Activity 10.1

Core comprehension – causation and remoteness

Find and read the case of *Corr* v *IBC Vehicles* [2008] UKHL 13 and answer the following questions.

This core comprehension activity supports your understanding of causation and remoteness and focuses on the concept of *novus actus interveniens*. This issue is directly referred to by Lord Bingham at [14]–[18], by Lord Scott at [17], and Lord Walker at [43].

a. **What is the definition of the break in causation attributable to a *novus actus interveniens* according to *Clerk & Lindsell on torts?***
b. **Which rationale is applied to decide whether a *novus actus interveniens* breaks the chain of causation?**
c. **Which question did the court consider in relation to causation and remoteness?**
d. **Why would it be unfair to exclude suicide from a foreseeable consequence of an employer's tort?**
e. **Does the fact that suicide is viewed differently today by the courts than it was in the past have any sway on the rationale of fairness?**

Activity 10.2

Applied comprehension – mesothelioma claims

This applied comprehension activity focuses on the difficulties of issues of causation and remoteness in claims related to mesothelioma, with particular consideration of the role of insurance to compensate victims.

Find the case of *Zurich Insurance Plc UK* v *International Energy Group Ltd* [2015] UKSC 33, read [1]–[7] and answer the following questions.

a. **What are the key aspects of mesothelioma which make an analysis of causation and remoteness difficult?**
b. **What is meant by the '*Fairchild* enclave'?**
c. **Describe how the special rule applies to victims of mesothelioma.**
d. **To what extent is the ambient environmental exposure considered in the special rule?**
e. **Why is the shift away from probability of exposure to significant exposure important to victims of mesothelioma?**
f. **How did the proportionate approach to recovery of damages operate as held in the *Barker* case?**
g. **How was the *Barker* approach reversed in the Compensation Act 2006 s.3(2)?**

h. How did the Mesothelioma Act 2014 make it easier for a mesothelioma victim to recover damages?

i. Why has legislative reform led to a shift in types of litigant parties disputing mesothelioma claims in court?

Sample examination question

In 2004 Theo was aged 19, an apprentice plumber and a talented rugby player. He hoped to sign a contract as a professional player and eventually to play for England. However he had back problems and so was referred to Ursula, a neurosurgeon. She told him that it would be impossible for him to take part in professional rugby without soon sustaining serious injury and no club would sign him on as a professional. If he were to give up rugby she advised him that he would be able to lead a normal life without back trouble for many years. There was, however, a new surgical procedure that offered a very good prospect of strengthening his back sufficiently to enable him to play rugby. Ursula knew that recent research had suggested that the new procedure carried a small risk of damaging the spine. Ursula was critical of this research and did not tell Theo about it. Theo decided to have the surgery. Although the operation was carefully performed, he suffered serious damage to his spine. He was then unable to work as a plumber and suffered considerable pain.

In January 2015 Theo's mother collapsed just outside her front door on a very cold night. As there was no help available, Theo lifted his mother inside. He experienced terrible back pains and is now permanently disabled.

Advise Theo as to any tort claim against Ursula on each of the following alternative assumptions:

a. he would probably have suffered no injury as the result of lifting his mother but for the earlier operation

b. he would probably have suffered the same injury as the result of lifting his mother even if he had not had the earlier operation.

Advice on answering the question

This question raises issues considered in Chapters 11 and 13. There is also a minor point that the hospital or health authority will be vicariously liable – see Chapter 4 – but no problem arises on that and it can be stated in a sentence.

a. **Ursula owes a duty to Theo. This is a classic duty situation and no extended discussion is required.**

b. **Is Ursula in breach? More discussion is required, especially on *Chester* v *Afshar*. You must carefully explain what Ursula has done and why. She didn't withhold the information from Theo because there was only a small risk, but because she thought the research suggesting that there was a small risk was flawed. Is that a breach of duty?**

c. **The main issues are causation:**

   i. **both scenarios: was Ursula's negligence the cause of the original injuries? (*Chester* v *Afshar* again).**

   ii. **On the first scenario, was Ursula also liable for the additional consequences of lifting the mother (*McKew*, etc.)?**

   iii. **On the second scenario, did Ursula continue to be liable for the original consequences (loss of job as plumber) even after Theo lifted his mother (*Baker* v *Willoughby and Jobling*)?**

11 Defences to negligence

Contents

Introduction

We have seen that the burden of establishing liability for the tort is on the claimant whereas the burden of establishing the defence is on the defendant.

If a claimant establishes a successful cause of action in tort it is open to the defendant to plead one (or more) of the defences available. Where, on balance of probability, a successful defence is established the defendant's liability for the damage may be reduced or the defendant may be totally absolved from liability.

Not all possible defences to an action in tort will be discussed in this chapter because some defences are specific to particular torts; for example, the specialist defences in the trespass action and for a nuisance, which are discussed in Chapters 3 and 16 respectively.

General defences which have particular relevance to claims in negligence are the topic of this chapter.

The defences we will look at are:

Contributory negligence

This defence operates where the claimant's own fault has contributed to the damage suffered and the damages payable are reduced in proportion to the claimant's degree of fault.

***Volenti non fit injuria* (consent)**

This means that no wrong is done to one who consents. A claimant who voluntarily agrees to undertake a risk of incurring harm is not permitted to sue for the consequent damage of taking that risk. It is important to note that ***volenti*** is a complete defence and if it succeeds the claimant gets nothing.

***Ex turpi causa non oritur actio* (illegality)**

No right of action arises from a disgraceful cause (perhaps criminal activity) during which the injuries are sustained. The effect of this defence is to completely absolve the defendant of liability for damage.

Learning outcomes

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **describe what is meant by contributory negligence**
- **explain the basis on which the courts reduce damages as the result of contributory negligence**
- **explain the role of consent as a defence to an action in negligence**
- **explain in what circumstances a defendant may escape liability by showing that the claimant had been acting illegally or morally reprehensibly at the time of the injury.**

Core text

- **Gilker, Chapter 16 'Defences to negligence', Sections 16-001 to 16-028.**

11.1 Contributory negligence

The defendant may plead that the claimant's own negligence contributed to the injury. This is referred to as contributory negligence. Before the Law Reform (Contributory Negligence) Act 1945, contributory negligence was a complete defence to an action in tort and no damages were recoverable for injuries or damage caused partly by the claimant's own fault. The effect of this rule was that if a claimant could be shown to have been even slightly negligent about taking care of their own safety the defendant's fault became irrelevant and the defendant was totally absolved of liability. The harshness of the 'all or nothing' rule led to a gradual modification of the defence and the enactment of the 1945 Act, which gave the courts power to apportion responsibility for damage between the claimant and the defendant, '… to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage' with the amount awarded adjusted to reflect this.

The courts have power under the Act to apportion the damage where a claimant's own conduct has contributed to the accident or harm but it cannot be used to effectively defeat a claim. For the Act to come into operation there must be fault on the part of both parties and this means that a finding of 100 per cent contributory negligence is not permitted as the effect of this would be to defeat a claim against the defendant by holding the claimant entirely responsible.

Fault is not confined to negligent conduct but it can include a deliberate act on the part of the claimant. Section 4 of the Act provides:

> …'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

Application of this provision can be seen in *Reeves* v *Commissioner of Police of the Metropolis* [2000] 1 AC 360, where the harm in question was inflicted by Reeves himself who committed suicide while in police custody. In *Reeves* the police were liable because they breached their duty to prevent the very act which had occurred. They raised the defences of *volenti*, *novus actus interveniens* and contributory negligence. Neither the defence of *volenti* nor the *novus actus* claim was accepted but the House of Lords found that the negligence of the police and the deceased's act of intentional self-harm contributed equally to the damage. Since the purpose of the Act is to apportion the damages to reflect the claimant's own responsibility for the harm suffered, the award of damages in this case was reduced by 50 per cent. The question being asked in contributory negligence is not: what was the cause of the accident? The emphasis is on what was the cause of the **damage**.

Where a defendant's negligence creates an emergency, the courts are reluctant to find contributory negligence on the part of a claimant who makes a wrong decision in a stressful moment. The conduct of a claimant in these situations is judged with the emergency in mind. This happened in *Jones* v *Boyce* (1816) 1 Stark 493, where the plaintiff was a passenger on the defendant's coach and, fearing that it was about to overturn, he jumped off and suffered injury. The coach did not overturn and had he stayed where he was the plaintiff would have been safe. However, confronted with two alternatives in an emergency situation the plaintiff was not guilty of contributory negligence because he had acted reasonably in the circumstances.

The important issues that arise in relation to contributory negligence are:

- The claimant must have failed to take reasonable care for their own safety, but no question of a pre-existing duty of care arises.
- The contributory negligence must be a cause of the damage and the damage must be a reasonably foreseeable consequence of the contributory negligence. The claimant's negligence may have contributed to the accident itself (e.g. a motorcyclist failing to keep a proper look-out for other vehicles) or may have contributed only to the injury (e.g. a motorcyclist failing to wear a crash helmet).

- Apportionment. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides that damages shall be reduced to such extent as 'the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'. The judge must first determine the amount of damages payable if the claimant had not been negligent and then deduct a certain percentage to reflect the claimant's contribution. It seems that the percentage may reflect both the relative potency of the claimant's and defendant's actions in causing the damage and the relative blameworthiness of the parties (see *Reeves* above).

Case law example

In *Froom* v *Butcher* [1975] 3 All ER 520, the plaintiff was driving his car when he collided with a car driven by the defendant and as a result he suffered head and chest injuries. The defendant admitted liability for the accident but claimed that the plaintiff's injuries were largely the result of his **own** failure to take care of his safety by not wearing a seatbelt. The defendant argued that the damages awarded to the plaintiff ought to be reduced accordingly. At first instance the judge held that the plaintiff was not negligent and full damages were awarded for the injuries. However, the defendant appealed on the ground that the judge had erred in not holding that the plaintiff's failure to wear a seatbelt amounted to contributory negligence. Although the negligence of the plaintiff did not contribute to the accident happening, his failure to take precautions increased the risk of harm. The Court of Appeal held that the standard of care is objective and said that in failing to wear a seatbelt the plaintiff failed to take reasonable precautions for his own safety and the award of damages was reduced by 20 per cent.

Contributory negligence was rejected in *Smith* v *Finch* [2009] EWHC 53 (QB) where a cyclist sustained serious head injuries in a road accident caused by the defendant. Although there is no legal requirement to wear a cycling helmet, the Court made an analysis of *Froom* and came to the conclusion that the judgment and observations of Lord Denning MR should apply to the wearing of helmets by cyclists. However, in this case the defendant was unable to show that an approved safety helmet would have prevented the claimant's serious head injuries or made them less severe.

In *Jones* v *Livox Quarries* [1952] 2 QB 608, the plaintiff was going from his workplace to the canteen for lunch and, disregarding his employer's safety instructions and unknown to the driver, he was riding on the towbar of one of the defendants' traxcavators. A dumper travelling close behind ran into the traxcavator and caused the plaintiff injuries. Although the driver of the dumper was found to be negligent in failing to keep an adequate lookout, the judge found contributory negligence on the part of the plaintiff because he had placed himself in a position of danger on the traxcavator. He was therefore found to be one-fifth responsible for the damage he suffered. On appeal against the reduction of damages the plaintiff argued that his contributory negligence should not count against him because the obvious danger arising from riding on the towbar was being thrown off, not being run into from behind and crushed by another vehicle. His appeal was dismissed on the ground that he had unreasonably exposed himself to the danger. He could not then say that that particular risk to which he had exposed himself was not the cause of his damage.

11.1.1 Contributory negligence involving children

Conduct that would be regarded as contributory negligence in the case of an adult would not necessarily be regarded as such in the case of children. Age is a circumstance which must be considered in deciding if there has been contributory negligence. In *Yachuk* v *Oliver Blais Co Ltd* [1949] AC 386 the defendants had sold a pint of petrol to a nine-year-old boy. The child had falsely told the defendants that his mother wanted the petrol for her car. When he used the fuel to make a burning torch for the purposes of a game he suffered severe injury for which the defendants were held liable in negligence. In supplying petrol to such a young boy, who neither knew nor could be expected to know of the dangers associated with handling it, the

defendant was negligent. There was no contributory negligence on the boy's part. In *Gough* v *Thorne* [1966] 1 WLR 1387, the plaintiff, a 13-year-old girl, was waiting to cross a busy road. A lorry driver stopped and beckoned her to proceed across the road and as she did so she was struck by the defendant who was driving too fast. The trial judge found that the driver was negligent but he also held that the girl had been contributorily negligent in failing to check if there was any traffic before she crossed the road. On appeal against the finding of contributory negligence the Court of Appeal held that the fact that she had relied entirely on the driver's signal to cross the road did not constitute contributory negligence. Lord Denning said that a very young child cannot be guilty of contributory negligence but, depending on the circumstances, an older child may be.

In *Jackson* v *Murray* [2015] UKSC 5, the Supreme Court reviewed the approach to contributory negligence in the case of a 13-year-old girl who suffered serious injuries when she stepped out from behind her school minibus into the path of an oncoming car. In the context of apportionment of damages in contributory negligence Lord Reed [26] said:

> It follows that the apportionment of responsibility is inevitably a somewhat rough and ready exercise (a feature reflected in the judicial preference for round figures), and that a variety of possible answers can legitimately be given. That is consistent with the requirement under section 1 (1) to arrive at a result which the court considers 'just and equitable'. Since different judges may legitimately take different views of what would be just and equitable in particular circumstances, it follows that those differing views should be respected, within the limits of reasonable disagreement.

11.2 *Volenti non fit injuria* (consent)

At first sight it seems obvious that someone who consents to the tort should not then turn round and sue. In practice however, it is complex and controversial. The effect of the defence of *volenti non fit injuria* (voluntary assumption of risk) is to absolve the defendant from the legal consequences of any harm or damage on the ground that the claimant voluntarily assumed to take the risk involved. An assumption of risk may be either express or implied but in either case the defendant must show that the claimant had full knowledge of both the nature and the extent of the risk.

Case law example

The defence succeeded in *Morris* v *Murray* [1991] 2 QB 6. After a bout of heavy drinking, Murray suggested to Morris that they go for a spin in his light aircraft. Soon after take-off, the aircraft crashed, killing Murray and severely injuring Morris who brought an action against the deceased's estate. The Court of Appeal found that the pilot's drunkenness was so extreme and obvious that the plaintiff was *volens* to the risk. According to Fox LJ 'A clearer source of great danger could hardly be imagined.'

Where the claimant accepts a lift from an obviously inebriated driver the plea of *volenti* depends on the degree of intoxication. In *Dann* v *Hamilton* [1939] 1 KB 509, the defendant had driven the plaintiff and her mother to see the Coronation decorations. They visited several public houses and it became obvious that the defendant's ability to drive was impaired. However, the plea of *volenti* was rejected and the plaintiff was found not to have consented to or absolved the defendant from subsequent negligence on his part. Asquith J held that *volenti* did not apply to this situation, unless the drunkenness was so extreme and so glaring that accepting a lift was equivalent to 'walking on the edge of an unfenced cliff'.

The defence of *volenti* is now impossible in any action brought by a passenger against the driver of a vehicle on a public road. The Road Traffic Act 1988, s.149 renders void any 'antecedent agreement or understanding' that a passenger is *volens* to the risk of negligent driving in any vehicle for which third party insurance cover is compulsory.

11.2.1 Knowledge of the risk does not necessarily imply consent

In *Smith* v *Charles Baker & Sons* [1891] AC 325 the House of Lords ruled that knowledge of the danger does not necessarily signify consent. In this case the plaintiff was employed drilling holes in a rock cutting and while he was working a crane often swung heavy stones overhead. The employee was aware that there was a risk of the stones falling and he had complained to his employer about the dangerous practice. When he was injured by a falling stone he brought an action against his employers, who pleaded *volenti non fit injuria*. Even though the plaintiff had knowledge of the danger and he continued to work, *volenti* was rejected because the court refused to accept that by continuing to work the plaintiff had voluntarily undertaken the risk of the stones falling.

11.2.2 *Volenti* in the context of employees

Smith v *Baker* illustrates that where employees are alleged to have consented in advance to accepting the risk of an employer's negligence, the courts take a cautious approach in applying the defence of *volenti*. The reality of the employer/employee relationship is that it is one of power, where the employee is not usually free to refuse to do certain things without fearing the employer's disfavour or some other disadvantage. Nevertheless, although the defence will rarely be successful in an action by an employee against an employer, *volenti* was accepted by the House of Lords in *ICI Ltd* v *Shatwell* where, according to Lord Reid: 'If the claimant invited or freely aided and abetted his fellow servant's disobedience, then he was *volens* in the fullest sense'.

11.2.3 *Volenti* in sporting activity

In the case of sporting activities, there is implied consent to contact which occurs within the rules of the game. However, the claimant might not be agreeing to accept all risks associated with the sport but will only impliedly consent to accept a lower standard of care for injuries sustained in a sport played within the ordinary rules of the game. In *Condon* v *Basi* [1985] 2 All ER 453, the defence of *volenti* failed where the plaintiff suffered a broken leg as the result of a foul tackle in the course of a game of football. It was held that consent to reasonable contact is consent only to non-negligent behaviour. In *Watson* v *British Boxing Board of Control* [2001] QB 1134 (a case we also looked at in the context of a duty of care in Chapter 4), it was also held that although a boxer consents to injury caused by his opponent in the boxing ring, he does not consent to injury resulting from inadequate safety arrangements by the sport's governing body after being hit.

11.2.4 *Volenti* in the case of rescuers

The approach taken by the courts can be illustrated in *Baker* v *Hopkins* [1959] 3 All ER 225, where the defendant employer had adopted a dangerous system of working by lowering a petrol engine down into the inside of a well. The engine discharged poisonous emissions and two of the workmen were overcome by the fumes. The plaintiff, a doctor, had volunteered to go down the well to rescue the workmen but he too was overcome by the fumes and died as a result. The Court of Appeal held that *volenti* was inapplicable because the plaintiff's actions as a rescuer were not truly voluntary: if the defendant puts either the property or the person of a third party in a situation of danger so that the claimant is under legal or moral pressure to attempt a rescue then, if the claimant suffers harm in the process, he is not to be barred from a remedy by the defence of *volenti*. This decision can also be explained on policy grounds as it is against the public interest to deter rescue.

11.3 *Ex turpi causa non oritur actio* (illegality)

What should happen if the claimant is engaged in some illegal (perhaps criminal) activity, and this illegality is a cause of the injuries sustained? An instinctive answer might be that no compensation should be available, but in fact illegality seldom operates as a complete bar to liability.

Nevertheless, the courts will not assist a claimant whose injury is linked to illegal conduct when it would be 'an affront to the public conscience' to do so, and might arguably encourage others in illegal activities.

The *ex turpi causa* maxim was applied in *Pitts* v *Hunt* [1991] 1 QB 24. Here, having both consumed large amounts of alcohol, the plaintiff encouraged the defendant to drive his motorbike in a reckless and dangerous fashion. They had jointly engaged in 'criminal and disgraceful conduct' resulting in the death of the defendant and serious injury to the plaintiff.

Clunis v *Camden and Islington Health Authority* [1998] 3 All ER 180 concerned a plaintiff with a history of mental illness, who killed a stranger in a violent attack. Before he killed the victim the plaintiff had been discharged into the care of the defendant health authority. He pleaded guilty to manslaughter on the grounds of diminished responsibility for the killing but claimed that the health authority was negligent in failing to treat him with reasonable care and skill. It was held that a plaintiff who had been convicted of a serious offence could not, on the ground of public policy, sue a health authority in negligence for failing to treat him properly, thereby leading to the commission of the offence.

Case law example

In *Gray* v *Thames Trains Ltd* [2009] UKHL 33, as the result of a serious rail crash caused by the defendant's negligence, the claimant suffered severe psychological depression which led him to kill a man. At the criminal trial for this offence his plea of guilty to manslaughter on the ground of diminished responsibility was accepted and he was ordered to be detained in a mental hospital under the Mental Health Act 1983. His claim in damages for loss of earnings after he committed the manslaughter was allowed by the Court of Appeal which held it was not defeated by *ex turpi causa* because the damages were not inextricably bound up with or linked to his criminal conduct. Thames Trains Ltd appealed against this decision arguing that a claimant cannot recover compensation for loss which has been suffered in consequence of his own criminal act. In allowing the appeal, the House of Lords ruled that Gray's conviction for manslaughter precluded a claim for loss of earnings during his detention by reason of the public policy expressed in the doctrine of *ex turpi causa*. Lord Hoffmann said the maxim *ex turpi causa* expresses not so much a principle as a policy; that policy is not based upon a single justification but on a group of reasons, which vary in different situations.

- The wider and simpler version was that you could not recover for damage which was the consequence of your own criminal act.
- In its narrower form, it was that you could not recover for damage which was the consequence of a sentence imposed upon you for a criminal act.

Joyce v *O'Brien* [2013] EWCA Civ 546 involved a joint criminal enterprise in which the claimant suffered serious head injuries as he and his uncle were making a getaway following the theft of two ladders. The Court of Appeal held that it was foreseeable that parties engaged in criminal activities might be subject to increased risks of harm. Where such harm materialised the principle of *ex turpi causa* would provide a defence. According to Elias LJ, the doctrine is one of public policy and there should be some flexibility in its operation. It will not apply to minor traffic offences but in most joint criminal liability cases the nature of the principal offence will determine which acts of a co-conspirator will attract the application of the doctrine.

In *Vellino* v *Chief Constable of Greater Manchester* [2002] 1 WLR 218, when the police arrived to enforce an arrest warrant on the claimant, he attempted to escape from their custody by jumping from a window of his second floor flat. He suffered brain damage and tetraplegia in the fall and claimed negligence on the part of the arresting officers, alleging that they had stood idly by and let him jump. The Court of Appeal held that the maxim *ex turpi causa non oritur actio* made the claim untenable because the claimant had to rely on his own criminal conduct in escaping lawful custody to found his claim.

Henderson v *Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43 analysed the effect that *Patel* might have on the type of situation seen in *Clunis* and *Gray*. The claimant had been found guilty of the manslaughter of her mother on the grounds of diminished responsibility. She was suffering from a severe form of mental illness and therefore was sentenced to detention on a mental health facility. She brought a negligence action against the health authority, which had been caring for her for a number of years, on the grounds that their failures had led to her crime. The health authority claimed that her action was defeated by the defence of illegality.

The Supreme Court upheld the findings of the lower courts that, in accordance with *Clunis* v *Camden and Islington Heath Authority* and *Gray* v *Thames Trains*, the defence of illegality would apply and thereby her action could not proceed. *Henderson* was referred to the Supreme Court because it had been argued that the important case of *Patel* v *Mirza* fundamentally changed the law on illegality, meaning that *Clunis* would be overruled and *Gray* must necessarily be departed from. The Court carefully considered *Patel* and held that the policy reasoning for the decision in *Gray* matched that in *Patel* and therefore the given that the cases were consistent, the defence of illegality would apply. Further, the claimant's lack of personal responsibility for her act, due to mental illness, did not negate the applicability of the defence.

Where the claimant's illegal activity is merely incidental to an accident or other event, *ex turpi causa* will not be relevant. An example is *Delaney* v *Pickett* [2011] EWCA Civ 1532 where the claimant happened to be in the process of making an illegal drugs delivery at the time of the traffic accident.

11.3.1 Illegality defence: recent developments

There can be strongly held differing views across a spectrum of opinion concerning this defence and a series of cases in the Supreme Court identified the need for guidance on the proper approach as soon as possible.

Patel v *Mirza* [2016] UKSC 42 was not a tort case but rather a claim for breach of contract and unjust enrichment. The parties had agreed to place bets on share prices using insider information (an illegal activity). The intended betting did not take place so the claimant sued for breach of contract and unjust enrichment to recover the £620,000 he had paid the defendant. The Supreme Court unanimously dismissed the defendant's appeal and ruled that a claimant who satisfies the requirements for a claim in unjust enrichment is not prevented from recovering simply because the agreement was based on an unlawful purpose.

The panel of nine justices attempted to rationalise the approach to the illegality defence. The majority held that the public interest is best served by a discretionary approach, which allows the court to consider a range of factors. Such a policy-based 'structured discretion' approach was favoured by the Law Commission (2009 Consultative Report). The dissenting minority favoured a more rule-based analysis because a discretionary approach required the courts to make value judgments about the respective claims of the public interest and this would lead to complexity, uncertainty and a lack of transparency. Unfortunately, any expectation that *Patel* v *Mirza* would provide clear rationales for the defence of illegality may have been misplaced, as is demonstrated in the case below.

In *Henderson* v *Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43 a woman had killed her mother while suffering from severe mental illness and brought a negligence action against the medical authorities, claiming their lack of care had caused her to commit the crime. The appellant argued that, according to *Patel* v *Mirza*, it should be possible to distinguish *Gray* v *Thames Trains Ltd* (2009) and that the defence of illegality should not apply to her claim.

The Supreme Court held that, because the crucial factor in *Gray* was that criminal responsibility had been established (rather than the extent of personal blame), the two cases could not be distinguished. Upholding the Court of Appeal and applying the policy tests from *Patel*, the following factors indicate overwhelmingly that illegality should bar her claim:

i. the gravity of her criminal offence

ii. the public interest in the proper allocation of NHS resources

iii. the very close connection between her claim and her offence and

iv. the public interest in deterring, protecting the public from and condemning unlawful killing.

Stoffel v *Grondona* [2020] UKSC 42 brought another recent application of *Patel* v *Mirza*. The claimant brought a negligence action against her solicitors for failing to register documents effecting a transfer of property. The defendants argued that, because the transfer had been part of an illegal mortgage fraud, the claim should be barred by the defence of illegality.

In holding that illegality should not bar the claim, the Supreme Court applied the new policy-based approach to illegality set out in *Patel*. The claimant was engaged in mortgage fraud, which is a serious criminal offence. However, denying her claim would not enhance the underlying purpose of the prohibition on mortgage fraud. Fraudsters are unlikely to be deterred by the risk that they will be left without a civil remedy if their solicitors prove to be negligent. Further, denying the claim would run counter to the important policy that solicitors should perform their duties to their clients diligently and without negligence, as well as with the policy that the victims of solicitors' negligence should be compensated for the loss they have suffered. It is important to remember that illegality can arise in an 'infinite possible variety of situations' and these may involve very different policy conditions.

Activities

Activity 11.1

Core comprehension – contributory negligence

The focus of this core comprehension activity is to understand the basis on which the courts reduce damages as the result of contributory negligence.

Find and read the case of *Jackson* v *Murray* [2015] UKSC 5 and answer the following questions.

You will note that this case is from Scotland and therefore terms such as the pursuer (the claimant) and the defender (the defendant) are used.

e. Which statute governs the apportionment of responsibility in claims of contributory negligence and which equitable principle governs the award?

f. Outline the apportionment of contributory negligence attributed to the 13-year-old schoolgirl who was hit by a car when carelessly crossing the road.

g. Which standard of care was applied to the actions of the 13-year-old?

h. Why in the first instance did the trial judge apportion 'a very large proportion of the overall responsibility' (90 per cent) to the claimant?

i. Which reasons were given by the appeal court to reduce the 90 per cent share of blame to 70 per cent?

j. Identify the two factors relevant to the consideration of causative potency.

k. Why was more blame attributed to the 13-year-old schoolgirl than the driver?

l. According to Lord Reid in the *Stapley* case, what must a court assess in order to apportion blame?

m. Why, according to Hale LJ in the case of *Eagle* v *Chambers* [2003] EWCA Civ 1107, is blameworthiness more easily linked to drivers of cars than, for example, pedestrians?

n. Is the apportionment of responsibility an exact science?

o. When can an Appeal Court interfere with an apportionment determined by a judge in a lower court?

p. Which conclusion did the Supreme Court reach on the apportionment of blame?

q. On which grounds did Lord Hodge in his dissenting opinion favour the apportionment of two thirds (claimant) to one third (defendant)?

Activity 11.2

Applied comprehension – defence of illegality

This comprehension supports your understanding of the key issues surrounding the defence of illegality. Read Lord Hoffmann's judgment in *Gray* v *Thames Trains*, and answer the following questions.

a. Identify the Latin phrase associated with the defence of illegality. What does it mean?

b. Using the example of the *Joyce* case, explain (i) who committed the 'wicked' act, (ii) what action was taken which was founded on that act, and (iii) why the action failed.

c. Does the defence of illegality always bar claimants from recovering in negligence?

d. Summarise in fewer than 100 words the relevant facts of the *Gray* case, identifying the illegal act committed and the link between Mr Gray and the defendant, Thames Trains Ltd.

e. Express the causal connection between the tort and the killing in terms of 'but for' causation.

f. Why does the fact that the immediate cause of the damage was the deliberate act of the claimant not suffice to exclude liability?

g. How does Lord Hoffmann describe the maxim of *ex turpi causa*?

h. Outline possible reasons why in the narrow form of this policy defendants should not be able to recover damages which result from sentencing resulting from a criminal act.

i. Outline possible reasons why in the wider form of this policy defendants should not recover for damage which was the consequence of their own criminal act.

j. Identify two justifications for the application of the wider rule.

12 Employers' liablility

Contents

Introduction

The employer is under a **personal non-delegable** duty of care to take reasonable measures to ensure the safety of his employees in the workplace. This duty began to be established by the common law at the end of the 19th century and was embodied in *Wilsons and Clyde Coal* v *English* [1938] AC 57.

Alongside the common law provisions, a number of statutes such as the Employers' Liability (Defective Equipment) Act 1969 and Health and Safety at Work Act 1974 were introduced to protect employees and, in certain circumstances, it used to be the case that breach of these statutory duties could give rise to a claim in tort. Where an employee could establish a breach of a statutory duty, the burden of proof shifted to the employer and the employee did not have to prove negligence: it was up to the defendant to prove that he was not negligent. However, changes introduced by the Enterprise and Regulatory Reform Act 2013 mean that, in future, claimants may need demonstrate fault, as in common law negligence. A duty may also arise under the law of contract; employment contracts contain an implied term that an employer will take all reasonable care to ensure the health and safety of their employees.

An employer may be vicariously liable for an injury caused to an employee due to the tort of another employee, without the claimant having to show that the employer was in any way at fault.

An employer is not normally liable for the torts of an independent contractor but the non-delegable duty is to **ensure that care is taken**. Therefore, if the independent contractor is acting under the explicit instructions of the employer or, if the employer is aware of the tort of the independent contractor, the duty may arise.

Learning outcomes

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **demonstrate an understanding of the distinction between and employer's liability for harm caused to their employees (personal liability) and an employer's liability for harm caused by their employees (vicarious liability)**
- **understand the meaning of the 'non-delegable' employers' duty and its implications**
- **explain the difference between the common law and statutory employers' duties**
- **understand the basic nature of breach of statutory duty**
- **evaluate the developments in respect of an employer's liability for occupational stress.**

Core text

- **Giliker, Chapter 7 'Employers' liability', Sections 7-001 to 7-024.**

12.1 Common law employers' duty

12.1.1 History

During the 19th century the tort system appeared to be weighted against the individual employee. The three doctrines listed here, sometimes referred to as the 'unholy trinity', prevented virtually any action by employees for workplace injury.

- The doctrine of 'common employment'
- The defence of contributory negligence
- The defence of *volenti non fit injuria* (or, consent).

The first, the doctrine of 'common employment', set down in *Priestly* v *Fowler* [1837] 150 ER 1030, held that an employer would not be vicariously liable for harm inflicted on workers by fellow employees. This prevented an employee injured by a fellow employee from taking any action against their employer. Under this doctrine, an implied term in the contract of employment provided that an employee assumed the risk of negligence of a fellow employee in the same employment.

Second was the defence of contributory negligence that, at the time, was a total defence to a claim in negligence.

The third doctrine, the defence of *volenti non fit injuria*, was available to an employer where the injured employee had undertaken or continued with the dangerous work in the knowledge of the potential risk of harm.

Together, these doctrines provided employers with a very high level of protection (in contrast to the position of the their workers) until this was addressed by legislation and the common law. Parliament legislated for the abolition of the doctrine of common employment with the Law Reform (Personal Injuries) Act 1948, and the Law Reform (Contributory Negligence) Act 1945 provided that contributory negligence was no longer a complete defence, turning it into a partial defence and permitting the courts to apportion liability. In *Smith* v *Charles Baker* [1891] AC 325 the House of Lords began the process of rejecting the defence of *volenti* in employment cases.

12.2 Elements of common law duty

Case law example

***Wilsons and Clyde Coal* v *English* [1938] AC 57**

In this important case, the courts also developed the notion of a personal or 'non-delegable' duty upon employers. This duty is to see that reasonable care is taken and the employer's obligation for the employee's safety is fulfilled by showing due care and skill. However, the duty is not fulfilled by delegation of that responsibility to others, even if they are employees selected with due care and skill. In *Wilsons,* the plaintiff miner was injured at the defendant's coal mine. The haulage equipment at the mine should have been stopped during travelling time but, as he was travelling through the pit at the end of a day shift, the plant was set in motion and the plaintiff was crushed. The defendant employers claimed that they had appointed a competent and qualified manager to control the technical management of the mine and in doing this they had discharged their duty of providing a reasonably safe system of working in the mine. The House of Lords rejected this claim and the employers were held liable but not vicariously liable; the employers were liable on the ground that they could not avoid their personal non-delegable duty to provide a reasonably safe system of working by delegation to a competent employee.

The employer's duty was stated to be:

- the provision of a competent staff
- adequate material and
- a proper system of working (including effective supervision).

To the above list has been added a fourth element: a safe place of work.

The employer's duty is a general duty to take reasonable care for the physical safety of the employee; it does not extend to protecting the employee's economic welfare. In *Reid* v *Rush and Tompkins Group plc* [1990] 1 WLR 2012 it was held that an employer had no duty to arrange accident insurance for a person working abroad or to warn the employee being sent abroad of the need to take out such insurance. Nevertheless, we will see later that the scope of the employer's duty to provide a safe system of work has now been extended to safeguard an employee against psychiatric harm, caused by workplace stress.

12.3 Non-delegable duty

Before going on to examine each of the elements of an employer's duty, it is important to note that this duty cannot be delegated. There is a personal duty placed upon the employer to see that care is taken. Even when the employee is temporarily posted elsewhere to work with another employer, the original employer is still under a duty to ensure the operation of a safe system of work. The non-delegable nature of the duty to provide a safe system of work can be illustrated with the case of *McDermid* v *Nash Dredging and Reclamation Co Ltd* [1987] AC 906, which concerned an unsafe system of work on a tug. The injured party was a deckhand whose accident was caused by the negligence of the tug's captain, who was employed by a third party. When McDermid brought a successful action against his employers, Nash, they appealed, contending that the captain was not their employee. The House of Lords unanimously dismissed the appeal. According to Lord Brandon,

> The essential characteristic of the duty is that, if it is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for the non-performance of the duty.

In the 19th century the term 'servant' was used to denote an employee and the employer was denoted as 'master'. One of the reasons for the use of this terminology is that at that time the work of a servant was mainly manual and carried out under the master's instruction. This terminology has become outdated and the terms employer and employee are now used as they reflect the modern workforce containing many skilled workers and professional employees.

12.4 The elements of the employer's duty

12.4.1 Competent staff

The employer owes a duty to employees to select competent employees, to give them proper supervision and to ensure that they are properly trained in the use of equipment. Although the duty to select competent employees is of less importance since the abolition of the doctrine of common employment (because this means that the employer will be vicariously liable for the tort of one employee against another), this duty can be relevant. In *Hudson* v *Ridge Manufacturing Co Ltd* [1957] 2 QB 248 where an employee was injured by a known practical joker who had a reputation for persistently engaging in practical jokes, the employer was liable for breach of his personal duty because he should have known about and taken steps to deal with the employee. Today, this could be reflected in a failure of an employer to address harassment or bullying in the workplace.

12.4.2 Adequate material

This duty includes not only the provision of adequate plant and equipment but also its inspection, maintenance and proper safety protection, including instruction in the use of the equipment.

Davie v *New Merton Board Mills* [1959] AC 604 the House of Lords found the employer not liable when an employee suffered injury at work as he was using a defective metal tool provided by the employer but manufactured by a third party. The House of Lords ruled that the essence of the tort of negligence is a failure to take reasonable care: an employer was not taken to guarantee the safety of the equipment he provided, nor was he liable for injury caused by a defect that was undiscoverable.

The ruling often left injured employees with no effective remedy and the effect of *Davie* was subsequently reversed by the Employers' Liability (Defective Equipment) Act 1969, s.1(1). The position now is that, if an employee is injured in the course of employment by a defect in equipment provided by the employer and the employee can prove that the defect was caused by the fault of some third party (usually the manufacturer), then the employer will be liable. The Act covers defective plant and equipment of every sort with which the employee is compelled to work and includes any plant, machinery, vehicle, aircraft, and clothing. In *Coltman* v *Bibby Tankers* [1988] AC 276 a ship was considered to be 'equipment' for the purposes of the 1969 Act. It is important to be aware that the employee still bears the task of proving both fault and causation against the third party.

Where safety equipment has not been provided, an employer may escape liability if they can show that, even if the equipment had been provided, the employee would not have used it and would therefore have suffered the injury anyway. In effect, the employer would argue that the case failed on the issue of causation, as occurred in *McWilliams* v *Sir William Arrol & Co Ltd* [1962] 1 WLR 295.

12.4.3 A proper system of working

An employer is under a duty to ensure a reasonably safe system of working and to give employees general safety instructions about their job. The duty will normally apply in a system of working that is regular or routine and covers: the physical layout of the job; the sequence in which the work is to be carried out; the provision, in appropriate cases, of warnings and notices; and the issue of special instructions.

In *Speed* v *Thomas Swift and Co Ltd* [1943] KB 557, the employers were liable for the employee's injury because, in the circumstances, they had not laid out a safe system of work when he was loading a ship from a barge. The loading was normally carried out while the ship's rails were left in position but sections of the rail had been damaged and the resulting circumstances had, on the occasion in question, made it unsafe to load the ship.

Case law example

Employers must warn employees of any inherent dangers in the work that they are required to do and in these circumstances it is no defence for an employer to argue that the employee himself should take precautions. in *General Cleaning Contractors* v *Christmas* [1953] AC 180 the plaintiff employee, a window cleaner, was sent to clean the windows of a club. As he was cleaning a first-floor window by standing on the window sill and supporting himself by holding the sash with one hand, the window came down on his fingers and caused him to fall to the ground. He had been instructed by his employers in the sill method of cleaning which, if the employee was careless, carried an obvious risk of danger. Although the system had been in operation for 20 years, the employers were found to have failed in their obligation to devise a reasonably safe system of work providing for an obvious danger. They did not give instructions to ensure that the windows should be tested before cleaning but left it to the initiative of individual employee to take precautions against a foreseeable danger. The House of Lords held that, where a practice of ignoring an obvious danger has been generally adopted by the employees, it is not reasonable to expect an individual employee to take the initiative in devising and using safety precautions. *General Cleaning Contractors* illustrates that the law places the responsibility to lay down a reasonably safe system of working firmly on the employer and that this cannot be delegated even to the employees themselves.

A more recent example of the nature and extent of supervision required arose in *Jebson* v *Ministry of Defence* [2000] 1 WLR 2005, where the claimant, one of a group of soldiers returning in a drunken state from a night out, fell when he tried to climb onto the roof of an army truck. Although there is no duty on the armed forces to provide a safe system of working in battle conditions, this immunity does not apply in peacetime. At first instance, a duty of care was recognised but the damage was held to be too remote. The Court of Appeal allowed the claimant's appeal and held that, under the circumstances, rowdy

behaviour of soldiers in high spirits was foreseeable and the employer should have taken steps, such as providing supervision, to guard against the risk.

12.4.4 A safe place of work

The employer must provide a safe place of work; however, this duty is discharged if the employer takes reasonable steps to see that the premises are safe. *Latimer* is a case that is discussed in Section 9.2.1 on the balancing test for breach of duty.

There is, of course, an inevitable overlap of the four categories of employers' duties. For instance, the ship in *Coltman* v *Bibby Tankers* could have been regarded as an unsafe place of work, rather than unsafe equipment.

12.5 Occupational stress

Historically, employers' liability has evolved to cover workplace accidents typical in the 19th century (factories, mines, quarries, farms to those developing in the late 20th and early 21st centuries. The latter include the effects of asbestos exposure, passive smoking, repetitive strain injury and, significantly, occupational stress. Growing awareness of various forms of mental health issues has led to the legal exploration of liability for types of psychological injury that do not conform to the format of the usual 'nervous shock' negligence cases, which is discussed in Chapter 5.

In *Walker* v *Northumberland County Council* [1995] 1 All ER 737 an area social services officer suffered a mental breakdown due to the pressures of his job, following which he took medical leave for three months. Despite assurances to the contrary, his employer failed to provide him with the support he needed, when he returned to work. He then suffered a second breakdown and was dismissed. His employer was held to be liable in negligence; the fact that he was known to be under considerable mental and emotional stress established the foreseeability necessary for a duty of care, which was breached when measures were not taken to address the workload.

It was confirmed in the key cases of *Sutherland* v *Hatton* [2002] EWCA Civ 76 and *Barber* v *Somerset* [2004] UKHL 13 that, as well as protecting an employee against physical injury in the workplace, an employer who knows or should know that an employee is susceptible to psychiatric injury as a result of stress at work is under a duty to take reasonable care to avoid such harm. *Hatton* involved four conjoined appeals (three of which involved public-sector employers such as teachers). The Court of Appeal stressed that the ordinary principles of employers' liability applied and then went on to lay down general guidelines for this type of action: an employer will only be liable if he foresaw or should have foreseen the damaging stress (which would have been foreseeable to any reasonable employer) and failed to take reasonable steps to prevent it. It was held that there are no intrinsically stressful occupations and that, unless an employer knows of some particular problem or vulnerability, they are usually entitled to assume that an employee can withstand the normal pressures of a job. In *Barber*, the House of Lords held that employers were expected to give positive thought to the psychological well-being of their staff and, in some circumstances, failure to inquire for further details could constitute a breach of duty.

12.6 Breach of statutory duty

In addition to the above common law duty, employers are also subject to a large body of statutory regulations for the protection of employees. For example, it may be compulsory under statute for an employer of building workers to provide safety helmets or it may be illegal under statute to do something, such as to smoke while working with inflammable substances. However, the fact that conduct is illegal and puts an employer in breach of a statutory obligation subject to a criminal sanction (such as a fine) does not necessarily mean that the breach gives rise to civil liability in tort, even if someone is injured as a result.

Breach of statutory duty is a tort in its own right independent of any other form of tortious liability. Today, many statutes, such as the Occupiers' Liability Act 1957, create a specific form of tortious liability to provide a remedy for a breach of obligations under the Acts but the action for breach of statutory duty can be more problematic.

Liability for breach of statutory duty depends on whether the statute, on its proper construction, confers a right of civil action on the employee. This may be explicitly stated but, if not, the courts have to decide, as a matter of policy, whether Parliament implicitly intended to confer such a right. In determining whether a civil action for breach of statutory duty will arise, the starting point is to look to precedent or for a clearly stated parliamentary intention in the statute.

In the absence of either, the following principles may assist but, in all cases, the key question is to determine the fundamental purpose the legislation was intended to achieve.

- Did Parliament intend to create a civil action?
- Was the statute imposed for the benefit of a particular class of persons?
- Was the damage caused by the breach of duty?

The action for breach of statutory duty plays an important role in ensuring health and safety in the workplace so it most frequently arises in the employment context. It is not uncommon for an employee seeking compensation for a workplace injury to sue the employer both in negligence and for breach of statutory duty.

12.6.1 The Health and Safety at Work Act 1974

The objective of the Act was to provide a unified and comprehensive framework, obliging employers to ensure, as far as is reasonably practicable, the health, safety, and welfare at work of all employees. In accordance with EU directives, the majority of pre-existing statutes were repealed and replaced by many different regulations, under the scheme of the Management of Health and Safety at Work Regulations 1999. These regulations (originally passed in 1993) are extremely varied and comprehensive, covering a wide range of duties from heating and ventilation to risk assessment and the reporting of accidents. The standard of care is frequently stated in the regulations and resulting case law as the duty to act according to what is 'reasonably practicable' or 'so far as practicable'. The regulations are often interpreted narrowly by the courts.

Case law example

***Fytche* v *Wincanton* [2004] UKHL 34**

A driver of a milk tanker sustained frostbite due to a tiny hole in the protective steel-toed boots issued to him by his employer. He brought an action against his employer claiming breach of the duty owed to him under the Personal Protective Equipment at Work Regulations 1992.

The House of Lords considered in detail the nature of the statutory duty owed under the regulations and a 3–2 majority found against the claimant. The employer's duty to maintain protective equipment (such as the boots) in good working order only pertained to their primary function in relation to an 'identified risk': that of a worker's feet being crushed by heavy objects. Exposure to severe weather had not been part of the claimant's role, and therefore frostbite was not within the risk against which the boots were designed to protect.

Until recently, s.47 of the Health and Safety at Work Act 1974 provided that breach of a duty imposed by health and safety regulations was presumed to give rise to a civil action, provided it caused damage. Section 69 of the Enterprise and Regulatory Reform Act 2013 amends the law so that in future, a breach of a duty imposed by health and safety regulations shall not be actionable unless specifically provided for by the legislation or common law negligence on the part of the employer is proved.

A recent noteworthy development in this area is *Goldscheider* v *Royal Opera House* [2019] EWCA Civ 711. Here, a viola player brought an action against his employers, the Royal Opera House, for breach of safety regulations. In a rehearsal of the opera *Die Walkure*, he was seated in front of the brass section of the orchestra when the sound level reached 132 decibels, roughly equivalent to a jet engine. He suffered hearing loss, which ended his musical career. The Court of Appeal upheld the trial judge's finding that Goldscheider was entitled to compensation for 'acoustic shock'. There were a number of precautions, which should have reasonably been taken, such as the placement of transparent acoustic screens.

The defence case had partially relied on s.1 of the Compensation Act 2006 suggesting that in such cases the court should take into account the possible deterrent effect a judgment might have on a desirable activity. This was rejected by the Court, due to the preventative measures that the defendants could have taken. *Goldscheider* illustrates the development of employee health and safety law, by bringing the orchestra pit and other live music venues into the equivalent category of protection of the factory floor and other more industrial working environments.

12.7 Summary

The various aspects of an employer's duty described in this chapter are not separate and distinct duties but part of a single duty on employers to take reasonable precautions to ensure the safety of their employees.

The employers' responsibility for the safety of their employees at work is personal and non-delegable.

An employer's liability arises not only for failure to adopt a safe system of working but also when a safe system is operated negligently.

An employer who becomes aware that stress at work is having an adverse effect on the mental health of an employee is under a duty to take positive steps to prevent the harm. This is a developing area of liability.

Activities

Activity 12.1

Core comprehension – common law employers' liability

Go to the Online Library and find and read *Sutherland* v *Hatton* [2002] EWCA Civ 76 and answer the following questions.

a. **What was the central issue to this case?**

b. **Explain why four separate appeals were being heard together.**

c. **How does work-related stress differ from other types of psychiatric harm?**

d. **Explain how the Court regarded the issue of control mechanisms in *Hatton*.**

e. **Identify the two factors involved in foreseeability of harm in employment stress cases?**

f. **Summarise in your own words the actions required from the employer to fulfill his duty of care towards his employees' psychological health.**

g. **Do you agree that no occupations are inherently dangerous to mental health?**

h. **What was the outcome of Mrs Hatton's appeal?**

i. **What was the court's main reasoning for this outcome?**

Activity 12.2

Applied comprehension

In the online library find and read Tomkins, N. 'First principles in employers' liability' (2010) 3 *JPIL* 131 and answer the following questions.

a. **Summarise the author's view of the 'balancing' exercise in employers' liability.**

b. **What is the rationale behind the standard of 'reasonable practicability' as the employers' standard of care?**

c. **In your own words, describe the three elements in the process of an employer's risk assessment.**

d. **Is the expected standard of care higher for large or wealthy organisations? If so, in what way? Give examples.**

e. **According to the author, what is the role of policy in this area of tort law?**

NOTES

13 Vicarious liability

Contents

Introduction

This chapter considers vicarious liability, where an employer – in the usual case – is held liable for torts committed by an employee.

Vicarious liability means that one person (even though otherwise not a tortfeasor) is liable for a tort committed by someone else. It is therefore an extreme form of strict liability. The only clear example in English law is the liability of employers for the torts committed by their employees in the course of employment.

It is important first to be clear about the distinction between primary liability and vicarious liability. Alongside vicarious liability for the torts committed by their employees, an employer owes their employees a non-delegable personal duty (primary liability) that arises from the employer's responsibility for the management of their organisation. The employer's personal liability normally requires fault on the part of the employer, whereas vicarious liability will be imposed without the claimant having to show that the employer is in any way at fault.

Learning outcomes

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **suggest reasons why the law should hold employers liable for certain torts committed by their employees**
- **distinguish between an employer and an independent contractor**
- **identify relationships 'akin to employment'**
- **identify when an employee is acting in the course of employment.**

Core text

- **Giliker, Chapter 7 'Employers' liability', Sections 7-025 to 7-041.**

13.1 Vicarious liability

An employer's **primary** liability is concerned with negligence **to** its employees in respect of harm suffered at work. An employer's **vicarious** liability is concerned with torts committed **by** its employees 'while acting in the course of employment'.

Before going on to consider the conditions necessary for vicarious liability to arise, the justifications for departing from the usual fault-based liability will be considered.

Many different theories have been advanced to justify the doctrine of vicarious liability but the most accepted justifications are:

- the 'benefit and burden' principle. The employer has established a business and derives the economic benefits of commercial success: the employer ought therefore to be liable for damage caused by the business
- the employer has created a risk and should be answerable if the risk materialises
- the employer is in the best position to know, or to find out, the nature and cost of accidents associated with the business and to take insurance against these risks
- the employer has responsibility for ensuring that its employees are effectively trained to carry out their work safely
- the employer is more likely to take staff training and supervision seriously
- the principle of vicarious liability means that the employer is more likely to be careful in selecting employees and to provide incentives to encourage them to take care
- the effect of the employer bearing the cost of insurance liability is to spread the loss, as the extra cost can be passed on to the public in the form of higher prices
- the 'deep pocket' argument, which is based on the fact that the employer is better able to pay compensation and is also more likely to have liability insurance. See *JGE* v *Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.

Vicarious liability does not mean that the employer is liable instead of the employee. The employee who committed the wrong remains liable. Vicarious liability is a form of secondary liability. For reasons of policy, the courts have considered it desirable to give claimants injured as the result of an employee's tort an action against the employer as well.

13.2 Establishing vicarious liability

To succeed in a claim based on vicarious liability, the claimant has to establish that:

- the alleged tortfeasor was an employee
- the employee committed a tort
- the employee committed the tort in the course of employment.

13.2.1 Establishing the employee relationship

It has proved difficult to identify a test that will distinguish an employee (for whom there is vicarious liability) from an independent contractor (for whom generally there is not). The issues are surprisingly complicated and the answer may depend on the precise contractual relationship. It is possible here only to identify the broad issues that arise.

A traditional example of the distinction was that a personal chauffeur is an employee and a taxi driver is an independent contractor. If your chauffeur carelessly knocks a pedestrian down, you are vicariously liable. If your taxi driver does it, you are not. This is not simply because the taxi driver is usually engaged only for a single trip. A contract of employment may be of short duration. A taxi company may be engaged on a long-term basis to provide a car and driver to take someone to and from work every day, but this is unlikely to make the driver an employee of the passenger or of the passenger's employer.

Modern styles of working, including the so-called 'gig economy', such as that of drivers and delivery personnel on 'zero-hours' contracts, have now called into question the traditional distinctions that the law has relied on to determine vicarious liability.

There are many other contexts in which the same question has to be answered. There are different tax and national insurance implications for employees, and an employee has greater employment rights and protection. A number of cases cited in this section are not about liability in tort at all. It is generally assumed that the same tests are applied whatever the context in which the question arises, but there are arguments against this assumption. This is particularly true where the employer and 'employee' have entered into complicated contractual arrangements for tax or national insurance purposes.

Case law example

In *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions and National Insurance* [1968] 2 QB 497 a concrete-manufacturing company introduced a scheme whereby its concrete would be transported by a team of lorry owners described as 'owner-drivers'. The agreement between the lorry owners and the company provided that they would be paid a fixed mileage rate for the service and it also specified their employment status to be self-employed independent contractors.

Although lorry owners were required to paint the lorries in the company's colours and wear the company's uniform, the drivers owned the lorries and bore the financial risk of the enterprise. In a dispute about whether the lorry owners were employees or independent contractors, the economic reality test was applied and on the facts of the case it was found that the lorry owners were unlikely to be acting as agents or employees of the company but were, in reality, independent contractors working under a contract for services. The key factors influencing the Court in reaching its conclusion were that the drivers (1) owned and maintained the lorries; (2) were free to hire other drivers in the event of holiday or sickness; and (3) took the chance of profit and bore the risk of loss.

There is nowadays a great variety of patterns of employment. It is not yet clear what arrangements of primary or vicarious liability can best deal with these. Here are some examples. The provision of agency staff is common in many industries, notably in clerical and hospital work. Bodies such as insurance companies or utility companies enter into contracts with customers under which they agree to supply, for example, plumbers to deal with emergencies.

13.2.2 Independent contractors

No single test has proved satisfactory as a distinction between employees and independent contractors. Courts have referred to the extent to which the employer can control how the individual does the job. They have considered how far the individual can be said to be integrated into the business. They have adopted an impressionistic approach and have added up the features of the relationship, identifying those features that were more like a contract of service (i.e. of employment) and those that were more like a contract for services and considered where the balance lay. Among many illustrative cases are: *Cassidy* v *Ministry of Health* [1951] 2 KB 343; *Stevenson Jordan & Harrison* v *Macdonald & Evans* [1952] 1 TLR 101, *per* Denning LJ In *Market Investigations Ltd* v *Minister of Social Security* [1969] 2 QB 173, Cooke J warned against the risk of a rigid application of the factors for consideration, saying:

> No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases.

13.2.3 Relationships 'akin' to employment

The question of whether the Catholic Church is the employer of its clergy was considered in *JGE* v *Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938. The Church claimed that priests are not employees of the Church; they are merely office

holders and not employees. The priest accused of sexual abuse had no employment contract with the trustees: there was no wage agreement, no mechanism for the trustees to dismiss or discipline him and no mechanism by which they could control him. The Court of Appeal upheld the first instance finding that the relationship between a parish priest and diocese was akin to an employment relationship, even though the priest received no wage and was rarely supervised. When considering vicarious liability in respect of persons not formally employed, the Court held that it was not appropriate to apply tests of employment laid down in cases dealing with unfair dismissal, or taxation or discrimination.

In *Various Claimants* v *The Catholic Child Welfare Society* [2012] UKSC 56 (hereafter *CCWS*), the Supreme Court held that the law of vicarious liability has developed recently to establish a number of important propositions, one of which is that it is possible for unincorporated associations (such as the Institute) to be vicariously liable for the wrongful acts of its members. In *CCWS* the Supreme Court reviewed the law of vicarious liability in cases involving sexual abuse of children where bodies, in pursuance of their own interests, caused their employees or persons in a relationship similar to that of employees, to have access to children in circumstances where abuse has been facilitated. The Court said that the approach to establishing vicarious liability involved a synthesis of two stages.

- The stage 1 question asks whether the relationship between the employee and the employer (or a relationship 'akin to that of employment') was one which was capable of giving rise to vicarious liability. Here Lord Phillips set out five considerations that would help to address this first stage:
    a. the employer is more likely to have the means to compensate the victim and can be expected to have insured against that liability
    b. the tort will have been committed as a result of activity being taken by the employee on behalf of the employer
    c. the employee's activity is likely to be part of the business activity of the employer;
    d. the employer, by employing the employee to carry on the activity, will have created the risk of the tort committed by the employee and
    e. the employee will, to a greater or lesser degree, have been under the control of the employer.
- The stage 2 question addresses the 'course of employment' test (see Section **13.3.1**) and asks if the connection between the employer and the perpetrator, the acts of abuse and the extent to which the employment created or significantly enhanced the risk of that abuse (the necessary close connection was established in *CCWS*).

In *Cox* v *Ministry of Justice* [2016] UKSC 10, the claimant had worked as the catering manager at a prison. She suffered injury as the result of the negligence of a prisoner, performing paid work under the claimant's supervision. In one of the first decisions applying the Supreme Court ruling in *CCWS*, the Court of Appeal held that in determining whether an employment relationship for the purposes of vicarious liability existed, it was necessary to ask whether the relationship between the claimant and the Ministry was one akin to employment. The Court of Appeal applied the relevant features identified in *CCWS* and held that it was clear that those features distinctly applied in this case. The defendant's argument that, unlike employees, prisoners have no interest in furthering the objectives of the prison service was rejected. A prisoner undertaking useful work for nominal wages binds him into a closer relationship with the prison service than would be the case for an employee and strengthens, rather than weakens, the case for imposing vicarious liability.

In *Cox* the Supreme Court considered the sort of relationship which has to exist between an employer and an employee before the employer can be made vicariously liable (the companion appeal of *Mohamud* v *WM Morrison Supermarkets* [2016] UKSC 11 considered how the conduct of the employee has to be related to that relationship for vicarious liability to be imposed (see Section 13.3.9)).

In *Armes* v *Nottinghamshire County Council* [2017] UKSC 60 the Supreme Court again considered relationships 'akin' to employment. The question in *Armes* was whether a local authority was vicariously liable for the physical and sexual abuse perpetrated by the foster parents into whose care they placed the claimant when she was seven years old. The case proceeded on the basis that there was no negligence on the part of the social workers involved with placing the claimant with the foster parents or in the supervision and monitoring of the placements. Nevertheless, the claimant argued that the local authority should be vicariously liable for their wrongful acts of abuse.

At first instance, the trial judge rejected vicarious liability on the ground that the local authority has no relevant control over the foster parents as to the manner in which, on a day-to-day basis, the foster parents provided family life to the child.

The Court of Appeal affirmed the judge's decision and the matter was then referred to the Supreme Court to consider whether the relationship between a local authority and foster parents fulfils the criteria for vicarious liability. In ruling that the local authority was vicariously liable for the abuse committed by the foster parents, Lord Reed (with whom Lady Hale, Lord Kerr and Lord Clarke agreed) applied the principles set out in *Cox* v *Ministry of Justice*:

> The general principles governing the imposition of vicarious liability were recently reviewed by this court in *Cox* v *Ministry of Justice*. As was said there, the scope of vicarious liability depends upon the answers to two questions. First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship in order for vicarious liability to be imposed? The present appeal, like the case of Cox, is concerned only with the first of those questions.

In her article 'Vicarious liability in the UK Supreme Court' (2016) in *The UK Supreme Court Yearbook* (Vol. 7, pp.152–166) Professor Paula Giliker comments: 'One is left to wonder where, after three Supreme Court decisions in four years, this leaves the legal development of the doctrine of vicarious liability'. In *Armes* the Supreme Court was being asked to develop the law beyond the point which it had already reached (and disagree with the conclusions reached in the courts below).The majority ruling in favour of vicarious liability (Lord Hughes dissenting) endorses Giliker's prediction that: '*Cox* and *Mohamud* are far from the end of this story'.

Barclays Bank plc v *Various Claimants* [2020] UKSC 13

In *Barclays Bank plc* v *Various Claimants* (2018) the Court of Appeal held that the defendant bank was vicariously liable for the sexual assaults against prospective staff committed by a doctor, who was an independent contractor. It reached this conclusion by applying *Lister*'s 'close connection test' and Lord Phillips's five criteria established in *CCWS* to establish the employment relationship.

However, in *Barclays Bank plc* v *Various Claimants* [2020] UKSC 13 the Supreme Court allowed the appeal by the defendant bank. The five factors identified in the *CCWS* decision may help to identify a relationship analogous to employment where it is not clear whether or not the tortfeasor is carrying on their own independent business. However, 'where it is clear that the tortfeasor was carrying out his own independent business' it was not necessary to consider the five criteria. The Supreme Court re-established what is effectively a 'independent contractor' defence.

13.2.4 'Borrowed employees'

There is a particular problem with borrowed employees, where, for example, one company supplies a crane and its driver to work for another company. It is plain that the driver remains an employee, but of which company? The presumption seems to be that the driver remains the employee of the lending company unless this is clearly displaced on the facts. In *Mersey Docks and Harbour Board* v *Coggins & Griffith (Liverpool) Ltd* [1947] AC 1, a mobile crane and a driver had been hired out to a firm of stevedores under a contract

which stipulated that the driver was to be the employee of the stevedores. In spite of this term, the employee's original employer, the Harbour Board, paid his wages and retained the right to dismiss him. The hirer, Coggins & Griffith, directed the tasks which were to be performed by the driver but not how he was to operate the crane. In the course of his work the driver negligently injured the plaintiff and the question to be determined was whether the firm of stevedores or the Harbour Board were vicariously liable. In holding the Harbour Board liable the House of Lords said the control test was still important. They noted that factors such as the type of machinery that had been loaned (the more complicated it is, the more likely the main employer will remain liable) and factors such as who pays the employees' national insurance contribution and the duration of the alternative service with the temporary employer are also relevant.

There can be dual vicarious liability. It had traditionally been assumed that where an employee was lent by one employer to work for another, vicarious liability for the employee's negligence had to rest with one employer or the other, but not both. However, in *Viasystems Ltd* v *Thermal Transfer Ltd* [2006] QB 510, the Court of Appeal held that it is possible for two separate employers to be vicariously liable for the tort of a single employee.

13.3 The employee must commit a tort

The employer is liable vicariously only if the employee has committed a tort. That means that the employer can take advantage of any **substantive** defence available to the employee (such as contributory negligence or *volenti non fit injuria*). In *ICI Ltd* v *Shatwell* [1965] AC 656, in defiance of his employer's orders and statutory safety regulations, the plaintiff went to test some detonators without taking the required safety precautions. The employer was not liable for the injuries sustained when an explosion occurred because the plaintiff was held to have consented to and fully appreciated the risk of injury. Here, the plaintiff and his brother (who actually caused the explosion) were quite senior safety officials, and personally responsible for compliance with the regulations. It is therefore a fairly extreme case and not likely to be a general precedent.

13.3.1 The tort must have been committed in the course of employment

This proposition is rather obvious, but it has proved difficult to identify a test that will distinguish between those torts that do occur in the course of employment and those that do not. The modern tendency of the courts seems to be in borderline cases to lean in favour of imposing vicarious liability if that is possible. According to Giliker (2017), the generous approach to the vicarious liability framework established by the Supreme Court in *CCWS* is justified because it creates 'a fairer and more workable test' that enables innocent victims to obtain compensation, albeit at the expense of innocent employers.

13.3.2 The 'Salmond test'

The test set out by Sir John Salmond in *Salmond and Heuston on the law of torts*, first published in 1953, has been commonly used by the courts:

> A master… is liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorised that they may be rightly regarded as modes – although improper modes – of doing them.
>
> An act will be in the course of employment under the test if it is (a) a wrongful act authorised by the [employer], or (b) a wrongful and unauthorised mode of doing some act authorised by the [employer].
>
> (Heuston, R.F.V and R.A. Buckley *Salmond and Heuston on the law of torts.* (London: Sweet & Maxwell, 1996) 21st edition [ISBN 9780421533509], p.443)

The explanation and application of this test can be illustrated by the following cases.

13.3.3 The general approach

In *Century Insurance Co Ltd* v *Northern Ireland Road Transport Board* [1942] AC 509, a tanker driver who, while delivering petrol, lit a cigarette and carelessly discarded a match causing a fire, was held to be acting within the course of his employment. It was said that the act of lighting the cigarette, while not in itself connected with his job, could not be looked at in isolation from the surrounding circumstances.

In *General Engineering Services* v *Kingston and St Andrew Corporation* [1989] 1 WLR 69, firemen operating a 'go-slow' policy who took five times as long as they normally would have done to drive to the scene of a fire were acting not within the course of employment. The Privy Council indicated that it was as though they had simply ignored the call which would not be a mode of performing their duties. This is however a case which founds itself firmly on the Salmond test and holds that a wrongful and unauthorised act is outside the course of employment.

In *Lister* v *Hesley Hall Ltd* (see Section 13.3.8) the House of Lords said that the proper approach to the course of employment is no longer to ask the question whether the acts were modes of doing authorised acts in the course of employment. In *CCWS* Lord Phillips noted that although the test of 'close connection' is approved by all it tells nothing about the nature of the connection.

13.3.4 Frolics and detours

The employer is not liable where the employee's act is wholly unconnected to the job for which they are employed. In such circumstances the employee is said to be 'on a frolic of his own' (*Joel* v *Morrison* (1843) 172 ER 1338). For instance, in *Beard* v *London General Omnibus Co* [1900] 2 QB 530 the employer of a bus conductor who, in the absence of the driver, negligently drove the bus himself was held not liable.

A number of cases have dealt with an employee who has deviated from the course of employment. Was the deviation sufficient to take the employee out of the course of employment? In *Storey* v *Ashton* (1869) LR 4 QB 476 the defendant's employees had been instructed to deliver wine and to bring back some empty bottles to the employer's offices. On the return journey one of the employees persuaded the other that, since it was by then after hours, they should set off in a different direction to visit some relatives. The employer was not liable for an injury caused by the employee because, at the time of the accident, the driver was not acting in the course of employment; he was on a new and independent journey which was entirely for his own business.

13.3.5 Driving to and from the place of work

Generally, an employee is not in the course of employment when driving to and from the place of work, but there are exceptions depending on the nature of the job and particular contractual arrangements. In *Smith* v *Stages* [1989] 1 All ER 833, a peripatetic lagger was working at a power station when his employer sent him and another employee to perform an urgent job in another part of the UK. In addition to their hourly rate they were paid travelling expenses for the journeys there and back. They were using a private vehicle and had discretion as to how and when they would travel. They worked without sleep to get the job finished two days early and decided to drive straight home. As they were travelling back together in the car they were both injured when the employee driving the car crashed into a wall. The driver was uninsured and the plaintiff sued the employer on the basis of vicarious liability. The House of Lords found the employers liable. Lord Goff said the fact that the men were travelling back early was immaterial since they were still being paid wages to travel there and back. Lord Lowry thought the crucial point was that the employees were 'on duty' at the time of the accident.

An employee travelling between home and work will not generally be in the course of employment. However, an employee travelling in the employer's time from home to a workplace other than the regular workplace or between workplaces will be within the course of employment.

13.3.6 Expressly prohibited acts

There is a further complication where the employee is doing something specifically **forbidden** by the employer. The outcome is then said to depend on whether the prohibition limited the sphere of employment (in which case the employee is not in the course of employment) or limited the manner in which the employee carried out duties (in which case the employee is still in the course of employment).

An act may be within the course of employment even though it has been expressly forbidden by the employer. In *Limpus* v *London General Omnibus Co* (1862) 1 Hurl & C 526 a bus driver was instructed not to race with or obstruct the buses of rival companies. He disobeyed this instruction and caused an accident in which the plaintiff's horses were injured. Despite the prohibition, the employers were liable since this was simply an improper method adopted by the employee in performing his duties.

In *Rose* v *Plenty* [1976] 1 WLR 141, the employer was liable when, despite his employer's express instruction not to do so, a milkman employed a boy aged 13 to help him on his milk round. Due mainly to the milkman's negligent driving the boy was injured. In the Court of Appeal, Lord Denning said the driver was still within the course of employment despite the express prohibition because he was still acting for the master's purposes, business and benefit.

13.3.7 Deliberate or criminal acts

In the cases considered so far the employee had committed the tort of negligence. It is, however, more difficult to apply vicarious liability where the employee has **deliberately** caused the damage to the claimant and/or the employee is guilty of a crime. How can such activities be in the course of employment? Using the orthodox test, the courts did impose vicarious liability where the employee was acting for the benefit of the employer (e.g. by assaulting a suspected thief) or stole property that he was employed to clean. In *Morris* v *CW Martin & Sons Ltd* [1965] 2 All ER 725 a mink stole which was sent for dry cleaning was stolen by one of the employees in the firm of cleaners. The employer was vicariously liable for the theft because the employee's act constituted an unlawful mode of doing his job. See: *Poland* v *Parr & Sons* [1927] 1 KB 236; *Lloyd* v *Grace, Smith & Co* [1912] AC 716. In *Warren* v *Henlys Ltd* [1948] 2 All ER 935 the employers were not held liable for a violent assault by a pump attendant because, on the facts, the attack was found to be a mere act of personal vengeance and outside the course of employment.

The limits of the Salmond test were reached in a case where a deputy headmaster sexually abused a pupil during a school trip to Spain. In *Trotman* v *North Yorkshire CC* [1999] BLGR 584 the test was applied in the case of a teacher who used school trips to commit sexual assaults on a dependent child. It is difficult to describe such conduct as an unauthorised mode of carrying out the deputy headmaster's duty. The Court of Appeal refused to hold the employer vicariously liable on the ground that the perpetrator was not acting in the course of employment; his conduct was said to be a negation of the task of caring for the plaintiff and not an unauthorised mode of carrying out an authorised task. This case has now been overruled by the House of Lords.

13.3.8 The *Lister* test

In *Lister* v *Hesley Hall Ltd* [2002] 1 AC 215, the House of Lords reviewed the application of the Salmond test which focused on whether the employee's wrongful act was either authorised by the employer or an improper way of doing what was authorised. It was held that in cases of serious criminal conduct the proper method of determining 'course of employment' is not to ask the simplistic question of whether the acts were modes of doing authorised acts but to adopt a broad approach to the question of the scope of an employee's employment. Here, the warden of a residential school for children, who had some years after the events been convicted of sexual assaults on pupils in his care, was acting in the course of employment so as to make his employers vicariously liable.

With the benefit of influential Canadian jurisprudence on the subject, the Law Lords focused on the close connection between the acts of the warden and the job he was employed to do. The defendants had entrusted the care of the children to the warden and the abuse had been inextricably interwoven with the carrying out of his duties: his torts had been so closely connected with his employment that it would be fair and just to hold the defendants vicariously liable. A number of judges noted that the warden was the very person selected to discharge the employers' own pastoral responsibilities to the children.

13.3.9 Application of the 'close connection' test

Which employees might fall within the *Lister* test? First, there are some *dicta* in the case itself. In particular, it was said that there would be no vicarious liability if the abuse had been perpetrated by a caretaker or handyman at the school (whose duties involve looking after the property rather than the pupils). The scope of *Lister* has been considered in the following cases.

In *Dubai Aluminium Co Ltd* v *Salaam* [2003] 2 AC 366, the principle in *Lister* was extended to include not just intentional torts, but also breaches of equitable duty which were closely connected with the acts that the employee was authorised to do in the course of the firm's business.

Reflecting the policy factors which influenced the decision in *Lister,* Lord Nicholls noted:

> [21] … Whether an act or omission was done in the ordinary course of a firm's business cannot be decided simply by considering whether the partner was authorised by his co-partners to do the very act he did. The reason for this lies in the legal policy underlying vicarious liability. The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.

Lister was applied by the Court of Appeal in *Mattis* v *Pollock* [2003] 1 WLR 2158, where the owner of a nightclub was vicariously liable when Mattis, the claimant, was rendered paraplegic following a stabbing by Cranston, a bouncer employed by the club. The evidence showed that Cranston had a history of behaving aggressively and the act was one of revenge. Judge LJ said at [19]:

> The essential principle we derive from the reasoning in the *Lister* and *Dubai Aluminium* cases is that Mr Pollock's vicarious liability to Mr Mattis for Cranston's attack requires a deceptively simple question to be answered. Approaching the matter broadly, was the assault 'so closely connected' with what Mr Pollock authorised or expected of Cranston in the performance of his employment as doorman at his nightclub, that it would be fair and just to conclude that Mr Pollock is vicariously liable for the damage Mr Mattis sustained when Cranston stabbed him.

In *CCWS* the Supreme Court considered the criteria that establish the necessary 'close connection' between relationship and abuse. Lord Phillips [86] identified a common theme emerging from the authorities in the UK, Canada and Australia:

> Starting with the Canadian authorities a common theme can be traced through most of the cases to which I have referred. Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

However, in *Mohamud* v *WM Morrison Supermarkets* [2016] UKSC 11 vicarious liability for an employee's attack on a customer at a petrol station was considered by the Supreme Court. The claimant was first racially abused verbally in the petrol station kiosk and then physically attacked by the employee who had followed him to his car. The Court

of Appeal's conclusion that the employee's attack was personally motivated and had nothing to do with his employment was unanimously rejected by the Supreme Court, where Lord Toulson said that the employee's motives were 'neither here nor there'. The employee's job was to attend to customers and his conduct in answering the claimant's request was inexcusable but fell within the 'field of activities' assigned to him.

The modern law on vicarious liability, established by the Supreme Court in *CCWS* and expanded by the decisions in *Cox*, *Mohamud* and *Armes* enable an increasing range of claimants to benefit from the doctrine's ability to act as a 'loss distribution device'. In *Armes* the majority of the Supreme Court applied the policy reasons set out by Lord Phillips in *CCWS* and the ruling is likely to pave the way for continued extension of vicarious liability.

Giliker (2017) points out:

> *Lister*, *JGE* and *Various Claimants* [*CCWS*] all involved victims of sexual abuse seeking recompense from the institutions responsible for the abusers in question. What is distinctive about *Cox* and *Mohamud*, however, is that these are not sexual abuse cases, but examples of traditional vicarious liability scenarios in which the question is whether an employment relationship exists or whether the misconduct of the employee takes him outside the scope of his employment. The Supreme Court rulings are therefore significant in indicating that sexual abuse cases are not a separate category of claims. The extension of vicarious liability to meet the facts of *Lister*, *JGE* and *Various Claimants* [*CCWS*] applies generally to all cases. The societal need to respond to sexual abuse scandals has therefore had a permanent impact on the shaping of the modern doctrine of vicarious liability.

WM Morrison Supermarkets plc v *Various Claimants* [2020] UKSC 12

In 2018 the Court of Appeal ruled that Morrison Supermarket was vicariously liable for a serious data breach caused by the deliberate malicious act of an employee. In pursuit of a personal grievance, a senior internal IT auditor at Morrison had downloaded the personal details of some 100,000 employees and shared them, including to three national newspapers. He was sentenced to eight years' imprisonment for fraud and statutory offences. Some 5,000 of the victims brought an action against their employer as vicariously liable for breach of the Data Protection Act 1998, breach of confidence and misuse of private information.

In *WM Morrison Supermarkets plc* v V*arious Claimants* [2020] UKSC 12 the Supreme Court overruled the Court of Appeal. Its more conservative interpretation of the 'close connection' limb of the two-stage test for establishing vicarious liability was that employers will not be liable for an employee's wrongful act where that act is not engaged in furthering the employer's business. Here the employee's activity was an effort to deliberately harm his employer as part of a personal vendetta. Consequently, no vicarious liability arose.

Bellman v *Northampton Recruitment* [2018] EWCA Civ 2214

In *Bellman*, the generous judicial trend in vicarious liability persisted in the case of an after-party following the annual Christmas get-together. Here, after consuming considerable amounts of liquid 'seasonal cheer', the managing director got into an argument over a workplace issue and ended up punching his employee who suffered serious brain damage, and brought an action based on vicarious liability.

Overturning a first-instance decision in favour of the defendants, Lady Justice Arden examined the overall context. Although the attack took place at a different venue than the official office party, there was a 'sufficient connection' between the wrongdoer's position as the most senior employee in the company and the nature of the dispute to render the assault as being within the course of employment. It can be suggested that *Bellman* is perhaps at the outer boundary of vicarious liability, a position borne out by the recent decisions of the Supreme Court in *Barclays Bank* and *Morrison Supermarkets*.

13.4 The employee's position

We have seen that even though the employer is vicariously liable, the employee also remains liable. Vicarious liability is not a kind of defence that enables the wrongdoing employee to transfer liability to the employer. Indeed, the employer is entitled to recover from the employee the amount of any damages paid to the claimant. In *Lister* v *Romford Ice and Cold Storage Co Ltd* [1957] AC 555, an employee took his employer's lorry to collect some waste, and took his father with him to help. The father was injured as a result of the son's negligence, for which the employer was vicariously liable. The House of Lords held that employees are obliged by their contract of employment to indemnify their employer against any liability which results from the employee's responsibility for damage caused. However, in England, in the interests of good labour relations, no such claim for indemnity would be made against an employee in the absence of deliberate wrongdoing. There was a 'gentleman's agreement' after the outcry about the *Romford* case (in which it was really the employers' insurers and not the employers who pursued the employee) under which liability insurers agreed not to exercise their rights except in certain circumstances.

The employer is, however, insured, and the effect of the rule therefore is that an insurance company is able to recover the amounts it has paid under the insurance policy. The insurance companies have entered into an informal agreement not to exercise the rights recognised in the *Romford* case.

Activities

Activity 13.1

Core comprehension – vicarious liability

Read Chapter 15 'Vicarious liability' Lunney, M., K. Oliphant and D. Nolan *Tort law: text and materials*. (Oxford University Press, 2017) sixth edition [ISBN 9780198745525], which is available on the VLE, and answer the following questions.

a. **Identify the three legal mechanisms which can be used to hold one party liable for the tort of another.**

b. **In which type of legal relationship does the law of vicarious liability predominantly operate?**

c. **Is the employer liable for every act of the employee?**

d. **What is the meaning of the Latin maxim: *'Qui facit per alium facit per se'*?**

e. **In the *Reedie* judgment what is the reasoning given for holding an employer responsible for injury which its employees have caused in the exercise of their employment?**

f. **Identify the main argument which Williams advances as an explanation for vicarious liability.**

g. **What does Atiyah mean when he refers to the principle of loss-distribution?**

h. **Which role do company shareholders play in the principle of loss-distribution when companies would be uncompetitive if they charged higher prices?**

i. **Which argument does Atiyah advance which endorses the principle of vicarious liability?**

Activity 13.2

Applied comprehension – close connection test

Find and read the case of *Mohamud* v *WM Morrison Supermarkets plc* [2016] UKSC 11, then answer the following questions.

a. **Outline the two requirements of establishing vicarious liability in tort as stated by Lord Toulson [1].**

Origins and development of vicarious liability

b. **Identify the four main factors which have driven the development of the doctrine of vicarious liability [10].**

c. **Identify the factor which led to the broadening of vicarious liability in the 17th century and the broad 'Holt principle'.**

The present law

d. **With regard to the 'field of activities', which question does the court consider and what is the court's approach when answering this question?**

e. **With regard to the 'sufficient connection', which principle is applied to determine liability?**

The present case

f. **Why did Mr Khan's foul mouthed response fall within the 'field of activities' of the job he was employed to do?**

g. **Identify two reasons why the Supreme Court reject the argument that Mr Khan's movement from the counter in the retail outlet where he served customers to the petrol station forecourt in front of the retail outlet where he did not serve customers broke the 'sufficient connection' test.**

h. What was Mr Khan's motivation for his conduct and to what extent was his motivation relevant to the judgment?

i. Why does Lord Dyson reject the acknowledged imprecision of the close connection test as a reason to replace it with another test?

j. How does the court address the issue of imprecision in the close connection test?

k. In fewer than 100 words explain which development in the law was central in the recent sexual abuse cases such as the *CCWS* case, which is not present in *Mohamud* v *WM Morrison Supermarkets plc*?

Part IV: Property and reputation

14 Defective premises: pure economic loss

Contents

Introduction

Physical damage to property is a form of damage for which the law of tort will provide compensation. Many cases concerning physical damage arise when the claimant either fails to realise a profit or incurs expenditure arising out of a defect in either a product, land or a building which the claimant has acquired. This chapter examines claims in respect of damage to property to illustrate the importance of distinguishing claims based on damage to property from claims based on a defect in property (which is the concern of contract law).

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **explain the legal significance of distinguishing between claims based on damage to property and claims arising from a defect in property**
- **evaluate the 'complex structure' approach**
- **analyse the leading authorities: *D&F Estates* v *Church Commissioners* (1989), *Anns* v *Merton* (1978) and *Murphy* v *Brentwood* (1990)**
- **explain the position concerning preventative expenditure for a defective structure to avoid damage to persons or property.**

CORE TEXT

- **Giliker, Chapter 3 'Negligence: economic loss', Sections 3-001 to 3-022.**

14.1 Economic loss: acquiring defective property

Subject to other rules on recovery, physical damage to property is a form of damage for which the law of tort will provide compensation. As you will see in the topic of nuisance (Chapter 16), the law will also compensate for so-called amenity damage as a result of interferences in property, such as, for example, diminished enjoyment of a property as a result of unpleasant smells emanating from a neighbouring factory. Where the claim is based on physical damage to property, the proper place to pursue the claim is under the tort of negligence.

It is therefore important in these circumstances to ensure that the claim in respect of the property is one based on **damage** to property and not a **defect** in property. Defective property is the concern of contract law. No claim in tort lies in respect of defective property unless the defect causes damage to other property or to a person or persons.

A line of cases then emerged in which claimants had acquired a house or a flat that had begun to show signs (or would show signs) of physical deterioration, so that the claimants had to spend money putting it right or had to sell it for less than it should have been worth. These cases constitute an important and difficult area of law in respect of which the leading authorities are *D&F Estates* v *Church Commissioners* [1989] AC 177 and *Murphy* v *Brentwood DC* [1991] 1 AC 398.

14.2 Defects and damage

As we have seen in Chapter 6, defective product economic loss is recoverable in contract but such loss is not normally recognised in tort. However, in *Anns* v *Merton LBC* [1978] AC 728 the House of Lords allowed the claim for the recovery of repair costs arising from the defective construction of a building. Here, some years after completion, a block of flats began to develop cracks in the walls. Despite prior approval of the building foundations by the local council, the cracks were caused because the foundations upon which the flats were built were too shallow. In considering the nature of the damages recoverable, Lord Wilberforce said (759):

> In my opinion they may also include damage to the dwelling house itself; for the whole purpose of the byelaws in requiring foundations to be of a certain standard is to prevent damage arising from weakness of the foundations which is certain to endanger the health or safety of occupants… the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement.

In finding that the plaintiffs had suffered 'material physical damage' the defendant council were required to compensate for repair costs needed to avoid a danger to the health and safety of occupants of the building. You will see below in *Murphy* that a seven-member House of Lords found it necessary to overrule its own decision in *Anns* (marking a contraction in the scope of a duty of care in economic loss cases).

In *D&F Estates* v *Church Commissioners*, the defective product consisted of negligently applied plaster. This was laid by specialist subcontractors during the building of a block of flats and, some years later, it became loose and began to flake off. The plaintiffs brought a tort action against the builder, with whom they had no contractual relationship, for the cost of renewing the plaster and the loss of rent while the work took place. The House of Lords regarded this as a case of the construction of an inherently defective building and, until such time as falling plaster caused personal injury or damage to 'other property', like carpets or furniture, there could be no liability in negligence. The mere discovery of a defect in a 'product' (pure economic loss) cannot justify using tort to circumvent the law of contract.

In *D&F Estates* v *Church Commissioners* the House of Lords cast doubt on the decision in *Anns* where Lord Bridge said:

> If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic.

Their Lordships clarified the distinction between situations where:

1. an undiscovered defect materialised and caused personal injury or damage to other property – this loss is recoverable in tort.
2. a defect is discovered before damage has occurred and the building owner needs to incur the cost of remedying the defect to avoid the threat of harm – this loss is pure economic loss and not recoverable in tort.

14.3 Reassertion of contract law

Case law example

Murphy v *Brentwood DC* [1991] 1 AC 398

The approach in *D&F Estates* was subsequently applied in *Murphy*, where the House of Lords ruled that a local authority was not liable in negligence to a building owner or occupier for losses arising from its failure to ensure that the building was designed or erected in accordance with building regulations. In this case the plaintiff had purchased a house which was constructed on a concrete raft foundation over an in-filled site. In 1981 the foundations of the house were found to have subsided causing cracks in the walls which threatened the whole fabric of the property. The concrete raft foundation had subsided and the plaintiff sued the Council who had approved the original construction plans for the house.

The House of Lords made it clear that the cracks in the walls constituted damage to the very property in question; it was not a case of the defective foundations causing damage to 'other property'. The Council was not liable. According to Lord Bridge, to allow recovery for a defect in property would be to introduce into the law of tort a non-contractual remedy as to fitness for purpose. Such guarantees are the province of the law of contract and not tort law. In this case the house had only damaged itself and was therefore merely a defective house which was a bad bargain; unless and until actual physical damage had occurred the cost of making the house safe or any diminution in its value was purely economic loss.

14.4 The 'complex structure'

Judicial speeches in both *D&F Estates* and *Murphy* considered what has been called the 'complex structure theory'. According to this, a building, instead of being seen as a unified structure, might instead be thought of as composed of many smaller components. If one of these malfunctioned and impacted on other parts of the building, this could be regarded as damage to 'other property' and thus potentially recoverable. An example given by Lord Bridge in *Murphy* was that of a faulty central heating boiler exploding and causing damage to the rest of the house. He went on to doubt, however, whether such a boiler could accurately be thought of as part of the structure of the building in the same sense as walls or foundations and concluded that the 'complex structure' approach offered 'no escape' from the *Murphy* principle.

Lord Jauncey put it this way,

> …to apply the complex structure theory to a house so that each part of the entire structure is treated as a separate piece of property is unrealistic. A builder who builds a house from foundations upwards is creating a single integrated unit of which the individual components are interdependent… If the foundations are inadequate the whole house is affected.

14.5 The current position

As the law now stands, preventative expenditure to avoid damage to persons or property is not recoverable in tort.

- The loss in these cases is to be classified as economic loss, even though there has been a physical effect on the building.

- There is a clear distinction between property which is defective and thereby causes damage to people or **other** property (damages recoverable) and property which merely is itself defective and is therefore worth less than it should be (damages not recoverable).
- The existence of the Defective Premises Act 1972 was cited in *Murphy* to support the denial of common law negligence liability for defects in buildings. The Act (s.1) imposes a duty on builders, subcontractors, architects, surveyors and other professionals to ensure that the work taken on is 'done in a workmanlike, or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed'.

Activities

Activity 14.1

Core comprehension – defective premises

This core comprehension activity is situated within your study of the topic of economic loss and defective premises. It should not be attempted before you have completed your Essential reading.

Use the Online Library to find and read the journal article: Markesinis, B.S. and S. Deakin 'The random element of their Lordships' infallible judgment: an economic and comparative analysis of the tort of negligence from *Anns* to *Murphy*' (1992) 55(5) *MLR* 619 (available in JSTOR and HeinOnline and Academic Search Complete). The questions can be answered by reading the 'Introduction' section of the article.

a. **What was the issue addressed in the judgment of *Anns* v *Merton LBC* in 1977?**

b. **Which two aspects of tort law are particularly relevant to the *Anns* judgment?**

c. **Why was the description of loss in *Anns* considered to be a misdescription?**

d. **What is the criticism of the definition of 'complex structures'? State the definition and the criticism.**

e. **Why does the survival of *Hedley Byrne* produce different liability outcomes?**

f. **Why do internal inconsistencies of the common law result in the different liability approaches to builders and surveyors?**

g. **How is the builders' potential liability for the anticipated costs of repairs defined?**

h. **Why is it argued that that the wrong defendant is being targeted?**

Activity 14.2

Applied comprehension – damage to buildings

Find and read the case of *Bellefield Computer Services Ltd* v *E Turner & Sons Ltd* (2000) 2 TCLR 759.

This applied comprehension activity draws on your earlier understanding of concepts of damages as applied to the special liability regime of defective premises. It concentrates in particular on the section entitled: 'The appeal by the dairy owners: damage to the building itself'.

a. **Why did the subsequent owners of the dairy, Bellefield, sue the builders, the Turner company?**

b. **Consider the six heads of damage claimed by the subsequent owners. Can you identify which heads of damage constitute pure economic loss?**

c. **How did the judge in the lower court formulate for which of the damages a duty of care was owed by the builders to the subsequent owners of the dairy, and for which of the damages a duty of care was not owed by the builders?**

d. Why were damages such as 'loss of profit' and 'increased costs of working' a lost cause?

e. In 'The appeal by the dairy owners' section, (i) which crucial fact in this case prevented the duty of care of the builders being extended to include the damage to the building and (ii) why was this important?

f. Why did the appellate court reject the argument of an incremental development of the law as held in *Murphy*, and thus that the 'the dairy should not be regarded as an indivisible building for the purposes of this branch of the law of tort'?

g. Why does the law of tort limit liability for infliction of financial harm?

h. According to Lord Brandon's dissenting speech in *Junior Books Ltd* v *Veitchi Co Ltd* [1982] UKHL 4, which difficulties underpin the policy that prevents recovery in tort against the builder in the case for defects in the building that have caused damage to it?

i. Why did the appellate court hold that the decision of *Murphy* does not leave room for manoeuvre on the facts of this case?

15 Defective premises: occupiers' liability

Contents

Introduction

This chapter deals with the duty owed by occupiers of premises to persons in or on the premises. This is a relationship in which the common law has long recognised a duty of care but the common law duty has now been **replaced** by negligence-type statutory duties in the Occupiers' Liability Acts 1957 and 1984.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **explain which entrants into private premises are lawful visitors and which are not**
- **define who is to be treated as an occupier of premises**
- **demonstrate a detailed knowledge of the duty of care owed by occupiers to lawful visitors under the Occupiers' Liability Act 1957**
- **describe and explain the nature and extent of the occupiers' duty to trespassers under the Occupiers' Liability Act 1984.**

CORE TEXT

- **Giliker, Chapter 8 'Occupiers' liability'.**

15.1 Background

By 1957 the common law regarding occupiers' liability was thought to be unsatisfactory. Some of the rules appeared rigid and complex (different duties were owed to different classes of entrants on the land) and others were considered inappropriate. Parliament enacted the Occupiers' Liability Act 1957, which prescribed the occupiers' duty to their lawful visitors. At that time occupiers owed only a very limited duty to people who were not lawful visitors (usually but slightly inaccurately called trespassers). A common law duty did develop in the years following 1957, but it was in turn replaced by a statutory duty in the Occupiers' Liability Act 1984.

The following introductory points should be noted.

- Lawful visitors are owed the duty set out in the 1957 Act; unlawful visitors are owed the duty set out in the 1984 Act. It is for the claimant to prove that they are a lawful visitor and therefore entitled to the more favourable duties in the earlier Act.
- Both Acts are expressed in very broad and non-technical language, which has given rise to few problems of interpretation. There have been very few cases arising out of the provisions of the Acts.
- Section 1(1) of both Acts provides that the rules in the Act have effect 'in place of the rules of the common law'. In other words, if the facts fall within the scope of the Act there is no room for an alternative common law action in negligence.

The Acts are concerned only with liability to people physically on the premises. However, although a person who suffers harm outside the premises which was caused by something on the defendant's premises will not be able to claim in occupiers' liability, a person outside the premises (such as on the street or in neighbouring property) may have an action in negligence or in the tort of nuisance (Chapter 16) or under the rule in *Rylands* v *Fletcher* (Chapter 17).

15.2 Occupiers' Liability Act 1957: scope of Act

Does the Act apply only to injuries resulting from the state of the premises or does it also apply to injuries resulting from activities on the premises? Injury suffered on the premises which is not caused by the condition of the premises, but, for instance, by a negligently driven car, is said to result from the 'activity' duty. An illustration of how the general law of negligence applies to an activity on the premises is provided in *Slater* v *Clay Cross Co* [1956] 2 QB 264 by Lord Denning:

> If a landowner is driving his car down his private drive and meets someone lawfully walking upon it, then he is under a duty to take reasonable care so as not to injure the walker; and his duty is the same no matter whether it is his gardener coming up with plants, a tradesman delivering goods, a friend coming to tea, or a flag seller seeking a charitable gift.

The modern tendency seems to be to apply the Act only to injuries resulting from the state of the premises. However, the usual view is that the Act applies only to the 'occupancy' duty and the 'activity' duty is covered by common law negligence. In *Ogwo* v *Taylor* [1988] AC 431, a fireman claimed for steam injuries he suffered as he was fighting a fire in a confined space at the defendant's premises. The occupier had put the fireman at risk by carelessly creating a danger on his premises and on this basis the fireman succeeded in common law negligence, rather than occupiers' liability.

15.2.1 What can be occupied? (s.1(3)(a))

Most cases involve the occupation of premises, such as houses, offices, factories, schools and so forth, but the Act also applies to any fixed or movable structure. In *Wheeler* v *Copas* [1981] 3 All ER 405, a ladder was held to come within the definition.

15.2.2 Who is an occupier? (s.1(2))

At common law (and under the statute) occupation is based on control and not necessarily on any title to or property interest in the land: the question is whether the defendant had sufficient control of the premises to be the person responsible for the safety of visitors. The 1957 Act does not define 'occupier' but provides that the rules of the common law shall apply.

In *Wheat* v *E Lacon & Co Ltd* [1966] AC 552 the defendant brewing company were owners of a pub which was run by a manager. The company granted him a licence to use the top floor of the premises for his private accommodation. His wife took in paying guests and one evening as it was getting dark a guest fell down the back staircase in the private portion of the premises and was killed. The handrail on the stairs was too short and did not stretch to the bottom of the staircase and someone had removed the light bulb from the top of the stairs. The House of Lords held that there can be two or more occupiers at any one time if they share control of the premises. Although the grant of a licence to occupy the top floor had been made to the manager the defendants still had sufficient control over the premises to remain occupiers and therefore under a duty of care. On the facts of the case the duty to the deceased had not been broken and the defendants were not liable.

15.2.3 Who is a lawful visitor? (s.1(2))

This is a slightly trickier question. The Act has abolished the distinction between different categories of lawful visitors (see s.2(1)).

The common law distinguished between different types of visitor to the premises. The level of occupiers' liability was set in a descending scale depending on the different duty owed to four different categories of entrant. The highest standard of care was owed to those, such as hotel guests, who were on the land by virtue of a **contract**. A less onerous duty was owed to **invitees:** those who had a mutual business with the occupier, such as a customer in a shop; a still lower duty was owed to mere **licensees**, a category of entrant permitted to enter premises for some purpose of their own but not requested to be on the land by the occupier. These categories are relevant to assist in understanding pre-1957 case law but are otherwise no longer relevant.

As far as 'uninvited' persons not covered by the above categories were concerned, no duty in negligence was owed. In respect of trespassers, the occupiers' obligation was merely to refrain from deliberately or recklessly causing them harm (*Addie* v *Dumbrek* [1929] AC 309).

Note that before 1984 the courts were very willing to use fictional devices in order to treat claimants (especially children) as lawful visitors so that they would have some statutory protection. Thus, if there were alluring things on the land for children to play on, the courts might treat these as in a sense inviting the children on to the land. Again, if an occupier knew that people were in the habit of walking across his land, perhaps as a short cut, and did nothing effective to deter them, he might be treated as having given them a licence to use the land. We shall see below that since 1984 trespassers have had enhanced rights under the Occupiers' Liability Act 1984, and the courts may now be much less willing to use such fictions.

A person who has a common law or statutory right of entry is a lawful visitor (e.g. the police executing warrants of arrest or search) a person who is exercising a public or private right of way is not a visitor to the occupier. A visitor may have permission to enter only until a certain time or only to enter certain parts of the premises† but the occupier must make clear the limits of the permission. Permission may normally be revoked (except in the third situation above), but the visitor must be given a reasonable time to leave.

†In *The Calgarth* [1927] Scrutton LJ said:

> When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters, you invite him to use the staircase in the ordinary way in which it is used.

15.2.4 The nature of the duty

The duty owed by the occupier to a lawful visitor is the 'common duty of care' defined in s.2(2). You should study this duty carefully and notice how closely it corresponds

to the common law duty of care. It is a flexible duty depending on the circumstances including the purposes for which **the visitor** is on the premises. The Act requires that it is the visitor who must be safe in using the premises but this does not necessarily mean that the premises themselves must be reasonably safe.

Case law example

The test as to whether the duty has been fulfilled is a question of fact, and the same factors as those in an ordinary negligence action (the size of the risk and the cost and practicability of taking precautions) are taken into account. The duty of care owed by an occupier to a visitor on his premises under s.2(2) of the Occupiers' Liability Act 1957 was considered in *Cole* v *Davis-Gilbert* [2007] EWCA Civ 396. The claimant suffered a leg injury when she stepped into a hole on a village green which had been inserted during the village fete to accommodate a maypole. The Court of Appeal said that there was a danger in setting too high a standard of care as it could lead to inhibiting consequences, namely the reduction in or prohibition of traditional activities on village greens. Scott Baker LJ pointed out: 'Accidents happen, and sometimes they are what can be described as pure accidents in the sense that the victim cannot recover damages for the resulting injury because fault cannot be established.'

Section 2(2) was also considered in *Sutton* v *Syston Rugby Football Club Ltd* [2011] EWCA Civ 1182 where a player gashed his knee on a plastic object submerged in the rugby pitch. The trial judge rejected the suggestion that a quick walk-over inspection of the rugby pitch was sufficient to discharge a club's duty to take such care as was reasonable. The club's appeal against a finding of liability was allowed. The Court of Appeal held that a 'reasonable walk over of the pitch' was sufficient and further noted that games of rugby are no more than games and desirable activities within the meaning of s.1 of the Compensation Act 2006.

In W*hite Lion Hotel* v *James* [2021] EWCA Civ 31 a guest fell to his death from the window of his hotel room, which was lower than regulation height and had a faulty sash. There had been no formal risk assessment by the defendants and the cost of preventative measures would have been negligible. (Installing protective bars on the window would have cost £6–7). A breach of the common duty of care was confirmed by the Court of Appeal but with a finding of 60 per cent contributory negligence.

Examples of relevant circumstances are given in subss.2(3) and (4), discussed below, but these are indeed only examples. Thus, although the Act mentions the special position of children, other visitors such as the elderly or disabled (not specially mentioned in the Act) might also raise similar problems for the occupier.

15.2.5 Children (s.2(3)(a))

An occupier should be prepared for children to be less careful than adults. They may be more adventurous and may not understand the nature of certain risks. The occupier does not, however, have to guarantee that the premises will be safe, but only has to take reasonable care. If the child's parents are present, they must share some responsibility, and, even if they are not present, it may be relevant to the occupier's duty that they thought it prudent to allow their child to be where he was.

Case law example

In *Glasgow Corporation* v *Taylor* [1922] 1 AC 44 the defendants were liable when a seven-year-old child died from eating poisonous berries which he had picked from a shrub in a public park. The berries looked like cherries or large blackcurrants and were found to act as an 'allurement' to children. It was alleged that the local authority knew of the poisonous nature of the berries but the shrub was not fenced nor was any warning of the danger given.

In *Phipps* v *Rochester Corporation* [1955] 1 QB 450 (a pre-Act case), a boy aged five and his sister aged seven walked across a large open space which was being developed by

the defendants. It was known to the defendants that people crossed their land but they apparently took no action. The child fell into a trench that had been dug in the middle of the open space and broke his leg. Although the trench would not have been obvious to a child the defendants were not liable. Devlin J placed the responsibility for small children primarily on their parents and concluded that both the parents and the occupier must act reasonably. This reasoning was followed in *Simkiss* v *Rhondda Borough Council* (1983) 81 LGR 460 where a seven-year-old girl fell off a steep slope which was situated opposite the block of flats where she lived. Her father stated in evidence that he had not considered the slope to be dangerous and the Court of Appeal concluded that if the child's father did not consider the area dangerous, the defendants could not be asked to achieve a higher standard of care. In *Bourne Leisure Ltd* v *Marsden* [2009] EWCA Civ 671 the question was whether a holiday site owner was liable for the drowning of a child in a pond, by failing to highlight the dangers and bring the pond's location or the existence of an access pathway to the parent's attention. The trial judge found that by failing to give warnings of that nature to the parents the site owner was in breach of their common duty of care. However, in allowing Bourne Leisure's appeal, the Court of Appeal held that although an occupier ought reasonably to anticipate that small children might escape the attention of parents and wander into places of danger, it does not follow that the occupier is under a duty to make the premises completely safe for children. In this case the problem with attaching blame in cases involving young children was noted by Lord Justice Moses who said that accidents may and do happen to young children without anyone being at fault.

Case law example

In *Jolley* v *Sutton London Borough Council* [2000] 1 WLR 1082 (see also Chapter 10) a derelict boat, which was left abandoned for at least two years beside a block of flats on the council's land, was found to have constituted an allurement and a trap, but these were not the causes of the accident. The immediate cause was that the plaintiff, a 14-year-old boy, and a friend decided to repair the boat, using a car jack and some wood to prop it up. While the boys were working on the boat it fell off the prop, crushing the plaintiff, who suffered serious spinal injuries resulting in paraplegia with major complications. The Court of Appeal allowed the council's appeal against the trial judge's finding of liability on the ground that although it was reasonably foreseeable that children would play on the boat and be injured, it was not foreseeable that they would prop up the boat and be injured by its falling off the prop, and therefore the plaintiff's accident was of a different kind from anything the council could reasonably have foreseen.

However, the House of Lords approached the question of what risk was foreseeable in the case of children in much more generous terms. In finding that the trial judge had been correct to consider the reasonable forseeability of the wider risk that children would meddle with a dilapidated boat and be at risk of physical injury, Lord Hoffmann noted (1093):

> it has been repeatedly said in cases about children that their ingenuity in finding unexpected ways of doing mischief to themselves and others should never be underestimated. For these reasons, I think that the judge's broad description of the risk as being that children would 'meddle with the boat at the risk of some physical injury' was the correct one to adopt on the facts of this case. The actual injury fell within that description and I would therefore allow the appeal.

Notice that the rule that an occupier should be prepared for children to be less careful than adults is not a mechanical rule to be applied every time the claimant happens to be a child. It is helpful in situations where the fact that the claimant was a child made it more likely that there would be an injury (because the child was of small stature or did not appreciate the risk) and the occupier should have guarded against this in some way.

15.2.6 Trade visitors (s.2(3)(b))

A visitor in the exercise of his calling will appreciate and guard against any special risks ordinarily incident to it. The situation that this subsection envisages is that an occupier who calls in, for example, a representative of the gas supply company to investigate a smell of gas can assume that the representative will know how to protect himself against the danger. See the discussion in *Roles* v *Nathan* [1963] 1 WLR 1117 where two chimney sweeps were called to clean an old coke-burning boiler. They were warned by an expert that the sweep-hole and inspection chamber should be sealed before the boiler was lit. They disregarded the warning and died when they were overcome by the fumes. The occupier was not liable because: (1) his duty had been discharged by warning the sweeps of the particular risks, and (2) he could reasonably expect a specialist to appreciate and guard against the dangers arising from the very defect that he had been called to deal with. Lord Denning said:

> If it had been a different danger, as for instance if the stairs leading to the cellar gave way, the occupier might no doubt be responsible.

This does not mean that the occupier is immune from liability: presumably the occupier must accurately explain the nature of the problem.

15.2.7 Warnings (s.2(4)(a))

This subsection has to be considered carefully. It deals with the situation where the occupier has given the visitor a warning of some danger on the premises (e.g. 'Loose carpet'; 'Slippery floor') (see again *Roles* v *Nathan* above). The important thing is to understand that the occupier who gives a warning is attempting to perform or to discharge their duty of care: they are not attempting to exclude their liability. If something slippery has been spilt on the floor of a shop, the occupier can (1) close the shop, (2) clean up the spillage or (3) give a warning so that the visitor can avoid the spot or step carefully. The question is whether the warning is enough to enable the visitor to be reasonably safe. Warnings may seek to disclaim responsibility – 'Persons enter at their own risk. The occupier accepts no liability for injury to persons using these premises.'

The claim in *Edwards* v *London Borough of Sutton* [2016] EWCA Civ 1005 concerned a duty to warn of obvious dangers. The claimant's bicycle pulled him off balance and caused him to fall over the side of a small ornamental footbridge bordered by low parapets. He sustained severe injuries in the fall and claimed that the defendant should have: installed side protection barriers to the bridge; warned of the dangers posed by the low sides of the bridge; and carried out a sufficient risk assessment of risk presented by the bridge to pedestrians. The trial judge found that in these circumstances the Borough was liable to the claimant (subject to a finding of 40 per cent contributory negligence). The Borough appealed, arguing that there was no inherent danger pertaining to the bridge that could give rise to a duty of care under the 1957 Act and there was no duty to warn of the obvious danger. The bridge had been there for many years (perhaps since the 1860s) and there was no record of any accident occurring from its use. In a unanimous decision, the Court of Appeal allowed the Borough's appeal on the ground that it had reached the requisite standard of care even though it did nothing in respect of the objectively dangerous state of the footbridge.

Although adult visitors do not require warnings of obvious risk, where a risk is not obvious, a defendant will be in breach of the duty under s.2 for failure to provide a warning. In *English Heritage* v *Taylor* [2016] EWCA Civ 448 the claimant was walking around an English Heritage historic site when he fell down an unmarked sheer drop into a moat. He sustained serious head injuries. In dismissing the defendant's appeal against liability, the Court of Appeal held that in this case the danger was not obvious and there had been no warning sign. A sign warning of the sheer drop would have been likely to influence the behaviour of most sensible individuals.

An important distinction between a warning notice and an exclusion of liability notice is that an exclusion notice is subject to the Unfair Contract Terms Act 1977. According to s.2, where the premises are occupied for the business purposes of the occupier any contract term or notice purporting to exclude or restrict liability for death or personal injury resulting from breach of the 1957 Act is invalid under UCTA 1977. In the case of loss or other damage to property, an occupier cannot exclude liability unless the term satisfies the test of reasonableness. The Consumer Rights Act 2015 applies where the visitor is a 'consumer' (someone who is acting for purposes that are wholly or mainly outside that person's trade, business, craft or profession) and the occupier is a 'trader' (a person or company acting for purposes relating to its trade, business craft or profession). In addition to the restriction excluding liability for death or personal injury, the Consumer Rights Act 2015 (s.62) provides that the test for exclusion of liability loss or other damage to property is one of 'fairness' (not one of 'reasonableness' as under UCTA).

15.2.8 Independent contractors (s.2(4)(b))

This needs careful consideration as well. It deals with the situation where the occupier has called in independent contractors, such as electricians to rewire a house or builders to erect an extension, and the injury is due to the faulty execution of 'any work of construction, maintenance or repair' (words that have been given a flexible interpretation – see *AMF International* v *Magnet Bowling* [1968] 1 WLR 1028). This too is a flexible provision. A substantial occupier, such as a university, would normally have a maintenance department that would be able to supervise outside contractors, but a domestic householder would have to trust a competent electrician to do a good job. An occupier might discharge the duty in such a situation by selecting the contractor carefully (e.g. checking that they belong to a professional organisation and not just giving the job to someone who called at the door or placed a small ad in the local newspaper).

In *Haseldine* v *CA Daw & Son Ltd* [1941] 2 KB 343, the defendant was not liable for the plaintiff's injuries when the lift in a block of flats fell to the bottom of its shaft. The accident happened as a result of the negligence of a firm of independent contractors who the defendant had employed to repair the lift. The defendant had discharged his duty by employing a competent firm of engineers to make periodical inspections of the lift. Having no technical skills meant that he could not be expected to check that the work had been satisfactorily done. This case was distinguished in *Woodward* v *Mayor of Hastings* [1945] KB 174, where a child slipped on an icy step at school and was injured. The step had been left in a dangerous condition by a cleaner, and even assuming that the cleaner was an independent contractor, the defendants were liable since there was no technical knowledge required to check the cleaning of a step.

Ferguson v *Welsh* [1987] 3 All ER 777 features a discussion of this subsection. This case concerned a tender awarded by a district council for the demolition of a building, which stipulated that the work must not be subcontracted without the council's consent. The plaintiff was the employee of a subcontractor who had been carrying out the work without the council's consent and who suffered serious injury as a result of the subcontractor's unsafe system of work. When it was discovered that neither the main contractor nor the subcontractor were covered by insurance, the employee sued the local authority as occupiers of the premises. The House of Lords found that the district council was not liable. It would not ordinarily be reasonable to expect an occupier, having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duties to his employees to observe a safe system of work.

Case law example

The Court of Appeal has ruled that it is just, fair and reasonable to impose liability on an occupier who allows an extra-hazardous activity to take place on their land without taking ordinary precautions to ensure that the independent contractor has public liability insurance and a proper safety plan. In *Bottomley* v *Todmorden Cricket Club* [2003] EWCA Civ 1575, the defendant club had allowed an independent contractor to carry out a pyrotechnic display on its land. The club was liable for

the personal injuries of the claimant (a voluntary and unpaid assistant of the independent contractor) who suffered severe burns and other injuries during the display. The Court of Appeal held that although the case was not about a risk caused by the state of the premises under the Occupiers' Liability Act 1957, the club was liable, along with the contractors (who had no public liability insurance), in common law negligence because of its failure to engage a competent contractor.

However, the extent to which an occupier is under a duty to check if the independent contractor is adequately insured was considered in *Gwilliam* v *West Hertfordshire Hospitals NHS Trust* [2002] EWCA Civ 1041, [2003] QB 443. As part of a fundraising event, the defendant hospital engaged an independent contractor to supply and operate a 'splat wall' for visitors bouncing from a trampoline. When the claimant was injured it was discovered that the contractor's public liability insurance had expired a few days before the event. The Court of Appeal held that the occupier owed a duty to take reasonable care to ensure that the claimant was reasonably safe and to take steps to ensure that an independent contractor, who was to supply potentially hazardous equipment, was adequately insured (on the facts of the case the defendant hospital had not breached its duty under s.2(4)(b)). It is interesing to compare the reasoning of the different judges in *Gwilliam*.

15.2.9 Defences

- Contributory negligence on the part of the visitor.
- *Volenti non fit injuria*. This is expressly referred to in s.2(5).
- Exclusion of liability. At common law (*Ashdown* v *Samuel Williams* [1957] 1 QB 409) and by s.2(1) of the 1957 Act the occupier was allowed to exclude his liability by contract or by notice 'in so far as he is free to do so'. The occupier may therefore display a notice, saying 'Enter at your own risk'. It is very important to distinguish the intention of such a notice from a notice warning of a danger (s.2(4)(a)), discussed above, and it is a very common error to confuse the two. A warning notice is an attempt to perform the duty: an exclusion clause is designed to protect the occupier against claims for breach of the duty.

The occupier is, however, restricted in his ability to exclude his liability in a number of ways.

- On ordinary principles the notice must be clear (both in the sense of legibility and in the sense of its intended scope) and reasonably drawn to the visitor's attention before entry. See also *White* v *Blackmore* [1972] 2 QB 561.
- The notice cannot exclude liability to those required and permitted by law to enter and who are therefore not free to stay off the occupier's land; they would be obliged to run the risk of injury for which there will be no compensation.
- It has been suggested, though never decided, that the occupier's duty cannot be reduced below the level of the duty owed to a trespasser. It would be surprising if the occupier could owe a higher duty to a person who had been forbidden to enter the property than to a person who had permission subject to an exclusion of liability clause.
- The main limitations on the right to exclude liability are now the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.

15.3 Occupiers' Liability Act 1984

The common law originally took a harsh view of the rights of those who were not lawfully on the land. (These persons are usually referred to as trespassers, but the category is wider than those who commit the tort of trespass to land: it includes those involuntarily on the land.) For an example of the old rule, see *Addie* v *Dumbreck* [1929] AC 358.

Various attempts were made to reform the law by judicial decisions. The most important was the decision of the House of Lords in *British Railways Board* v *Herrington* [1972] AC 877, which imposed on occupiers a 'duty to act with common humanity' towards trespassers. In this case the six-year-old plaintiff was badly burned when he was trespassing on the defendants' land. The child had obtained access to the land through a gap in a chain link fence which had been trodden down. The defendants knew that in the past children had been seen on the line, but they took no action. Although the plaintiff was a trespasser he was allowed to recover in negligence: a trespasser is owed a lower duty of care, but nevertheless an occupier does owe a duty to act humanely.

This case has now been replaced by the Occupiers' Liability Act 1984, but may still be relevant in cases that fall outside the scope of the Act (e.g. where the visitor has suffered property damage (or the loss is due to the claimant's activity as in *Revill* v *Newbery* [1996] QB 567 and *Keown* v *Coventry Healthcare NHS Trust* [2006] EWCA Civ 39).

The 1984 Act in many ways follows the pattern of the 1957 Act (e.g. as to who is an occupier and the kind of premises covered by the Act: s.1(2)). Instead, the structure of the liability is as follows:

- there has to be a danger on the premises (s.1(1))
- a duty **only arises** if three separate conditions are satisfied (s.1(3))
- the content of the duty is set out at s.1(4)).

According to s.1(3) of the 1984 Act, the duty is owed by the occupier when:

a. he is aware of the danger or has reasonable grounds to believe that it exists;

b. he knows or has reasonable grounds to believe that the [non-visitor] is in the vicinity of the danger concerned or that he may come into the vicinity of the danger…and;

c. the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the [non-visitor] some protection.

If the conditions of s.1(3) are satisfied, then the nature of the duty is stated in s.1(4):

> …the duty is to take such care as is reasonable in all the circumstances of the case to see that the non-visitor does not suffer injury on the premises by reason of the danger concerned.

It should also be noted that, like the 1957 Act, the occupier's duty may be discharged by a suitable warning (s.1(5)) however unlike the 1957 Act, it is not required that the warning 'be such as to enable [the entrant] in all the circumstances to be reasonably safe' but only that reasonable steps have been taken to draw the danger to the entrant's attention. It is also a defence that the visitor willingly accepted the risk (s.1(6)).

The most important cases on the effect of the 1984 Act are:

- *Ratcliffe* v *McConnell* [1999] 1 WLR 670 where *volenti non fit injuria* was considered in determining if a duty of care existed in the case of a 19-year-old student who, having drunk about four pints of alcoholic drink, climbed over the gate of a college open-air swimming pool at about 02.30. Although conscious of the word 'Warning', the plaintiff did not read the notice by the gate. He got undressed and took a running dive into the pool either at the point where the shallow end started or at the slope from the deep to the shallow end. He hit the top of his head on the bottom, suffering tetraplegic injuries. The Court of Appeal held that the occupiers owed no duty under s.1 of the Occupiers' Liability Act 1984. Knowing that the pool was closed for the winter, that it was dangerous to dive into water of unknown depth and that the water level of the pool was low, the plaintiff had willingly accepted the risk as his within the meaning of s.1(6).

- *Donoghue* v *Folkestone Properties Ltd* [2003] EWCA Civ 231, [2003] 2 WLR 1138.
- *Tomlinson* v *Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46.

The general principles are best examined through *Tomlinson*, which also makes reference to its predecessors. Among the issues that should be considered in studying that case are these:

- Tomlinson had originally entered the premises (a park) lawfully, but had then thrown himself forward into a pool where swimming was forbidden. He was treated as a trespasser, but some of the judges were uneasy about this. Why?
- There is an extensive analysis of the requirements in s.1(1), (3) and (4) of the 1984 Act.
- There was an extensive discussion of the policy arguments that led the House of Lords to reject Tomlinson's claim, including the likely social consequences of imposing a duty on a local council (considered in Chapter 1). You should compare this case with others that have also raised the question of how far the law should impose on others (particularly public bodies) an obligation to protect people against their own folly.

In summary, those in control of premises (occupiers) owe a common duty of care under the Occupiers' Liability Act 1957 to lawful visitors. This is a flexible duty varying according to the circumstances, some of which are given in the statute as examples. Occupiers owe a different and less stringent duty to unlawful visitors under the Occupiers' Liability Act 1984.

Activities

Activity 15.1

Core comprehension – visitor and trespasser

Find and read the case of *Tomlinson* v *Congleton Borough Council* [2003] UKHL 47 and answer the following questions. This activity requires you to read [1]–[16] of the *Tomlinson* judgment. It consolidates your understanding of the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984 and improves your ability to understand the implications on the duty of care owed by occupiers of land to visitors and trespassers.

The accident

a. **What do the facts of the case tell us about the age of Mr Tomlinson, the place where the accident occurred and who owned the land, how he injured himself and the extent of his injuries?**

Occupiers' liability and visitor or trespasser

b. **At common law to whom did the occupiers owe a duty of care?**

c. **What change did the 1957 Occupiers' Liability Act bring to the common law approach in this respect?**

d. **How is the duty of care of the occupier to visitors defined by statute?**

e. **Under which circumstances may the degree of care expected from the occupier vary?**

f. **Name three factors which will warrant closer scrutiny by the court to determine whether the occupier has discharged its duty according to the circumstances of the individual case.**

g. **Why did the 1957 Act not apply to Mr Tomlinson's situation? Which Act did apply?**

h. **Under which circumstances may the occupier owe a trespasser a duty of care?**

i. **Outline the scope of duty owed by occupiers to trespassers.**

j. **What were the policy reasons behind making the duty owed to trespassers under the 1984 Act a lesser duty, as to both incident and scope, than the duty to a lawful visitor under the 1957 Act?**

k. **Which duty arises more frequently – the duty to visitors under the 1957 Act or the duty to trespassers under the 1984 Act? Why?**

Activity 15.2

Applied comprehension

In the online library find and read Amirthalingam, K. 'Occupiers' liability in England: time for some housecleaning?' (2017) *PN* 46. Answer the following questions.

a. **How did the Court of Appeal in *English Heritage* reconcile apparent inconsistencies in the decision of the recorder at first instance?**

b. **What was the effect of the decision in *Tomlinson* upon the appeal in *Edwards*?**

c. **In the author's opinion, what is the difference between the 1957 and 1984 Acts regarding the 'obvious danger'?**

d. **Applying your understanding of the two Acts, what is the key difference on the issue of duty of care between s.1 of the 1957 Act and s.1 of the 1984 Act?**

e. **In your own words explain the author's conclusion regarding the relative merits of the statutes compared to the common law.**

Sample examination questions

Question 1

Luke is the owner of the Methuselah Arms Hotel. The hotel is very popular with elderly holidaymakers and is advertised as especially suitable for them. Mr and Mrs Jackson booked in for a holiday. The receptionist told them that there was a programme of redecoration under way in the hotel. The Jacksons are both in their late eighties. Mr Jackson is in good health, but Mrs Jackson suffers from the early stages of Alzheimer's disease. After lunch one day Mrs Jackson decided that she would stay in her room for a rest. Mr Jackson left her and went to the residents' lounge. Mrs Jackson woke up and could not remember where she was. She left her room, walked along a corridor and through a door marked: 'Private. Staff Only. Residents not admitted.' She opened a door to a room that was being redecorated. She fell over the rolled-up carpet, broke her leg and smashed her valuable watch. Two members of staff found her, and one of them, Nina, ran down to the lounge. Mr Jackson was asleep in a chair. Nina shook his shoulder and told him that his wife appeared to be unconscious after a bad fall. Mr Jackson jumped up suddenly out of his chair. As a result he turned dizzy and fell down, cutting his face very badly.

Advise the Jacksons.

Question 2

Penny is a student at the Gradgrind University College. The College holds a dance and party. All the publicity for the party states that it is open only to staff and students and that they should have their College identity cards with them. Penny goes to the party and takes her 12-year-old brother, Frank, with her. Frank is very tall for his age and is not challenged by the College porters when he arrives. Mark's joinery firm has been carrying out minor repair work at the College, and there are several prominent notices displayed, stating: 'Caution. Repair work in progress.' During the evening Frank goes to the lavatory. The bulb has been missing from the light outside the lavatory for several days. Frank runs out of the lavatory and along the corridor. He trips in the semi-darkness and lands on a chisel that has been left leaning against a wall by one of Mark's employees. Frank's hand is severely injured and his mobile phone is smashed.

Advise Frank.

Advice on answering the questions

Question 1

Consider the two claimants separately. Mrs J was injured by state of premises and so the Occupiers' Liability Acts should be considered, but her case can be argued in different ways (compare the problem of analysis in Tomlinson). She was originally a lawful visitor. Can you argue breach of common duty of care to her, since the hotel knew she was elderly and frail and encouraged such visitors? Was there a breach of duty to her that enabled her to wander into danger? Could the hotel argue that Mr J should not have left her on her own (cf. Phipps in relation to children)? Alternatively Mrs J is a trespasser when she goes through the door: apply the 1984 Act. Either way, can the hotel excuse themselves by saying it was the fault of the contractors (if not hotel employees)? Consider a separate claim against the decorators (if they are not hotel employees) either under the Acts if they have sufficient control of the premises to be 'occupiers' or at common law. A claim for the broken watch may be possible under the 1957 Act, but there are problems with property damage if she is a trespasser. Mr J's claim is unlikely to be under the Acts as it is not concerned with state of premises. Was Nina negligent in passing on the bad news about his wife in the way she did – was it foreseeable that he would try to jump up suddenly? This is NOT however a question of psychiatric injury. Is there a possible battery claim against Nina, but might there be implied consent or some other defence?

Question 2

Frank's status is the first problem. Is he a lawful visitor or trespasser? Publicity had made it clear that only students were allowed, but door staff let him in. However, even if he is a trespasser, the occupiers (through their staff) clearly knew that he was in the building and exactly the same could have happened if he had been a student, so there might be a breach of the 1984 Act as they knew (?) about the light bulb. Can the college escape liability by pointing to Mark as contractor? Could there be a separate claim against Mark? Was there possible contributory negligence by Frank running in darkness? Note the problem of property damage.

16 The law of nuisance

Contents

Introduction

There are two common law torts with the word 'nuisance' in their name. The two forms of nuisance are quite distinct torts and must be considered separately.

The first is private nuisance, which deals with indirect interferences affecting the use and enjoyment of land, such as excessive noise and the emission of smells or noxious fumes. It is essentially a remedy for landowners in respect of indirect harm affecting their property. The second is public nuisance.

Public nuisance has a wider application. It is essentially a form of criminal liability arising from a wide range of antisocial activities but individual tort actions are limited to claimants who have experienced special damage above and beyond that suffered by the rest of the public.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **explain the difference between various forms of nuisance and when each form is applicable**
- **apply the rule relating to the tort of private nuisance and, in particular, be able to identify:**
  - **who can sue**
  - **when a court is likely to find liability**
  - **what defences exist**
  - **what remedies exist**
- **outline the basic rules of the tort of public nuisance**
- **understand the potential for overlap between nuisance and the torts of *Rylands* v *Fletcher* and negligence**
- **identify the influence of the Human Rights Act 1998 on this area of tort.**

CORE TEXT

- **Giliker, Chapter 10 'Nuisance and the rule in *Rylands* v *Fletcher*'.**

16.1 The different forms of nuisance

It is important to ascertain exactly when the torts of nuisance will arise and how a court might be expected to deal with them. This will involve considerations of liability (should the court intervene?) and remedies (if so, how?). In particular, torts protecting rights to land, private nuisance and public nuisance raise fundamental questions concerning how we, as a society, live together. So to what extent should householders have the freedom to do what they want in their own property? How far should their liberty be restrained by their neighbours? In seeking to balance the interests of all parties, the courts must make difficult decisions which directly affect the quality of people's lives.

There are three main types of nuisance which should be distinguished:

- private nuisance
- public nuisance
- statutory nuisances.

Statutory nuisance is beyond the scope of this course. The Environmental Protection Act 1990 Part III enables local authorities to enforce regulation of environmental matters such as pollution and waste disposal. You should note that public enforcement, whether civil or criminal, is much more common than a civil action.

It is important that you obtain a clear understanding of private nuisance, and, to a lesser extent, the basic principles of public nuisance.

16.1.1 Basic definitions

Private nuisance

Winfield and Jolowicz define private nuisance as an 'unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it' (Goudcamp, J. and D. Nolan *Winfield and Jolowicz on tort.* (London: Sweet & Maxwell, 2020) 20th edition [ISBN 9780414066250]).

Public nuisance

Public nuisance, in contrast, is both a crime and a tort. It is defined by Romer LJ in *Attorney-General* v *PYA Quarries Ltd* [1957] 2 QB 169 at p.184:

> any nuisance is 'public' which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as 'the neighbourhood'; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case.

Although the courts frequently draw comparisons between private and public nuisance, they are in reality very different torts, which seek to protect different interests and have little in common apart from their name. Private nuisance will be relevant where the claimant suffers interference with the use of their **land**. Public nuisance has a different concern. This is usually a disturbance which affects the public in general and the claimant in particular. It is important to ascertain (1) what kind of nuisance is applicable; (2) whether liability arises; and (3) if not, whether there are any other relevant torts, for example negligence.

16.2 Private nuisance

Three types of private nuisance can arise in practice:

1. physical injury to land (for example, by flooding or noxious fumes)
2. substantial interference with the enjoyment of the land (for example smells, dust and noise)

3. encroachment on a neighbour's land, for example, by spreading roots or overhanging branches, which is of minor significance.

All three forms seek to protect the claimant's use and enjoyment of land from an activity or state of affairs for which the defendant is responsible.

Case law example

In *Davey* v *Harrow Corporation* [1958] 1 QB 60, roots of trees which were growing on the defendant corporation's property had penetrated the land of the plaintiff's adjoining property. This encroachment caused damage to the plaintiff's house. In the Court of Appeal Lord Goddard said: '... if trees encroach, whether by branches or roots, and cause damage, an action for nuisance will lie...' No distinction is to be drawn between trees which may have been self-sown and trees which were deliberately planted on land.

16.2.1 Who can sue?

This is fundamental both in understanding the operation of the tort of private nuisance and in ascertaining who has a cause of action in any given case. As we know already, the tort of private nuisance protects claimants against interference with the use or enjoyment of their land. In other words, it protects their rights in their land. It is hardly surprising, therefore, that only those with rights in the land, namely an interest in land or exclusive possession, will be able to sue: see *Malone* v *Laskey* [1907] 2 KB 141 and the House of Lords in *Hunter* v *Canary Wharf Ltd* [1997] AC 655.

In *Khorasandjian* v *Bush* [1993] 3 All ER 669 the Court of Appeal held that the plaintiff, who lived with her mother and had no proprietary interest in the property, was entitled to an injunction to restrain a private nuisance in the form of telephone harassment. Dillon LJ said:

> To my mind, it is ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or a leasehold proprietary interest in the premises in which he or she has received the calls.

However, in *Hunter* the majority in the House of Lords overruled this decision and put beyond doubt the principle that a propriety interest in land is required to found an action in private nuisance.

Nevertheless, as you will see below, it has been questioned whether the exclusion of family members living in the home is consistent with Article 8 of the European Convention on Human Rights (see Section 16.4).

16.2.2 What amounts to a private nuisance?

There is no better definition that that of Lord Wright in *Sedleigh-Denfield* v *O'Callaghan* [1940] AC 880 at p.903:

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society. The forms which nuisance may take are protean.† Certain classifications are possible, but many reported cases are no more than illustrations of particular matters of fact which have been held to be nuisances.

†**Protean** = varied.

The test is one of 'reasonable user', balancing the interest of defendants to use their land as is legally permitted against the conflicting interest of claimants to have quiet enjoyment of their land. Such a balancing exercise places a considerable amount of discretion on the judge. It is impossible to establish a legal rule as to what is a reasonable use of one's land. As Lord Wright suggests, the most that can be done is to use common sense and obtain guidance from the many reported cases in this field. It should be noted, however, that the ordinary use of your home will not amount

to a nuisance, even if it discomforts your neighbour due to poor soundproofing or insulation. In *Baxter* v *Camden LBC (No 2)* [2001] QB 1, a tenant of a flat complained of the noise created by her immediate neighbours, also tenants of the defendant. The day-to-day noise of the tenants was made worse because the property had been converted into flats without proper sound insulation. The Court of Appeal dismissed the claim in nuisance on the ground that occupants of low-cost, high-density housing must be expected to tolerate higher levels of noise from their neighbours than others in more substantial and spacious premises.

The test is **not** of reasonable care. It is no defence to prove that the defendant had taken all reasonable care to prevent the nuisance occurring. The court will look at the **result** of the defendant's conduct (i.e. the impact upon the claimant).

16.2.3 Factors determining reasonable use

Damage to property or personal discomfort

The courts are more willing to find a nuisance where physical damage to property has been caused, and tend to ignore factors such as the nature of the locality (discussed below). Personal discomfort will normally have to be substantial to merit a response: see *Walter* v *Selfe* (1851) and *St Helen's Smelting Co* v *Tipping* (1865) below.

The nature of the locality

Thesiger LJ stated classically in *Sturges* v *Bridgman* (1879): 'What would be a nuisance in Belgrave Square[†] would not necessarily be so in Bermondsey'. This means that the nuisance will be judged according to the area in which it occurs. For example, emission of smoke from a factory will not be considered a nuisance in an industrial estate, but would be likely to be found to be a nuisance in a largely residential area. Planning permission is not enough by itself to change the nature of the locality, although this may occur as a matter of fact due to investment in the area. In *Gillingham Borough Council* v *Medway (Chatham Docks) Co Ltd* [1993] QB 343 planning permission to develop a commercial dock was held to have changed the character of the neighbourhood and the local residents were therefore unable to claim in nuisance for the disturbance it created. However, in *Wheeler* v *JJ Saunders Ltd* [1996] Ch 19 it was held that the granting of planning permission to facilitate an activity on a site already used for that purpose does not carry with it an immunity in nuisance in respect of implementation of that planning permission.

[†]Belgrave Square is an upper class residential area in Central London.

The defendants in *Wheeler* had obtained planning permission for two pig-weaning houses on a site already used for that purpose. In response to the plaintiff's claim in nuisance the defendants contended that, since they had obtained planning permission, any smell emanating from the pigs kept in the weaning houses could not amount to a nuisance. Here, the Court of Appeal found the defendants liable. Staughton LJ said:

> It would in my opinion be a misuse of language to describe what has happened in the present case as a change in the character of the neighbourhood. It is a change of use of a very small piece of land, a little over 350 square metres according to the dimensions on the plan, for the benefit of the applicant and to the detriment of the objectors in the quiet enjoyment of their house. It is not a strategic planning decision affected by considerations of public interest. Unless one is prepared to accept that any planning decision authorises any nuisance which must inevitably come from it, the argument that the nuisance was authorised by planning permission in this case must fail.

Coventry v *Lawrence* [2014] UKSC 13 concerned an alleged noise nuisance arising from a motor sports stadium for which planning permission had been granted. In this case the Supreme Court reviewed the law of nuisance and considered:

- the relationship between planning control and the tort of nuisance
- the right by **prescription** to commit a nuisance and the argument that the claimant '**came to the nuisance**' (both considered below).

The Supreme Court reviewed the extent to which a grant of planning permission might change the character of a neighbourhood and considered the approach to be adopted by a court when deciding whether to grant an injunction to restrain a nuisance or whether to award damages instead.

The Court held that the mere fact that the activity which is said to give rise to the nuisance has the benefit of a planning permission is normally of no assistance to the defendant. Lord Neuberger said at [95]:

> A planning authority has to consider the effect of a proposed development on occupiers of neighbouring land, but that is merely one of the factors which has to be taken into account. The planning authority can be expected to balance various competing interests, which will often be multifarious in nature, as best it can in the overall public interest, bearing in mind relevant planning guidelines. Some of those factors, such as many political and economic considerations which properly may play a part in the thinking of the members of a planning authority, would play no part in the assessment of whether a particular activity constitutes a nuisance—unless the law of nuisance is to be changed fairly radically.

Duration and frequency

This is a matter of common sense. The longer and more frequent the interference, the more likely it will be found to be a nuisance: see *De Keyser's Royal Hotel Ltd* v *Spicer Bros Ltd* (1914) and *Crown River Cruises Ltd* v *Kimbolton Fireworks Ltd* [1996] 2 Lloyd's Rep 533. This does not necessarily exclude an isolated escape of sufficient gravity – see *SCM (United Kingdom) Ltd* v *WJ Whittal & Son Ltd* [1971] 1 QB 337 – but in such cases the claimant is more likely to sue under the rule in *Rylands* v *Fletcher* (see Chapter 17).

Utility of the defendant's conduct

This is not an important consideration. Private nuisance is concerned with the **results** of the defendant's conduct on the **claimant** and not on the community as a whole. It may, however, influence the court in exercising its equitable jurisdiction whether to grant an injunction.

Case law example

In *Miller* v *Jackson* [1977] QB 966 the plaintiffs bought a house in 1972 in such a location that it was inevitable that cricket balls from a cricket ground nearby would be hit into the garden. Cricket had been played on the ground since 1905 but the plaintiff contended that since the houses were built it had become a substantial interference and claimed in negligence and in nuisance. The Court of Appeal found that the playing of cricket constituted an unreasonable interference with the plaintiff's enjoyment of land and was therefore a nuisance. The majority considered that the social utility of cricket could not justify a substantial interference in the plaintiff's enjoyment of their land but no injunction was granted to restrain the cricket. The court took the view that the utility of the club outweighed the plaintiff's interest.

Abnormal sensitivity

If the complaint is based on the abnormal sensitivity of the claimant, the court will not interfere. This would offer the claimant far too much protection at the defendant's expense. For example, the claimant may not be able to withstand any noise while working. It would clearly be unjust for the law to allow the claimant to stop the defendant making any noise during this period.

The leading case is *Robinson* v *Kilvert* (1889) 41 Ch D 88. Here, the complaint related to hot air which affected brown paper stored in the plaintiff's part of the building and which had come from the lower part of the building in which the defendant operated a business. The court refused the claim. The heat was not so high that it would affect ordinary paper or even the plaintiff's workforce. The damage was due to the exceptionally delicate nature of the plaintiff's trade. This would not amount to a nuisance. **If**, however, the interference would have affected ordinary paper, the

plaintiff would have been able to claim the full extent of his losses: see *Mackinnon Industries* v *Walker* [1951] WN 401 (recovery for harm to orchids when such fumes would have damaged **any** flowers grown).

A case that gives a valuable insight into the way the courts regard factors such as locality and sensitivity is *Fearn* v *The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104. Here, a private nuisance action was brought by the owners of luxury flats that were intrusively overlooked by a viewing deck at the neighbouring Tate Gallery. Finding in favour of the defendants, Mann J cited the need for give and take in modern society and observed, 'In an inner city urban environment with a considerable amount of tourist activity, an occupant can expect less privacy than perhaps a rural occupant might'.

The Court of Appeal upheld the ruling against the claimants and denied any further option of taking the case to the Supreme Court. Significantly, it went on to reject the judge's opinion on the possible interdependence between nuisance and privacy law. For this, it set out five reasons, among them the difficulty in creating 'clear legal guidance' on when overlooking constituted an interference with amenity and also the inconsistent policy objectives of the law of nuisance compared to those of the developing law on privacy.

Malice

The state of mind of the defendant would also seem to be relevant in assessing whether the defendant's use of their land is reasonable. For example, in *Christie* v *Davey* [1893] 1 Ch 316 the plaintiff succeeded in obtaining an injunction when her neighbour, frustrated by the noise of music lessons in her home, expressed his annoyance by knocking on the party wall, beating trays, whistling and shrieking. In the words of North J at 327: 'what was done by the defendant was done only for the purpose of annoyance and in my opinion, it was not a legitimate use of the defendant's house'. See also *Hollywood Silver Fox Farm Ltd* v *Emmett* [1936] 2 KB 468. Here, the defendant's premises adjoined the plaintiff's silver fox farm. In attempting to prevent the foxes from breeding the defendant discharged guns on his own land as near as possible to the boundary of the plaintiff's land to scare the foxes. Macnaghten J considered the intention of the defendant to be relevant in nuisance and an injunction and damages were awarded.

16.2.4 Who can be sued?

In any action in nuisance, it is important to identify potential defendants. The most obvious is the person creating the nuisance ('the creator'). However, part of the skill of a lawyer is in identifying other potential defendants: for example, the creator's landlord or employer. Equally, should you be unable to identify the creator – for example if the nuisance was caused by a trespasser who has since disappeared – it is important to be able to bring actions against other parties, such as the local council, who may be able to intervene to assist you.

16.2.5 Employers

Where the occupier of the land exercises control over employees who cause a nuisance in the course of employment, the occupier will be liable. This will extend to liability for independent contractors where the employer owes a non-delegable duty to the claimant: see *Matania* v *National Provincial Bank* [1936] 2 All ER 633 and *Bower* v *Peate* (1876) 1 QBD 321.

16.2.6 An occupier who has adopted or continued a nuisance

This is established in the leading case of *Sedleigh-Denfield*, which consolidated pre-existing law and applies to both private and public nuisances. Here, a local authority, without the defendant's permission (and therefore as a trespasser), had placed a drainage pipe in a ditch on the defendant's land with a grating designed to keep out leaves. The grating had not been fixed in the correct position, with the result that,

during a heavy rainstorm, the pipe became choked with leaves and water overflowed onto the plaintiff's land. The House of Lords held the defendant liable. He had **adopted** the nuisance by using the drain for his own purposes to drain water from his land. He had also continued the nuisance because his manager should have realised the risk of flooding created by the obstruction and taken reasonable steps to abate it.

Liability thus arises in two ways, which are both fault-based:

1. **adopting a nuisance**, that is, using the state of affairs for your own purposes, or
2. **continuing a nuisance**, that is, with actual or presumed knowledge of the state of affairs, failing to take reasonably prompt and efficient steps to abate it.

It is essentially a rule of good sense and convenience. Where, as in *Sedleigh-Denfield,* the occupier of the land is best placed to deal with the nuisance, they will be liable if they are found to be at fault. It has been applied to the activities of trespassers on the occupier's land (*Page Motors Ltd* v *Epsom and Ewell BC* [1982] 80 LGR 337) and acts of nature (*Goldman* v *Hargrave* [1967] 1 AC 645 – failure to extinguish with adequate care a tree which had been struck by lightning and had caught fire – and *Leakey* v *National Trust* [1980] QB 485 – failure to protect neighbouring villagers from the effect of subsidence to the defendants' land). *Leakey* extended the principle in *Goldman* to include nuisances caused by the natural condition of the land itself. The defendants were liable for failing to take appropriate action when they knew of the risk.

Being fault-based, unlike the usual test for private nuisance, the courts apply a very distinctive test for liability. In finding liability in *Goldman*, Lord Wilberforce added that the defendant's conduct should be judged in the light of their resources and ability to act in the circumstances. In his Lordship's view, it would be unjust to demand a standard of conduct of which the defendant was not capable, or to require an excessive expenditure of money. If, therefore, the defendant is poor, and abatement will require vast expense, the defendant will not be considered negligent. Equally, less will be expected of the infirm than of the able-bodied. See also *Holbeck Hall Hotel Ltd* v *Scarborough BC* [2000] QB 836.

Most controversy relates to the first category of claims, which raises difficult questions in practice. The basic rule is that the court will examine the purpose for which the premises are let and consider whether the nuisance was a necessary consequence of the letting. If so, the landlord will be liable for authorising the nuisance: *Tetley* v *Chitty* [1986] 1 All ER 663. In practice, complications arise. For example, in *Smith* v *Scott* [1973] Ch 314, a local authority was not found to have authorised the nuisance caused by a family they housed even when they were known to be a 'problem family'. It could not be said that the council had authorised the Scotts to commit a nuisance when it had inserted in their tenancy agreement a clause expressly prohibiting the commission of such acts. This would seem unduly favourable to the landlord.

Case law example

Such potential difficulties are manifest in two Court of Appeal decisions of 2000 which are difficult to reconcile: *Hussain* v *Lancaster CC* [2000] QB 1 and *Lippiatt* v *South Gloucestershire CC* [2000] QB 51. They appear to reach different conclusions, and you should take particular note of the way in which the Court of Appeal in *Lippiatt* seeks to circumvent the earlier decision in *Hussain*. The question in both cases was whether the local authority would be liable for the actions of their tenants (in *Hussain*) or their licensees (in *Lippiatt*).

Hussain concerned a campaign of racial harassment against a shopkeeper on the defendant's housing estate. It was alleged that the council, as landlords, should have intervened to prevent their tenants from harassing the Hussains. The Court of Appeal rejected this claim. The council's standard form tenancy agreement had included a clause instructing the tenant 'not to discriminate against or harass any residents or visitors'. In the circumstances, the council could not be said to have authorised these acts. Second, the tenants' actions did **not** involve a use of their land, which would be required to render the nuisance actionable.

The Court of Appeal in *Lippiatt* took a different view. Here, travellers had been allowed to stay on council land and had caused havoc by trespassing, dumping rubbish and other acts of vandalism on neighbouring land. In finding the council liable, *Hussain* was distinguished on two grounds.

1. The travellers had used the land to commit the nuisance by using it as a 'launching pad' to commit acts of nuisance on neighbouring properties.
2. The council was more likely to be liable for the acts of trespassers and licensees than tenants (as in *Hussain*). While tenants have statutory protection, it is easier to evict trespassers and licensees from land. By failing to do so within a reasonable period of time, the council found itself liable.

It must be questioned whether this distinction is a convincing one. It is far from established that a private nuisance must emanate from use of land. It will in most cases, but is this the same as a rule? See *Thompson-Schwab* v *Costaki* [1956] 1 WLR 335.

16.2.7 Defences

In advising a potential claimant, it is important to identify potential defences. Only when these are assessed can you advise whether a claimant is likely to succeed. There are a number of defences specific to nuisance in addition to the ordinary defences of voluntary assumption of risk and contributory negligence. These are:

1. statutory authority
2. 20 years prescription
3. the act of a stranger.

Statutory authority

If the nuisance is caused by the activities of a local authority (or any other body acting under statutory powers), it may be a defence that it is acting within the scope of its authority and therefore authorised by Parliament to act in this way. It is a question of interpretation of the relevant Act. In the absence of an express provision, the courts will interpret the Act to ascertain whether authorisation is implied: see *Allen* v *Gulf Oil Refining Ltd* [1981] AC 1001. Where the nuisance is the inevitable consequence of the performance of the authorised operations, a defence will lie. It is not inevitable, however, if caused by the negligence of the defendant. Equally, the statute may contain a 'nuisance clause' providing that nothing in the Act shall exonerate the undertaker from liability for the nuisance: *Department of Transport* v *North West Water Authority* [1984] AC 336.

20 years prescription

This provides a defence where the nuisance has interfered with the claimant's interest in land for more than 20 years. Two points should be noted: it does not apply to public nuisance, and time will only start from the moment the claimant is aware of the nuisance. In *Sturges* v *Bridgman,* above, the defendant's premises adjoined those of the plaintiff, a medical practitioner. For over 20 years the noise and vibrations from the defendant's business as a confectioner had not interfered with the plaintiff's use of the land. The plaintiff then built a consulting room in the garden and complained of the noise. Prescription was pleaded but the defence failed because time ran from when the new building was erected and the nuisance had only commenced from that date.

The unforeseeable act of a stranger

A reservoir overflowed onto the plaintiff's land in *Box* v *Jubb* [1879] 4 Ex D 76. The defendant was not liable on the grounds that the flood had been caused by the actions of another neighbour, over which the defendant had no knowledge and no control. Note the potential alternative actions in *Rylands* v *Fletcher* and negligence in such cases, although the defence could equally apply.

16.2.8 Ineffective defences

It is as important to recognise defences which do **not** work as to identify those which will oppose the claimant's action. The following are defences which have been rejected by the courts:

1. coming to a nuisance
2. social utility
3. nuisance due to many.

Coming to the nuisance

It is a well-established rule that the claimant may sue even though the nuisance was, to the claimant's knowledge, in existence before they arrived at the premises. In *Bliss* v *Hall* (1838) 4 Bing NC 183 the plaintiff occupied a property adjoining the premises of the defendant candle-maker. The plaintiff alleged nuisance in the emission of smells and noxious vapours which resulted from the candle-making process. The fact that the business had been carried on in the same premises for three years before the plaintiff came to the adjoining property did not defeat the plaintiff's claim. The justification for the rule is that it would be unreasonable to expect someone not to purchase land because a neighbour was abusing their rights. This rule was confirmed by the Court of Appeal in *Miller* v *Jackson* (1977) where Lane LJ stated:

> It is no answer to a claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant's premises that he would inevitably be affected by the defendant's activities where no one had been affected previously.

However, note Lord Denning's dissenting view on this point.

The principle that it is no defence to argue that the claimant came to the nuisance was reaffirmed by the Supreme Court in *Coventry* v *Lawrence*. Lord Neuberger said this is consistent with the notion that nuisance claims should be considered by reference to the 'give and take as between neighbouring occupiers of land'.

Utility

This is not a defence, although it may encourage the court to be more flexible in deciding a remedy. In *Adams* v *Ursell* [1913] 1 Ch 269 the utility of a fish-and-chip shop to local poor inhabitants could not justify its presence in a fashionable street. See also *Miller* v *Jackson* (1977).

Due to many

It is no excuse that the defendant was simply one of many causing the nuisance in question: see *Lambton* v *Mellish* [1894] 3 Ch 163 where Chitty J held that if the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint.

16.2.9 Remedies

There are three main remedies to consider: an injunction, abatement and damages. It is important to consider which remedy would best suit the claimant's needs. Does the claimant want to stop the nuisance? If so, they should seek an injunction. Where the nuisance is no longer continuing, the claimant would no doubt be seeking damages. In most cases, the claimant is likely to be seeking an injunction.

Injunctions

The main thing to note here is that it is a discretionary remedy and the claimant has no **right** to an injunction. The court may decide to give damages 'in lieu' of an injunction: s.50, Supreme Court Act 1981 and *Shelfer* v *City of London Electric Lighting Co* [1895] 1 Ch

287. The *Shelfer* rules (commonly seen as a starting point in considering an award of damages instead of an injunction) provide that whether for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction if:

- the injury to the plaintiff's legal rights is small
- it is one which is capable of being estimated in money
- it is one which can be adequately compensated by a small money payment
- it would be oppressive to the defendant to grant an injunction.

The Supreme Court in *Coventry* v *Lawrence* [2015] UKSC 50 took the opportunity to review the court's power to award damages in lieu of an injunction and to remind judges of their broad discretion beyond the boundaries of the *Shelfer* rules. Lord Neuberger identified 'public interest' as a relevant consideration in reaching this decision and Lord Sumption said:

> In my view, the decision in *Shelfer*…is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control.

Abatement

This is a self-help remedy and thus to be exercised with caution. An example is where your neighbour's branches grow over your fence and you cut them back. The House of Lords examined this remedy in *Delaware Mansions Ltd* v *Westminster City Council* [2002] UKHL 55, but it is a remedy of limited utility and realistically only worth considering in relation to minor problems such as encroaching roots and branches.

Damages

The most important question in relation to damages is the extent to which the claimant may obtain compensation for their losses. Private nuisance, as a tort to land, is considered to protect proprietary interests. The rule therefore, as suggested by the leading case of *Hunter* v *Canary Wharf*, would seem to be that the householder may obtain damages for interference with their interest in land, be it physical or non-physical, but not for personal injury. Damages will be awarded for the diminution in the value of the land or lesser enjoyment of the use of land or its fixtures: see *Hunter* v *Canary Wharf*, notably Lord Hoffmann's judgment.

Case law example

***Network Rail Infrastructure* v *Williams and Waistell* [2018] EWCA Civ 1514**

The claimants owned property bordering the defendants' railway embankment, which was infested with Japanese knotweed, an extremely invasive and damaging wild plant. The home owners brought an action in private nuisance, claiming damages for diminution in value of their homes, due to the encroachment of the plant and as well as requiring Network Rail to treat and eliminate the knotweed. It was held that pure economic loss in value did not constitute actionable damage in private nuisance; only loss of amenity in terms of use and enjoyment of the land would be recognised as a remedy for private nuisance. That was indeed present: the risk of future damage to structures on the land imposed a burden on the claimants, which impaired the quiet enjoyment of their land, and so was recoverable.

Damages in private nuisance contrast with those in public nuisance. Here, it has long been accepted that the claimant can obtain damages for personal injury in addition to damage to property, loss of custom and perhaps even particular inconvenience caused to the individual. Consequential economic loss is recoverable: *Andreae* v *Selfridge & Company Ltd* [1938] Ch 1. Equally, damage to personal property would appear to be recoverable: see *Halsey* v *Esso Petroleum Co Ltd* [1961] 1 WLR 683 – damage to laundry

hanging in the garden. It should of course always be considered whether the claim satisfies the rules of remoteness, which is the same test as used in negligence: are damages of a type which can be reasonably foreseen?

16.2.10 Private nuisance: summary

Private nuisance is a tort to land and protects the claimant's use and enjoyment of land. This involves a balancing exercise between the rights of the claimant and other householders. The defendant will only be liable if their conduct amounts to an unreasonable use of their land. The balancing exercise will be undertaken by the judge who will take note of a number of factors. The leading case of *Hunter* v *Canary Wharf* (1997) has determined that only those with a right to land can sue. Potential defendants include the creator of the nuisance and, to a lesser extent, their employer, landlord or simply the occupier of the land who has adopted or continued the nuisance. There are a number of defences which must be considered (and those which must be rejected). It is important to consider carefully what remedies are available (and the Supreme Court decision in *Coventry* v *Lawrence* concerning an award of damages in lieu of an injunction). Will the court grant an injunction? To what extent will a court award compensation for the claimant's losses?

16.3 Public nuisance

Public nuisance is actionable when it:

- '…. materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects' as stated in *Attorney General* v *PYA Quarries Ltd*
- does not specifically affect the claimant's land (or the claimant does not have the required interest in land to found an action in private nuisance)
- the claimant has suffered 'special damage'; or an action is brought on behalf of the community.

For individual claimants, there are two main concerns: Has the nuisance affected a class? Can they show special damage? Special damage consists of damage in excess of that suffered by the public at large. It must be direct and substantial and covers personal injury, property damage, loss of custom or business and, it is claimed, delay and inconvenience.

Case law example

In *Tate & Lyle Industries Ltd* v *Greater London Council* [1983] 2 AC 509 ferry terminals constructed by the defendants in the River Thames caused excessive silting. This disrupted the plaintiff's business by obstructing access to their jetty and they had to spend large sums on dredging operations. Their claim in private nuisance was dismissed because: (1) the jetty itself was unaffected and (2) they had no private rights of property in the river bed. However, it was their public right to use the river which had been damaged and the House of Lords held that their claim lay in public nuisance alone. The expenditure incurred by the plaintiffs on dredging constituted particular damage over and above the ordinary inconvenience suffered by the public at large, and was therefore recoverable.

If the individual cannot prove special damage, the only other basis on which an action may be brought in tort is in the name of the Attorney-General by means of a relator action (for example, see *PYA Quarries* above) or by a local authority under s.222 of the Local Government Act 1972: see, for example, *Stoke-on-Trent City Council* v *B&Q (Retail) Ltd* [1984] AC 754 or otherwise under statute. A criminal prosecution may also be possible.

16.3.1 Public nuisance: summary

Claims relating to public nuisance are usually straightforward. Provided you recognise the possibility of a claim distinct to private nuisance and the two criteria mentioned above are satisfied, few difficulties arise.

16.4 The relevance of the Human Rights Act 1998

Article 8 of the European Convention on Human Rights provides for respect for private and family life. This opened a potential for new grounds of action in situations already covered by private nuisance. In *Dennis* v *Ministry of Defence* [2003] EWHC 793 (QB) the owner of a large estate was disturbed by the noise of low-flying military aircraft and sued for an injunction and damages for the reduction in value of his property. The High Court recognised that this constituted a breach of his Article 8 rights, as well as common law nuisance. However, an injunction would be against the public interest and so damages only were awarded, totalling almost £1 million. The higher courts, in *Marcic* v *Thames Water Utilities* [2003] UKHL 66 recognised the potential for huge public liability in such actions and, citing both statutory authority as well as a wide margin of appreciation for individual states given by the European Court of Human Rights, have refused to permit Article 8 to have much impact in this area. See also, *Hatton* v *UK* (2003) 37 EHRR 28.

Activities

Activity 16.1

Core comprehension – Characteristics of nuisance

Read Buckley, R.A. *The law of negligence.* (LexisNexis Butterworths, 2005) [ISBN 9780406959416], Chapter 12: 'Interference with comfort and enjoyment' (available on the VLE), and answer the following questions.

This core comprehension activity consolidates your understanding of the following issues relating to the law of nuisance: the establishing of liability, proof of nuisance, extent to which 'locality' is important, noise and vibration, plaintiffs who are peculiarly susceptible to noise, measurement.

a. **How do courts gauge whether the subject of a plaintiff's complaint is a nuisance?**

b. **In the case of *A-G* v *Gastonia Coaches* how did the defendant company's parking arrangements for its fleet of coaches interfere with the comfort and enjoyment of local residents?**

c. **Why was the complaint about the noise of repair and cleaning work dismissed?**

d. **Why is the issue of the locality important in determining whether material interference has occurred?**

e. **In the *Rushmer* decision in 1906 why was the operation of the presses at night in a Fleet Street address considered to be a nuisance?**

f. **In the *Gillingham Borough Council* decision why did economic activity in the area defeat the plaintiff's right to complain?**

g. **Using the example of the *Dunton* case, address the following questions:**

   i. **How was the locality of the plaintiff's property changed?**

   ii. **What type of value did the court perceive in the playground activity?**

   iii. **How did the injunction bring relief to the complainants?**

h. **Why are courts less willing to impose restraints upon defendants if the complaint of nuisance is made by plaintiffs who are unduly sensitive to the nuisance? Give an example from a judgment concerning noise.**

i. **Identify the limitations of the usefulness of scientific measurements of sound (i.e. decibel levels).**

Activity 16.2

Applied comprehension – planning permission and nuisance

This applied comprehension activity considers the interrelationship between planning permission and nuisance.

Find the case of *Coventry* v *Lawrence* [2014] UKSC 13 and read at least [77]–[99] and [180]–[186].

This case concerns the law of private nuisance, in particular nuisance by noise in the sense of personal discomfort.

Questions (a)–(f) relate to Lord Neuberger's judgment at [77]–[99] on the topic 'The effect of planning permission on an allegation of nuisance'.

Questions (g)–(j) relate to Lord Carnwath's opinion at [180]–[186] on the topic 'The character of the locality'.

a. **What are the two reasons given for the potential relevance of the grant of planning permission for a particular use to a claim in nuisance?**

b. **Which question faced the Court in its consideration of the effect of the planning permission on claims of noise nuisance?**

c. **Why did Jackson LJ reaffirm Buckley J's decision in the *Gillingham* case, in which the residents' claim of public nuisance for noise, vibration, dust and fumes was dismissed?**

d. **Paraphrase in fewer than 45 words how the extent of the land development became a factor in the ability of the defendants to raise the defence of planning permission.**

e. **Outline the role which compensation may play in correcting the grant of a planning permission which causes nuisance to a property owner and give two examples of statutory provisions which provide such compensation.**

f. **Describe the difficulty which is highlighted in respect of this approach.**

g. **Name at least four aspects of the modern world which courts have taken into account in judging the acceptability of the defendant's activity and 'the character of the locality'.**

h. **What role does the common law of nuisance play in relation to modern planning and environmental controls?**

i. **In the example given of a professional football stadium within an urban area, explain:**

   i. **why it would be difficult for a resident to sue for noise nuisance**

   ii. **under which circumstances the resident would be able to sue.**

j. **Does Lord Carnwath advocate a differentiated approach depending on whether the locality is urban or rural in character?**

17 The rule in *Rylands* v *Fletcher*

Contents

Introduction

The rule in *Rylands* v *Fletcher* (1865) LR 1 Ex 265 protects the interest in land from loss due to **isolated escapes**. Although *Rylands* v *Fletcher* is closely related to private nuisance, it differs in that it does not depend on the defendant being involved in a continuous activity or an ongoing state of affairs. Unlike trespass to land, *Rylands* v *Fletcher* does not require a direct and intentional interference. The rule in *Rylands* v *Fletcher* differs from the tort of negligence because there is no need for the claimant to show the existence of a duty of care or a breach of that duty.

Many commentators believe that *Rylands* v *Fletcher* is of relatively little practical significance today. This is because of the expansion of the torts of nuisance and negligence – as well as developments in statutory liability for conduct which is damaging to the environment. Enforcement of these provisions is in the hands of public bodies, which means that claimants may save a good deal of time and expense by directing their complaints to the relevant body. However, there have recently been two major cases in which the House of Lords considered this tort in detail.

LEARNING OUTCOMES

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **explain the nature of the rule in *Rylands* v *Fletcher* and where it fits in the context of other torts**
- **analyse the circumstances in which a claim under *Rylands* v *Fletcher* is likely to arise**
- **identify who can sue whom under the rule**
- **explain the defences which exist and the remedies available.**

CORE TEXT

- **Giliker, Chapter 10 'Nuisance and the rule in *Rylands* v *Fletcher*', Sections 10-048 to 10-073.**

17.1 *Rylands* v *Fletcher*

In the case itself, a mill owner had employed independent contractors to build a reservoir on his land to provide water for his mill. During the course of building, the independent contractors discovered some old shafts and passages of an abandoned coal mine on the defendant's land, which appeared to be blocked. When the reservoir was filled, the water burst through the old shafts, which were subsequently found to connect with the plaintiff's mine. As a result, the plaintiff's mine was flooded and he sought compensation.

The action was ultimately resolved at the House of Lords level, but the classic statement of principle was given by Blackburn J in the Court of Exchequer Chamber:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

This formula has inevitably been refined by time and now can be reduced to four points. All four must be proved to establish liability.

1. In the course of non-natural use of land
2. the defendant brings on his land for his own purposes and collects something likely to do mischief if it escapes
3. which does escape
4. and causes foreseeable damage to land.

Non-natural use

This requirement is the one that has contributed most significantly to limitations on the use of this tort. Its meaning has been contested since *Rickards* v *Lothian* (1913) where it was held:

> It is not every use to which land is put that brings into play [the *Rylands* v *Fletcher*] principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land, or such a use as is proper for the general benefit of the community.

This has been reviewed, most recently in *Transco* v *Stockport MBC* [2003] UKHL 61, below.

Escape

The concept of escape is demonstrated by *Read* v *J Lyons & Co Ltd* (1947), where the plaintiff was employed as an inspector in the defendant's munitions factory. In the course of her employment, she was injured by the explosion of a shell that was being manufactured on the premises. The House of Lords ruled that, since there had been no 'escape' of the thing that inflicted the injury, *Rylands* v *Fletcher* was inapplicable. In the absence of an allegation of negligence, the plaintiff's claim failed. It should also be noted that a claim for personal injury would not now be appropriate under *Rylands* v *Fletcher*.

Reasonably foreseeable loss

The House of Lords in *Cambridge Water Co* v *Eastern Counties Leather* [1994] 2 AC 264 determined that the rule will only apply where the loss suffered is reasonably foreseeable and that it is, in reality, an extension of the tort of private nuisance to isolated escapes from land. Although the rule in *Rylands* v *Fletcher* has its origins in nuisance it had, until *Cambridge Water*, come to be regarded as having evolved into a distinct principle governing liability for the escape of dangerous things. *Cambridge Water* restores it firmly to the realm of private nuisance.

17.1.1 *Cambridge Water Co* v *Eastern Counties Leather*

In *Cambridge Water Co* v *Eastern Counties Leather* [1994] 2 AC 264 the defendants, an old established leather manufacturer, used a chemical solvent, PCE, in their tanning process. PCE evaporates quickly in the air but is not readily soluble in water. In the course of the process, before a change of method in 1976, continual small spillages had gradually built up a pool of PCE under the defendants' premises. The solvent seeped into the soil below and contaminated the aquifer from which the plaintiffs drew their water. At first instance the claim in *Rylands* v *Fletcher* was dismissed because it was held that there was no non-natural use of the land.

The House of Lords held that the use of industrial chemicals had constituted non-natural use of land but the action failed because, over the period of the collection and seepage, it was not reasonably foreseeable that the quantities of the chemical would accumulate or that, if they did, there would be any significant damage. The House of Lords held that the claims in negligence and nuisance failed due to lack of foreseeability that the seepage would cause the resultant damage of pollution. Despite the introduction of the requirement for foreseeability of the type of damage, the strict liability aspect of the tort was retained because it was not required that the escape itself be foreseeable.

Lord Goff also questioned whether the rule should continue to be seen as analytically distinct from nuisance: 'it would… lead to a more coherent body of common law principles if the rule were to be regarded as essentially an extension of the law of nuisance to isolated escapes from land'.

17.1.2 *Transco* v *Stockport MBC*

In *Transco* v *Stockport MBC* [2003] UKHL 61 the House of Lords confirmed that the rule was in fact a subset of private nuisance. Here, the council was the owner of a tower block of flats and an adjacent embankment. A large water pipe serving the flats leaked and water escaped into the embankment and caused it to collapse. As a result, a high pressure gas main was left exposed and the claimants sought recovery of the substantial costs spent in taking action to prevent the pipe fracturing. The trial judge held the council liable, finding that its use was not an ordinary use of land. However, the Court of Appeal overturned this ruling and held that the provision of a water supply through a service pipe carrying water from the mains to a block of flats on the council's land is an ordinary use of land under the principles in *Rylands* v *Fletcher*. The House of Lords agreed with the Court of Appeal and held that the piping of a water supply, a routine function which could not be seen as creating any special hazard, was an ordinary use of the council's land. The conditions to be met before strict liability is imposed for 'non-natural' use will not be easily satisfied unless the defendant's use of land is shown to have been extraordinary and unusual and creating a special hazard.

This case is particularly important because the House of Lords took the opportunity to review the modern scope and application of the rule in *Rylands* v *Fletcher*. In favouring a restrictive approach, the rule will in future be confined to exceptional circumstances where the occupier has brought some dangerous thing onto his land which poses an exceptionally high risk to neighbouring property should it escape, and which amounts to an extraordinary and unusual use of land. Note that although the law of negligence has been greatly expanded since *Rylands* v *Fletcher* was decided and a claimant entitled to succeed under the rule would now have a claim in negligence, their Lordships rejected the abolition of the strict liability rule. The rule, stated as being an aspect of private nuisance which had stood for nearly 150 years, should not be discarded.

17.2 Who can sue?

Before *Transco*, it was unclear whether the claimant would need a right in land to sue. Although there were decisions permitting non-occupiers of land to sue for damages (see *Shiffman* v *Order of the Hospital of St John of Jerusalem* (1936) and *Perry* v *Kendricks Transport* [1956] 1 WLR 85) they were inconsistent with the position in private nuisance,

set out in *Hunter* v *Canary Wharf Ltd* [1997] AC 655. In *Transco*, the House of Lords reaffirmed the approach taken in *Cambridge Water* that only those with rights over land may sue under *Rylands* v *Fletcher*.

In *Read* v *Lyons* it was said *obiter* that the plaintiff must be an occupier in order to maintain an action under the rule in *Rylands* v *Fletcher* and in *Weller & Co* v *Foot & Mouth Disease Research Institute* [1966] 1 QB 569 it was held that the plaintiffs could not succeed under the rule because they did not have an interest in land affected by the escape.

17.3 Defences

Liability will be reduced or eliminated if the escape is due partly or wholly to the claimant's fault: see *Ponting* v *Noakes* [1894] 2 QB 281 and the Law Reform (Contributory Negligence) Act 1945, s.1.

17.3.1 Unforeseeable act of a stranger

This is a well-established defence. The act must be due to the actions of a third party over whom the defendant has no control: see *Box* v *Jubb* (1879) 4 Ex D 76. In *Rickards* v *Lothian* [1913] AC 263 a malicious act by an unknown third party blocked a domestic water system. The water overflowed and caused damage to the plaintiff's premises on the floor below. We have seen above that Lord Cairns' requirement in *Rylands* v *Fletcher* of 'non-natural use' has been established as part of the rule. Here Lord Moulton defined non-natural use as 'some special use bringing with it increased danger to others.' The defendants were not liable because the overflow of water was caused by the act of a stranger over whom they had no control. The third party's actions must be unforeseeable: *Northwestern Utilities Ltd* v *London Guarantee Co* [1936] AC 108.

17.3.2 Act of God

Due to the advances in modern technology and science, this defence is largely defunct. The defendant will not be liable where the escape is due solely to natural causes in circumstances where no human foresight or prudence could reasonably recognise the possibility of such an occurrence and provide against it. In *Nichols* v *Marsland* (1876) 2 Ex D 1 the defendant had formed artificial ornamental lakes on his land by damming up a natural stream. Following a thunderstorm there was an unprecedented rainfall which caused the banks of the ornamental lake to burst and destroy bridges on the plaintiff's land. The defendant was not liable because the escape was caused by natural forces in circumstances 'which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility.'

However, on very similar facts, in *Greenock Corp* v *Caledonian Railway* [1917] AC 556 the application of this defence was criticised by the House of Lords. The rainfall was found not to be an act of God and the Corporation was held to be under a duty to make sure that owners or occupiers on a lower ground level are as secure against injury as they would have been had nature not been interfered with.

17.3.3 Statutory authority

This operates in a similar manner to that of private nuisance. See, generally, *Green* v *Chelsea Waterworks Co* (1894); *Charing Cross Electricity Supply Co* v *Hydraulic Power Co* [1914] 3 KB 772; and *Dunne* v *North Western Gas Board* [1964] 2 QB 806.

17.3.4 Consent

This may be express or implied and arises generally in the context of escapes from something maintained for the common benefit, for example, the water tank for a block of flats. In such circumstances, the tenant is assumed to forgo any rights against the landlord due to the benefit he or she gains, provided the escape occurs without negligence: *Kiddle* v *City Business Properties Ltd* (1942).

17.4 Damages for personal injury?

Damages have been awarded for personal injury in the past. In *Hale* v *Jennings* (1938) a chair became detached from a 'chair-o-plane' in a fairground and a stallholder who suffered personal injuries as a result of the 'escape' was allowed to recover for personal injury. in *Read* v *Lyons* doubts were raised about whether the rule in *Rylands* could be used in a claim for personal injury and in *Hunter* v *Canary Wharf* it was held that personal injuries are not, *per se*, recoverable.

Lord Bingham in *Transco* affirmed that 'the claim cannot include a claim for death or personal injury, since such a claim does not relate to any right in or enjoyment of land'. The same rule therefore applies for all forms of private nuisance.

17.5 Summary

The rule in *Rylands* v *Fletcher* consists of four requirements:

1. the defendant brings on his lands for his own purposes something likely to do mischief if it escapes
2. which escapes
3. due to a non-natural use
4. which causes foreseeable harm.

Guidance should be sought from the leading cases of *Cambridge Water* and *Transco*. Only those with a right to land may sue and there are a number of defences which are similar to those seen in private nuisance. The remedy will usually be that of damages, but it will be confined to proprietary losses and exclude claims for personal injury.

Activities

Activity 17.1

Core comprehension – *Rylands* v *Fletcher* basics

Find and read the case of *Transco plc* v *Stockport MBC* [2003] UKHL 61 and answer the following questions.

This core comprehension exercise focuses on Lord Bingham's opinion in [1]–[14] of the judgment and underpins your understanding of the basic operation of the rule in *Rylands* v *Fletcher*.

a. **Outline the rule in *Rylands* v *Fletcher*.**
b. **Why must there be an escape from one tenement to another?**
c. **Why do claims under the rule exclude claims for death and personal injury?**
d. **Give four examples of types of escape which may satisfy the 'mischief or danger' test.**
e. **Why does Lord Bingham opine that the mischief or danger test should be difficult to satisfy?**
f. **Identify the test of the ordinary use of the land.**
g. **Identify the defences available in actions brought in *Rylands* v *Fletcher* nuisance.**
h. **Why did the appeal fail?**

Sample examination question

Arabella owns a large house in its own grounds at the edge of a village. Next to her house is a farm owned by Ben. All of Ben's animals had to be slaughtered during an outbreak of foot and mouth disease, and, in order to earn some income, Ben leased part of his land, including the field next to Arabella's house, to Charles to organise car boot sales at the weekend. These become very popular and large numbers of cars arrive, frequently causing traffic jams in the village. The village church had been damaged by fire earlier in the year and Sunday morning services are held in Arabella's house: the noise from the car boot sale disturbs the worshippers. Some of the visitors to the sale have been taking a short cut across Arabella's garden, picking flowers and digging up plants.

Charles opened a barbecue at the entrance to the field selling hamburgers and hot dogs. One morning, the barbecue exploded and soot and debris landed in Arabella's garden.

Advise Arabella.

Advice on answering the question

We will examine the issues in turn:

a. Which forms of nuisance are applicable?

Arabella owns land and there is interference with its use and enjoyment. This would suggest a potential claim in private nuisance. There are traffic jams in the village: a possible public nuisance? Soot and debris escape from Charles' rented field into Arabella's land. This suggests a claim under the rule in *Rylands* v *Fletcher*.

b. Right to sue?

Arabella owns a house and thus seems to have an interest in land satisfactory for private nuisance and the rule in *Rylands* v *Fletcher*. The Sunday morning worshippers, however, do not. It must be queried whether Arabella has suffered 'special damage' for public nuisance.

c. Will a court find liability?

It is at this stage that we must divide up the potential heads of liability and identify the particular defendants. There are three potential heads of liability and three potential defendants: Ben (as landlord), Charles (as tenant) and the visitors to the sale.

i. Private nuisance

The complaint relates to noise and damage to land by third parties – the visitors. It is unlikely that any claim may be made against them – they are not identified in any event. Any claim must therefore be brought against Ben or Charles. First, did Ben as the landlord authorise this nuisance? If we look at the purpose of the lease, he knew that it would be used for car boot sales which would bring a number of people to the area with ensuing noise and disruption (see *Tetley* v *Chitty* (1986)). Would it of necessity lead to property damage on neighbouring land? Only if this could be established would Ben be liable to Arabella for the actions of Charles and his visitors. Charles may incur liability as tenant and occupier of the land. The question here is whether he should be responsible for the actions of his visitors. Under *Sedleigh-Denfield*, where the occupier adopts or continues the nuisance of others, he will be liable. Has Charles taken reasonable steps to abate the nuisance? A more fundamental question also arises: do the noise and property damage amount to a nuisance at all? The noise disturbs the worshippers (who have no rights to sue), but are they extra-sensitive (see *Heath* v *Mayor of Brighton* (1908))? Damage to property will, however, normally be regarded as a nuisance: see *St Helen's Smelting Co* v *Tipping* (1865).

ii. Public nuisance

This will be based on the traffic jams in the village. It must be questioned, however, whether Arabella herself can show special damage.

iii. The rule in *Rylands* v *Fletcher*

The exploding barbecue would appear to fit under this head. The four requirements set out in *Cambridge Water* would appear to be satisfied, assuming that the damage is reasonably foreseeable. There is no personal injury to worry us here.

d. Defences

There do not seem to be any potential defences to discuss.

e. Remedies

Arabella really would like an injunction to stop the property damage and damages for the barbecue explosion. She would not obtain any damages for personal injury under private nuisance or the rule in *Rylands* v *Fletcher*. It seems unlikely that social utility would prevent the court from awarding an injunction (contrast *Miller* v *Jackson* (1977)).

18 Privacy and misuse of private information

Contents

Introduction

The protection of privacy and use of private information is a relatively new area of the law of tort in the United Kingdom. Its development has been rapid since two coinciding events, the Human Rights Act 1998 and the increasingly intrusive behaviour of the tabloid press, facilitated by new technology. The range and influence of this area of tort is pressing and wide-ranging, and it has had particular application in the concerns of politicians, celebrities and members of the royal family. Unlike the law of defamation, it concerns publications that are not claimed to be false.

Learning outcomes

Having completed this chapter, and the Essential readings and activities, you should be able to:

- **understand the history of the protection of privacy in English law**
- **describe the range of current legal approaches to privacy**
- **understand how the courts now recognise the separate tort of misuse of private information**
- **appreciate the impact of the Human Rights Act 1998 on this developing area of law.**

Core text

- **Giliker, Chapter 15 'Privacy (or misuse of private information)'.**

18.1 Human rights

Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

Article 10: Freedom of expression

1. Everyone has the right to freedom of expression: This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority…

Human Rights Act 1998, s.12(1) and (4): Relief

1. This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

4. The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appear to the court, to be journalistic, literary or artistic material (or conduct connected with such material), to—

   a. the extent to which—

      i. the material has, or is about to, become available to the public; or

      ii. it is, or would be, in the public interest for the material to be published;

   b. any relevant privacy code.

18.2 History of protection of privacy in UK law

English law has characteristically not directly protected privacy in its own right, however there are a number of different torts which indirectly addressed wrongful intrusion into another's privacy.

Case law example

***Kaye* v *Robertson* [1991] FSR 62**

During a storm, a British television celebrity Gordon Kaye, was injured when a tree fell onto his car. While he was recovering in hospital, a journalist and photographer entered his room (despite signs excluding them) and attempted to 'interview' him. Mr Kaye obtained an interim injunction to prevent publication but, when the newspaper appealed, it was held that:

> … in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether … statutory provision can be made to protect the privacy of individuals.
>
> (Glidewell LJ)

The court recognised that there were indirect means of addressing such an issue: the laws of libel; passing off; trespass to the person; and malicious falsehood. The latter was applied to the *Kaye* case:

> The essentials of this tort are that the defendant has published about the plaintiff words that are false, that they were published maliciously and that special damage has followed as the direct and natural result of their publication.

Malice was inferred on the basis that the defendants knew that it was false to state that Mr Kaye had knowingly granted the interview. The special damage was the claimant's loss of the valuable right to sell his story. Damages would not be an adequate remedy and so the case for an interim injunction was made.

In the past, various government bodies and working groups have considered the problem of press intrusion. The Calcutt Report (1990) adopted the following working definition of privacy: 'The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information'.

On press regulation generally, see the more recent Leveson Inquiry: Culture, Practice and Ethics of the Press (2011–12). Subsequently, a new body for self-regulation was established: the Independent Press Standards Organisation (IPSO). The Office of Communications (OFCOM) is the government body that oversees telecoms, television, radio and postal communication, and reviews complaints in respect of these.

Note also that the Data Protection Act 1998 (see *Barclays Bank plc* v *Various Claimants* [2018] EWCA Civ 1670) and the Protection From Harassment Act 1997 also provide remedies in some of the situations included in this chapter.

18.3 The development of a 'privacy tort'

18.3.1 Breach of confidence

This equitable remedy traditionally arose from breach of a duty to keep confidence arising from either a confidential situation, transaction, or relationship. It was used in *Prince Albert* v *Strange* (1849) 1 De G & M 652 where the relationship of confidence was that of employer–employee and *Argyll* v *Argyll* (1967) Ch 302 where it was a marital one.

Mirroring the 1849 case was *HRH Prince of Wales* v *Associated Newspapers* [2006] EWCA Civ 1776 where Prince Charles successfully obtained damages for breach of confidence when his private journals containing observations on Hong Kong were disclosed by an employee and published by *The Mail on Sunday*. Applying the Article 8 and Article 10 'balancing exercise' there was no sufficiently strong public interest in the publication.

18.3.2 Commercial interests

Douglas v *Hello! (No 1)* [2001] 2 WLR 992 was one of the first actions to test the impact of the Human Rights Act 1998, which came into force in October 2000. The actors Michael Douglas and Catherine Zeta-Jones had entered into a contract giving rights to report on their wedding to *OK! Magazine* but took legal action when this was breached by a competitor journal, *Hello!*. The occasion was far from private in the sense of seclusion (there were hundreds of guests present) but the claimants wished to enforce their control of the publicity arising from it.

Sedley LJ in the Court of Appeal held:

> [W]e have reached a point where it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy. … [T]he law has to protect not only those whose trust has been abused but also those who find themselves subject to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.

Although the claimants were not successful in obtaining an interim injunction to prevent publication, they were later successful in obtaining damages in *Douglas* v *Hello! (No 3)* [2003] All ER 996.

18.4 Misuse of private information

Although the press cannot be characterised as a 'public authority' directly addressed by the Human Rights Act 1998, the European Convention may require the State to take steps to protect Convention rights, such as the Article 8(1) right to respect for private and family life, home and correspondence.

Case law example

Campbell v *Mirror Group Newspapers* [2004] UKHL 22 is the leading case in the creation of the tort of misuse of private information. The model Naomi Campbell had publicly denied having a drug problem. *The Mirror* subsequently published an article detailing Miss Campbell's 'courageous bid to beat her addiction to drink and drugs' accompanied by a photo of her leaving a Narcotics Anonymous meeting. She claimed damages for breach of confidence, succeeding at first instance, and was awarded a modest sum, including aggravated damages. The defendant appealed and the Court of Appeal held that, regardless of whether the claim fitted more properly within breach of confidence or privacy, the publication was justified as being in the public interest. *The Mirror*'s correction of her earlier misleading statements, when viewed according to the Human Rights Act, s.12(4) criteria regarding balancing the right to privacy and freedom of expression, should not give rise to compensation.

The Law Lords unanimously found, while 'there is no over-arching, all-embracing cause of action of "invasion of privacy"', there can now be said to be a right against wrongful disclosure of private information. Lord Hoffmann described the cause of action as a new variant of breach of confidence but one which has 'firmly shaken off the limiting constraint of the need for an initial confidential relationship'.

What information should be protected by this new cause of action? According to Lord Nicholls, 'Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.' Thus, the test is basically a subjective one (based on the claimant's expectation) limited by the requirement that this expectation be reasonable and that the defendant knew or ought to have known about that expectation.

The aspects of the publication that were complained of were as follows:

- the fact of Miss Campbell's drug addiction
- the fact that she was receiving treatment
- the fact that she was receiving treatment at Narcotics Anonymous
- the details of the treatment and
- the photograph of her leaving a meeting.

Accepting that each of the five aspects were of an essentially private nature, it was then necessary for the court to embark upon balancing the Article 8 right of Miss Campbell to private life with the Article 10 right of the newspaper to inform the public. The tests applied were:

- did the publication pursue a legitimate aim? and
- were the benefits that would be achieved by publication proportionate to the harm that might be done by interference with privacy?

The balancing exercise was a difficult one. However, by a majority of three to two the appeal was allowed. The Law Lords accepted that a line could be drawn between the first two and the last three aspects of the claim. The fact of drug addiction and treatment was 'open to public comment in view of her denials' and not unduly intrusive. However, the disclosure of details of her treatment accompanied by the secretly taken photograph were more than just 'peripheral' to the main story and went beyond merely setting the record straight. Disclosure of this private information could have disrupted her necessarily confidential course of therapy at a 'fragile' stage and as such could not be justified. The claimant's damages were reinstated.

McKennitt v *Ash* [2006] EWCA Civ 1714

Ms Ash had written a biography of Ms McKennitt, a folk singer, revealing details of the singer's personal life, which had been obtained during her close friendship with the author. These included details of the claimant's sex life and her feelings about the death of her husband. An injunction was obtained against further publication and was upheld by the Court of Appeal. The questions were:

1. Is this a situation in which the information is protected by Article 8? As described in *Campbell*, was there a reasonable expectation of privacy?

2. If so, in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by Article 10? That is, was there a countervailing public interest in publishing the information?

On these facts, any Article 10 rights of the author must yield to the Article 8 rights of the subject of the book. The information was of a confidential nature, was obtained in a relationship of confidence based upon friendship, and therefore carried with it 'a reasonable expectation of privacy'.

18.5 The current situation regarding protection of privacy and private information

18.5.1 Physical intrusion

In *Wainwright* v *Home Office* [2003] UKHL 53 the claimant and her son were subjected to an intrusive and distressing search for drugs during a prison visit. The facts occurred before the coming into force of the Human Rights Act 1998 and, despite Sedley LJ's view in *Douglas*, the House of Lords held that there was no 'principle of privacy so abstract as to include the circumstances of the present case'. In *Wainwright* v *UK* (2007) EHRR 40 the European Court of Human Rights (ECtHR) held that the Home Office, a public authority, had been in breach of both Articles 8 and 13 of the ECHR, in imposing a physical search that was a disproportionate response to the possibility of drug smuggling.

18.5.2 Photographs

As demonstrated in the *Campbell* case, courts acknowledge the particular power of the visual image. In *Peck* v *UK* (2003) 36 EHRR 719, a man was photographed by CCTV on a London street late at night, holding a large knife, having recently attempted suicide. This footage was later broadcast widely as part of a crime-prevention and detection initiative. Having failed in his legal actions at the domestic level, Peck successfully applied to the ECtHR, which found that he was entitled to compensation for the distress suffered. Any public interest in demonstrating the effectiveness of CCTV in crime prevention was outweighed by the serious breach of his Article 8 rights.

Max Mosley, the Chairman of Formula One and son of the late Oswald Mosley, a fascist sympathiser at the time of the Second World War, sued the defendants for breach of confidence and unauthorised publication of personal information contrary to Article 8. A tabloid newspaper had published photos (secretly taken) of him partaking in a sado-masochistic 'orgy', accompanied by an interview with one of the female participants. His action was founded upon the pre-existing relationship of confidentiality between the participants, and it cited as authority *McKennitt* v *Ash*.

In *Mosley* v *News Group Newspapers* [2008] EWHC 1777 (QB), Mosley was awarded £60,000 damages for the distress suffered and as recognition that his right to privacy had been breached. Mr Justice Eady in the High Court carried out the now familiar balancing exercise between Articles 8 and 10 and was not convinced by the defendant's allegation that there had been a Nazi or 'death camp' theme evident in the session, thereby creating a public interest in its revelation. Commenting particularly on the potency of visual images, he concluded that the claimant had had a reasonable expectation of privacy in relation to sexual activities ('albeit unconventional') carried out between consenting adults on private property.

18.5.3 Children

Any arguments to be made that publication is in the public interest are likely to be significantly less valid if it is the children (or other family) of a celebrity. In *Murray* v *Express Newspapers* [2008] EWCA Civ 446, the 'Harry Potter' author J.K. Rowling and her husband brought an action for breach of the Article 8 right to privacy, on behalf of

their son, regarding the publication of a photo (taken with a telephoto lens) that had been published of their child in a pushchair on a public street. The Court of Appeal held that the law should protect children from intrusive media attention, to the extent of holding that a child had a reasonable expectation that he would not be targeted in a public place in order to obtain photographs for publication. (See also the German case of *Von Hannover* v *Germany (No 1)* (2005) 40 EHRR 1.)

The international element frequently arising in such actions was demonstrated by *Weller* v *Associated Newspapers* [2015] EWCA Civ 1176. A photo of the musician Paul Weller and his three children, taken on a day out in California, was published online. Not only had no consent been given, but the paparazzi had been requested to stop, despite assurances that the children's faces would be pixelated. This was not done and the children were identified by surname. An injunction against further publication was granted in the English courts. The fact that this would not have been actionable in California was given little weight by the Court of Appeal, which followed *Von Hannover* and *Murray*. According to Tomlinson LJ, 'A person's age is an important attribute. It cannot reasonably be said that young children even when they are in public, lay themselves open to the possibility of their privacy being invaded.' The publication did not contribute to a current debate of general interest and there were genuine concerns for the safety of the children.

18.5.4 The criminal justice system

Someone who is the subject of a police investigation may have a strong interest in keeping the situation out of the public eye.

Case law example

When a criminal investigation is being conducted, Article 10 arguments have the potential to be more persuasive, as was seen in *Sir Cliff Richard* v *BBC and the Chief Constable of the South Yorkshire Police* [2018] EWHC 1837 (Ch).

A well-known veteran entertainer was investigated by the South Yorkshire Police (SYP) in respect of an historic sex abuse allegation. When it was decided to search the claimant's home (at a time when he was abroad), someone from within the investigation secretly notified the BBC in advance. There was extensive coverage of the search including live filming from overhead, which was broadcast worldwide. The coverage had a serious emotional and physical impact on Sir Cliff, as well as damage to his reputation and professional status. He remained under investigation for two years until he was notified that no charges would be brought.

Sir Cliff brought actions for damages against the BBC and SYP for violation of his rights in privacy (and under the Data Protection Act 1998). In the High Court Mr Justice Mann applied the balancing exercise between Articles 8 and 10 from *McKennitt* v *Ash* to determine the proportionality of the publicity. He held that, as a general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation and this need not be compromised in the course of a search. Despite the high profile of the claimant, there was no persuasive public interest in publicising details of an unsubstantiated allegation against him merely in order to 'satisfy the curiosity of a particular readership'. The BBC's Article 10 defence was not assisted by the subterfuge they had used to access the story, nor the sensationalist tone of the resultant broadcast. The court awarded £210,000 damages to the claimant (plus a much larger sum to cover legal costs), noting that protection of reputation is part of the function of the law of privacy, as well as that of defamation.

The position was clarified in *ZXC* v *Bloomberg LP* [2020] EWCA Civ 611. The claimant, an American businessman, was under investigation by an unnamed UK law enforcement body. The defendant had published an article about the investigation, having obtained a letter that had been marked 'Confidential' and making clear that the investigation was at an early stage and that the claimant had not been arrested. An attempt to obtain an injunction failed and the action based on misuse of private information proceeded.

The first-instance ruling in favour of the claimant was upheld by the Court of Appeal. The leading judgment of Simon LJ analysed the privacy claim according to the familiar two-stage test set out in *McKennitt* v *Ash*:

1. did the claimant have a reasonable expectation of privacy here so as to engage his rights under Article 8 and
2. if so, did Bloomberg's Article 10 rights outweigh the claimant's Article 8 rights?

In finding for the claimant, it was concluded that, in general, a person does have a reasonable expectation of privacy about the fact or details of their being subject to a police investigation, up to the point of charge. In relation to the second question, reporting about alleged conduct is different from the information about that conduct. Such information was the subject of the claim here, therefore, the balance tipped in favour of Article 8 and against publication.

18.5.5 Royalty

A tradition of royal conflict with the press has been continued by the Duke and Duchess of Sussex. Following a protracted skirmish in the courts, the former Meghan Markle was granted summary judgment in her action against the *Daily Mail* for misuse of private information and breach of copyright. In *Duchess of Sussex* v *Associated Newspapers* [2021] EWHC 273 (Ch) the judge concluded that the claimant had had a reasonable expectation of privacy in respect of her letter to her father and the defendants had interfered with that expectation. There had been a limited justification in correcting inaccuracies in the public domain, however, the defendant's publication of 'long and sensational articles' was neither necessary or proportionate. The disclosures were manifestly excessive and thus unlawful.

In *Duchess of Sussex* v *Associated Newspapers* [2021] EWCA Civ 1810 the Court of Appeal gave summary judgment in favour of the Duchess. Rejecting the newspaper's appeal, the Court confirmed that the contents of the letter were 'personal, private and not matters of legitimate public interest' and therefore their publication could not be legally justified.

18.6 Remedies

18.6.1 Misuse of private information

The claimant in a 'privacy' or misuse of private information case may be seeking damages for distress or loss of reputation, as in the *Mosley* and *Richard* cases. The so-called 'phone hacking' cases in the UK arose from the discovery that journalists from the *News of the World* and other Murdoch newspapers had been hacking into the numerous voicemails belonging to royalty, prominent politicians, celebrities and other citizens who had been victims of crime.

Legal action for misuse of private information proceeded and resulted in damages awards ranging from £72,500 to £260,250, which were similar to those awarded for defamation, as in *Gulati* v *MGN* [2015] EWCA Civ 129.

18.6.2 Injunctions

More controversially, the claimant may wish to prevent further, or any, publication. The urgency of such an action would be reflected in an application for an interim injunction, which can be applied for and granted without a full trial, which could take a number of months to arrange. The interim injunction, however, has great implications for freedom of expression.

Section 12(3) of the Human Rights Act 1998 requires that 'No … relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.' In *Cream Holdings* v *Banerjee* [2004] UKHL 44, the court recognised that exceptionally

> there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those where the potential adverse consequences of disclosure are particularly grave...

The interests of the children of the claimant were emphasised by the Supreme Court in *PJS* v *NGN* [2016] UKSC 26. A celebrity who was married with young children was allegedly involved in extramarital sexual relations with another couple. He obtained an interim injunction against a magazine, which proposed to publish the story on the grounds of breach of confidence and misuse of private information. This was effective for 11 weeks until the story was published in the United States and Canada, in both hard copy and online. The Court of Appeal set aside the injunction on the grounds that the information was already in the public domain.

However, the Supreme Court held that the Court of Appeal's balancing exercise between Articles 8 and 10 had been wrongly premised on giving undue weight to right of freedom of expression, the story already having been published. Rather, 'an intense focus on the comparative importance of the rights being claimed in the individual case was needed'. There was a huge difference between the appellant's children learning about the matter in due course, and 'the media storm' that was likely to meet the discharge of the injunction. It was concluded that the interim injunction would be maintained on the grounds of misuse of private information.

An interim injunction concerning the identity of a party involved in the criminal justice system was the issue in *Khuja* v *Times Newspapers* [2017] UKSC 49. The appellant was one of nine men arrested for very serious child sex grooming offences in Oxford. He obtained an interim injunction until such time as he was charged or released. When notified that he was to be released without charge, he applied for a non-disclosure order concerning his identity, to protect himself and his family from 'misuse of private information'. The denial was approved by the Supreme Court. The public interest in allowing the free and open press reporting of court proceedings extended to the issue of appellant's identity. These matters would have been discussed in open court and raised no reasonable expectation of privacy.

For a time, there was a perceived explosion of so-called 'super injunctions', which aimed not only to prevent publication of the story but even the revelation of the names of the parties involved in any legal action, in order to protect reputations, often of celebrities. Because of the threat to freedom of information posed, these non-disclosure orders have been the subject of Court of Appeal guidelines to restrict their use. The increasingly widespread use of social media has also reduced the practical likelihood of anonymity being maintained.

18.7 Summary

In considering the possibility of legal action for breach of confidence or misuse of private information it is important to take into account the nature of any relationship involved, in terms of creating a duty of confidence and also whether a situation carries with it an expectation of privacy. It is also necessary to give particular consideration to the power of photographs, the interests of any children involved but, also, to the issue of public interest in favour of publication.

Activities

Activity 18.1

Core comprehension – *Richard* v *BBC*

Find and read the case of *Sir Cliff Richard* v *BBC and the Chief Constable of the South Yorkshire Police* [2018] EWHC 1837 (Ch). Answer the following questions.

a. **What two causes of action did the claimant bring against the BBC?**

b. **What was the position of South Yorkshire Police in the current case?**

c. **How did the BBC come to know about the proposed search of the claimant's home?**

d. **In your own words, describe the main considerations for the BBC in their decision to publicise the search.**

e. **What are some of the key cases that are used to give background to the claimant's case?**

f. **Summarise the conclusions of Mr Justice Mann on the aspect of public interest in publication.**

g. **What factors did the judge take into account in assessing general damages?**

h. **What factor justified the award of aggravated damages in this case?**

Activity 18.2

Applied comprehension – *Weller* v *Associated Press*

In the online library, find and read Bessant, C. 'Photographs of children in public: the wider significance of *Weller* v *Associated Newspapers*' (2016) 27(6) *Ent LR* 197.

Answer the following questions.

a. **What is the 'starting point' for determining an action for misuse of private information?**

b. **What factor contributed to trumping any Article 10 arguments in favour of publication?**

c. **What is the evidence that *Weller* is a particularly significant case?**

d. **What factors might strengthen the claims to privacy of 'ordinary' (i.e. non-celebrity) children?**

e. **What arguments made by the press in favour of publication would be persuasive?**

f. **In the future, how significant will the actual publication of any photo be?**

Feedback to activities

Contents

Chapter 1

Activity 1.1

Applied comprehension

a. **Non-delegable duty situations: vicarious liability occurs when the employer defendant has been negligent:**

   True or false?

   This is false. Vicarious liability occurs when an employer is made liable for a wrong committed by their employee who was acting in the course of employment.

b. **Occupiers' liability: in *Edwards* v *London Borough of Sutton* [2016] EWCA Civ 1005 the bridge was held to be dangerous. The defendant occupier was liable in negligence:**

   True or false?

   This is false. The danger presented by the bridge was held to be obvious and so the occupier was not liable in negligence for failing to provide side barriers.

c. **Informed consent: patient autonomy was fully recognised in *Montgomery* v *Lanarkshire* [2015] UKSC 11:**

   True or false?

   This is true. In Montgomery the standard of care expected in relation to disclosure of risk was held to require explaining material risks of which the reasonable person in the plaintiff's position would wish to be aware.

d. **Glass houses: breach of privacy can never constitute private nuisance:**

   True or false?

   This is false. In *Fearn* v *Trustees of the Tate Gallery* [2020] EWCA Civ 104 it was held that breach of privacy could, in the correct circumstances, constitute private nuisance. However, according to the facts of this case, the defendants' use of land was not unreasonable.

Activity 1.2

Applied comprehension – challenging views of tort

a. Only certain types of injury are likely to attract compensation. This is because the claims brought are much affected by the incidence of compulsory insurance so that the accidents that are compensated closely match the areas where liability insurance is to be found.

b. … motor accidents comprising 80 per cent of the total and employer liability 8 per cent.

c. This is not only because fault is less readily apparent but also because, in the absence of insurance, we are less inclined to think of seeking a remedy in tort.

d. Road accident. Liability insurance.

e. The social security system provides a welfare safety net for victims while they pursue their cases in court.

f. … in 9 out of 10 cases the real defendants are insurance companies, with the remainder comprising large self-insured organisations or public bodies such as government departments and health authorities. It is extremely rare indeed for an uninsured individual to be the real defendant.

g. Almost 60 per cent.

   … Almost three in five adults now have some form of this insurance.

h. A key statistic of the tort system reveals how unusual it is for a court to become involved: 98 per cent of cases are settled before they are even set down for trial,

and of the few that do receive a trial date, most are concluded before that formal hearing takes place.

i. … the notion of responsibility goes far beyond that of fault and this is reflected in the strict liability regimes found in the law of tort. These areas of non-fault liability are usually limited in their practical effect but have widespread popular support especially in the area involving injuries at work. For example, it has been shown that people commonly think that employers should pay for injuries caused to their workforce even in the absence of any fault on their part.

   … strict liability, especially if deriving from statute.

j. Tort law is universal and applies to all accidents and injuries.

   Tort claims for personal injury are often brought and defended by individuals.

   Tort claims are determined in court by judges aided by lawyers and juries.

   Tort liability is largely dependent upon proof of fault and findings of law.

   Tort cases reflect the justice requirements of due process and fairness.

   Tort focuses upon compensating financial loss and serious injuries.

   Tort awards full compensation for losses suffered.

Chapter 2

Activity 2.1

Core comprehension – compensating victims of diseases

a. The 'man-made' description refers to the source of the injury suffered, each of the sources being non-natural. Latency, when a disease lies dormant for some time and manifests itself at a later time, and gradual contraction, when victims may contract the disease over a period of time, are two aspects of man-made disease which may present together or separately.

   … although they stem from a man-made source the injury cannot be attributed to an isolated and identifiable time and place. (p.249)

b. 1. Occupational injuries

      Examples: dust diseases, repetitive movement injury, deafness and dermatitis.

   2. Product injuries

      Examples: tobacco and chronic adverse drug reactions.

   3. Environmental injuries

      Examples: caused by fertilisers and man-made radiation.

c. 1. Problems relating to time.

   2. Medical causation.

   3. Proof of fault.

d. The courts recognised that justice would be best served to extend discretion to such victims as their injury presented with delay.

e. Victims may not know whom to name as the defendants or may be unable to trace the defendant. Further, in the case of employers, business entities may have changed or ceased to trade.

   Victims of gradually contracted man-made disease may have worked for multiple employers and therefore the blame for the wrongdoing may have to be shared or apportioned.

The reliance on a discretionary grant to proceed with claims which are out of time presents further uncertainty.

f. Stapleton highlights that the balance of probabilities test used to determine medical causation for injuries caused by man-made disease relies on the availability of necessary statistical data. If this data is lacking or incomplete, victims of man-made disease will have great difficulties in proving that the balance of probabilities test has been met.

g. Proof of fault relates to the knowledge which defendants (and claimants) had or ought to have had about the risks of injury by the man-made disease. Much of the knowledge question is argued using expert evidence, which adds to the complexity and costs of the proceedings. The aspects of latency and gradual contraction also impact on answering the knowledge question.

h. 1. Adequate monitoring.

   2. Possible defences.

   3. Undue sensitivity.

   All these issues contribute to the uncertainty of aspects of the injured parties' claim and add 'to the relatively high uncertainty of outcome in disease cases even where medical causation can be established' (p.253).

i. The law of tort has traditionally favoured accident victims who have suffered traumatic injury to the detriment of victims of diseases who have suffered non-traumatic injury. This preferential treatment arises from existing conceptual machinery, such as insurance and welfare benefits.

Activity 2.2

Applied comprehension – reforming compensation

a. *Hedley Byrne* v *Heller* [1964] AC 465; *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145.

b. Lord Goff believed that, given the different origins and objectives of tort and contract law, there was nothing 'objectionable' in allowing for concurrent duties as long as there had been no specific limitation or exclusion of this.

c. The 'assumpsit duty' is distinct from a contractual duty or undertaking. It arises from a gratutitous (or voluntary) undertaking rather than bilateral, or two-way, as in contract. The loss recovered is akin to that in tort rather than in contract.

d. The existence of concurrent duties does not necessarily indicate concurrent remedies (see p.28). *Baltic Shipping* v *Dillon* (1993) 176 CLR 344 illustrates the High Court of Australia determining a case in which, despite concurrent duties, liability and therefore remedies were not concurrent.

e. 'Remoteness' is a concept used in determining causation in negligence (see Section 10.10) according to which the defendant will be liable only for losses which were reasonably foreseeable at the time of the tort: *The Wagon Mound (No 1)* [1961] AC 388.

f. Concerning the interaction of duties in contract and tort regarding remoteness, Professor Burrows argued that the contractual standard (reasonable contemplation of the parties at the time of contracting) should always apply (see pp.41–42).

g. Recognising concurrent liability, for instance in contract and tort, is the same as recognising concurrent duties. Practically speaking, it can mean that the content of one duty could be impacted or limited by that existing in another duty. Taylor illustrates this in his final paragraph by giving the example of trustee obligations influencing the legal interpretation of tortious or contractual duties.

ACTIVITY 2.3

CORE COMPREHENSION – SOCIAL VALUE OF ACTIVITIES

a. Mr Tomlinson badly executed a dive into a lake owned by the Council. As a result, he is tetraplegic and unable to walk.

b. It is a requirement that the injury must be someone else's fault for Mr Tomlinson's claim to succeed.

c. '… the unauthorised use of the lake and the increasing possibility of an accident; this is swimming and the use of rubber boats.' [19]

   … the county council's management plan treated swimming as an 'unacceptable water activity'. The minutes of the county council's Advisory Group of interested organisations (anglers, windsurfers and so forth) record that… 'The risk of a fatality to swimmers was stressed and agreed by all.' The windsurfers in particular were concerned about swimmers getting in their way; perhaps being injured by a fast-moving board. [17]

d. See Lord Hoffmann at [34].

e. **River banks**

   See Lord M'Laren as cited at [57].

   Cliff edges

   See [60].

   Uneven water surfaces

   See [61].

f. See Lord Hoffmann at [46].

g. The right to engage in dangerous activities which do not harm others would be unnecessarily restricted if reckless people are able to obtain compensation for injuries suffered without proof of fault.

h. See [94].

ACTIVITY 2.4

CORE COMPREHENSION – COMPENSATION CULTURE

a. 'The growth of a "compensation culture" implies an increased and unreasonable willingness to seek legal redress when things go wrong,' whilst "litigation crisis" implies that this shift in social attitudes has been translated into undesirable (perhaps unbearable) levels of formal disputing.

b. it appears that there are too many (successful) claims; at other times that compensation payouts are too costly, quite commonly that lawyers' fees are excessive; sometimes a mixture of all of these …'.

c.

   - 'The volume of litigation ('too many').
   - The value of compensation awards (payouts … too costly).
   - The high costs of legal representation (lawyers' fees … excessive)'.

d. 'First, claimant lawyers often point out with considerable (if self-interested) justification that the great majority of injured persons never resort to the law; that it is precisely the absence of a compensation culture that characterises our liability system… A second point is whether legitimate, well-founded claims should be counted as part of the 'problem'.

   The idea that defendants are beset by ever-increasing numbers of doubtful claims is unproved.

e. The thrust of this argument is that well-founded claims are deserving of formal dispute resolution and any resulting compensation awarded by the courts. It is difficult to assert that reasonable claims and reasonable approaches to litigation form part of the 'compensation culture' as defined above.

f. Williams reminds us that the fear of potential liability claims leads to certain categories of defendants adopting a defensive approach to their activities to avoid the likelihood of being unfairly sued.

g. '…new types of claims "that were simply not considered by lawyers 20 or 30 years ago are now being pursued"'.

h. Theoretically, an expanding liability regime would cause a rise in the price of insurance policies as the potential risk of being sued would be greater. However, the practical effect depends on a number of factors.

Activity 2.5

Applied comprehension – liability in insurance claims

a. See [1].

b. See [2].

c. Employers operating in the UK are obliged to insure against liability for injuries sustained by employees with authorised insurance companies.

d. These alternative bases of response (or 'triggers' of liability) have been loosely described as an occurrence (or manifestation) basis and an exposure (or causation) basis.

e. The exposure or causation basis because it would justify '… a conclusion that there was during the relevant insurance period an occurrence sufficient to trigger liability under the insurances.' [3]

f. See [6].

g. See [91].

Examples:

> Mesothelioma is a long tail disease in which the problems raised have been particularly acute. [91]
>
> … These conclusions have application not merely to mesothelioma but to employers' liabilities in relation to other long tail industrial diseases such as asbestosis and pneumoconiosis. [98]

A workplace accident would be an example of a short tail disease where causation is easily determinable as it manifests itself immediately.

> In the vast majority of cases there will be no difficulty in identifying the moment at which the negligence or breach of duty causes the physical harm, for the harm will take the form of an obvious injury. [92]

h. See [94].

i. See [95].

j. See [97].

k. Insurers interpreted employer liability insurance contacts more narrowly, namely from the point in time upon which an actionable injury in the form of malignancy existed.

l. See [99].

Chapter 3

ACTIVITY 3.1

CORE COMPREHENSION – TRESPASS TO THE PERSON

a. Negligence and assault and battery.

b. The family of the deceased pursued the civil action in assault and battery, not to obtain damages (which had already been conceded in negligence) but for 'vindication', i.e. a public recognition that their relative had been unlawfully killed by the police. (See p.23.)

c. The main purpose of the criminal law 'is to identify, and provide punitive sanctions for, behaviour that is categorised as criminal because it is damaging to the good order of society' whereas 'the function of the civil law of tort is different. Its main function is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others.' The impact on defences is that a more generous approach will be allowed by the criminal law than the civil. See paras 17 and 18.

d. Self-defence in a civil case of assault and battery requires that a mistaken belief held by the defendant must also be reasonably held. The 'vindicatory' action by the claimants was permitted to proceed to trial.

ACTIVITY 3.2

APPLIED COMPREHENSION – *WILKINSON* V *DOWNTON*

a. i. Because the article was written and published intentionally.

   ii. Because the substance of the publication was true; further, it was not alleged that the publication was defamatory of the claimant.

b. The conduct element, the mental element and the consequence element.

c. The publication was justified in the interests of free speech and so the conduct element was not satisfied.

d. The Supreme Court required that the defendant have the intention to cause the claimant significant distress.

e. Subjective intent may be imputed as a matter of fact but, as a matter of law, it will not be imputed that the defendant had intended the natural and probable consequence of their acts.

f. Each student will have their own ideas.

g. It may be guessed that with clearer guidelines and a shrinking of the ambit of the tort in *Wilkinson* v *Downton*, there will be fewer cases such as *O* v *A* and therefore a broadening of freedom of speech.

Chapter 4

ACTIVITY 4.1

CORE COMPREHENSION – DUTY, BREACH, DAMAGES

a. Mrs Al-Kandari sued her husband's solicitors in negligence for loss suffered when the solicitors failed to keep safe a passport which was issued to both the father and the children. In possession of the document the father removed the children from the jurisdiction to Kuwait. He abducted and assaulted the claimant and left her abandoned in a van.

b. The solicitors voluntarily assumed responsibility towards the claimant and her children. This wider responsibility fell within the concept of the duty owed to neighbours as established in *Donoghue* v *Stevenson*.

c. 1. The real risk of another abduction.

2. The real risk of Mr Al-Kandari obtaining possession of the passport.

3. Failure to inform the claimant of the whereabouts of the passport.

d. The Court held that the event of abduction was 'a distinct possibility' based on the history of the case and it was therefore reasonably foreseeable that Mr Al-Kandari might attempt to obtain the passport for the purpose of abduction.

e. Severe injuries, both physical and mental, the latter having long-term effects. £32,068.14.

f. If you have completed the **Additional research** exercise you will find more detail of Mrs Al-Kandari's ordeal, the threat made to her life and the damages she suffered.

Activity 4.2

Applied comprehension – protection of the public against crime

a. This case concerns victims of domestic violence [19–28]. The wider public interest in this case is denoted by the fact that three organisations who were not party to the Act made submissions in the case (interveners) – Liberty, Refuge and the Welsh Women's Aid organisation, Cymorth i Ferched Cymru [17].

b. See [33].

c. Twenty-two minutes before being murdered by her ex-boyfriend, Ms Michael had made an emergency 999 call to the police, informing the call handler that her ex-boyfriend had hit her and had threatened to return at 'any minute' to kill her.

d. See [63], citing *Hill*, and [97].

e. See [99] and [100].

Activity 4.3

Applied comprehension – police duty of care and crime prevention

a. They are not persuaded. If it applies in respect of the police, why not the NHS too? If it encourages the police to act more carefully, the duty may end up saving resources. Empirical evidence is needed.

b. This answer requires further research! AV Dicey was a barrister and legal academic at the end of the 19th century. As a constitutional theorist, he was responsible for the principle of parliamentary sovereignty. The Diceyan conception of the rule of law requires that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.'

c. The *Caparo* three-part test.

d. This is the authors' term for proximity, which is based on a particular relationship between the claimant and the defendant – a category that they argue should be broadened.

e. The authors deal with this in detail (at p.152), where they specifically refute each of the three reasons the majority give for rejecting duty of care.

f. Lady Hale was in the minority of the Supreme court. She argued cogently for finding a duty of care to the claimant victim and the authors broadly agree with her.

g. (See p.155.) The test would ensure that police officers investigating and suppressing crime would not be held liable in negligence too readily, even if they owed a duty of care to the claimant.

Chapter 5

ACTIVITY 5.1

CORE COMPREHENSION – PSYCHIATRIC INJURY

a. See para.4.1.

b. See para.4.4.

c. An illness which denotes 'more than mere mental distress'. See para.5.6.

d. In the Australian jurisdictions… There is no additional requirement that the plaintiff should establish that the defendant ought reasonably to have foreseen the possibility that he or she might suffer psychiatric illness. (para.5.7)

The Law Commission recommended that

> it should be a requirement for liability for psychiatric illness that a duty of care be owed to the plaintiff by the defendant; and that in establishing that duty of care it should be a requirement that, at least where the plaintiff is outside the area of reasonably foreseeable physical injury, it was reasonably foreseeable that the plaintiff might suffer psychiatric illness. (para.5.10)

e. See para.5.11.

f. [n]othing will be gained by treating [physical and psychiatric injury] as different 'kinds' of personal injury, so as to require the application of different tests in law. (para.5.12)

… liability for psychiatric illness would no longer turn on the fortuitous absence of a physical injury. (para.5.13)

g. See para.5.14.

h. See para.5.14.

i. In assessing whether psychiatric illness is reasonably foreseeable the defendant, unless he or she has special knowledge to the contrary, may assume that the plaintiff is a person of 'customary phlegm' and of 'a normal standard of susceptibility.' (para.5.21)

… We therefore think that allowing the defendant to assume that the plaintiff is a person of 'customary phlegm' is best interpreted as meaning nothing more than that, in deciding whether psychiatric illness was reasonably foreseeable (and analogously to reasonable foreseeability in physical injury cases), one can take into account the robustness of the population at large to psychiatric illness. (para.5.26)

This is intended to exclude from compensation those who are abnormally susceptible to psychiatric illness. (para.5.21)

j. See para.5.25.

ACTIVITY 5.2

CORE COMPREHENSION – SECONDARY VICTIMS

a. The issue raised in this case is whether the death of Mrs Taylor was a relevant incident for the purposes of Ms Taylor's claim as a secondary victim. [25]

b. See [1].

c. See [1].

d. See [2].

e. Example: The defendant's case advanced the workplace accident in February as the relevant event at which Ms Taylor was not present. The claimant advanced the collapse on 19 March 2008 as the relevant event at which she was present. If the workplace accident prevailed as the relevant event, the claimant would be unable to meet Requirement (vi), the control factor of physical and temporal proximity.

f. See [8].

g. See the lower court judgment cited in [19].

h. See the citation at [21].

> … In a secondary victim case, physical proximity to the event is a necessary, but not sufficient, condition of legal proximity. [27]

i. See [32].

j. … in secondary victim cases, the word 'proximity' is also used in a different sense to mean physical proximity in time and space to an event. [27]

Chapter 6

Activity 6.1

Core comprehension – limitations to the 'special relationship'

a. The contractors were insolvent and therefore not worth suing.

b. The purpose of the website was to provide a list of names and addresses as the first step in a process in which it was envisaged that people such as the claimants would then follow up with their own inquiries.

c. (See para.15.) In an earlier case she stated that assumption of responsibility was a concept still being developed and without clear guiding principles.

d. (See para.25.) In the circumstances, there was certainly reasonable foreseeablility of reliance.

e. (See para.31.) The relevant website urged independent inquiry. Therefore, reliance was not reasonable.

f. See para.41, which indicates that there would have been liability, according to tort measures and reduced by contributory negligence.

Activity 6.2

Applied comprehension – tests for duty of care for negligent misstatement

a. The case and its application by courts have not 'stood the test of time' in providing workable criteria for determining duty.

b. It would appear that he does although he details extensive problems with it, in part due to vagueness of the 3 key criteria.

c. He concludes that it has the potential as a general test, in fleshing out proximity, but little has been done by judges to develop it.

d. See [p 138] The outcome is an 'emphatic rejection' of assumption of responsibility as a principle which can provide answers to all the problems in this area of duty.

e. A number of case examples are given. A key one is *Dean* v *Allin & Watts* (p.144).

f. The author concludes that it may be 'a matter of taste' and 'shrouds for discretionary decisions driven by policy'.

g. (See p.149.) The 'pockets of liability' approach goes back to at least 2006 and, in the area of professional negligence, is based upon particular sets of facts and policy relating to specialist functions and a move away from general theory.

Chapter 7

ACTIVITY 7.1

CORE COMPREHENSION – WRONGLY SUSPECTED PARENTS

a. See [53].

b. 1. i. … that the mother was suffering from Munchausen's syndrome by proxy and that she had fabricated M's condition. [57]

   ii. M was also referred to an expert on allergic conditions. He concluded that M was indeed suffering from extensive and severe allergies. [58]

   2. i. Dr Wilson concluded R had been sexually abused… The father and his son, R's elder brother, were told they should not sleep at home when R was released from hospital. [62]–[63]

   ii. the correct diagnosis of Schamberg's disease was made. [63]

   3. i. Dr Blumenthal, a consultant paediatrician, diagnosed the baby as having an 'inflicted injury', a spiral fracture of the femur. [66]

   ii. the revised medical opinion was that the history and injuries were consistent with brittle bone disease. [67]

c. … that neither East Berkshire Community Health NHS Trust nor North Staffordshire Hospital NHS Trust, nor any of the other defendants then being sued, owed a duty of care to the mother. [60]

   … neither defendant owed a duty of care to the parents. [69]

d. … the best interests of [the] child. [71]

e. … the need to safeguard children from abuse by their own parents, and the need to protect parents from unnecessary interference with their family life. [71]

ACTIVITY 7.2

APPLIED COMPREHENSION – PUBLIC AUTHORITY LIABILITY IN CHILD ABUSE CASES

a. Example: Children are particularly vulnerable because they are dependent on their parents and may be too young, or too scared, to complain of parental abuse. See [72].

b. See [73].

c. See [77].

d. … interference with family life does not justify according a suspected parent a higher level of protection than other suspected perpetrators is the factor conveniently labelled 'conflict of interest'. [85]

   This is not to say that the parents' interests should be disregarded or that the parents should be kept in the dark. The decisions being made by the health professionals closely affect the parents as well as the child. Health professionals are of course fully aware of this… But it is quite a step from this to saying that the health professionals personally owe a suspected parent a duty sounding in damages. [87]

e. Example: It would be inconsistent with the discharge of these responsibilities if health professionals were to be subjected to a legal duty, sounding in damages, to take care to protect persons suspected of being the source of harm to the child. See [89].

f. Lord Bingham argued that the legal basis upon which children relied to make claims should be equally available to parents.

   If this consideration does not preclude a claim by the child it is hard to see why it should preclude a claim by the parent. [31]

If such skill and care are required in relation to the child, there is no reason why this consideration should preclude a duty to the parent. [32]

g. It is hard to see how, in the present context, imposition of a duty of care towards parents could encourage healthcare professionals either to overlook signs of abuse which they should recognise or to draw inferences of abuse which the evidence did not justify. But it could help to instil a due sense of professional responsibility, and I see no reason for distinguishing between the child and the parent. To describe awareness of a legal duty as having an 'insidious effect' on the mind of a potential defendant is to undermine the foundation of the law of professional negligence. [33]

h. ... there would be a breach of duty to the child, with separation or disruption of the family as possible or likely consequences. But this would be a breach of the duty owed to the parents also, and the consequences are not suffered by the child alone. [37]

i. i. ... Thus it is not the formation or communication of a suspicion which is complained of, but a negligent failure to investigate, test, explore, check and verify... What the healthcare professionals are required to do is exercise reasonable skill and care in taking an accurate history and then to form such professional opinion as, subject to further investigation, may be appropriate. [39]

... a child is much less likely to complain. [39]

ii. See [44].

Chapter 8

Activity 8.1

Core comprehension – liability for omissions

a. 1. The defendant's creation of a source of danger, even if entirely without fault.

2. The defendant's undertaking of responsibility for the claimant's welfare.

3. The defendant's occupation of an office or position of responsibility.

b. Rescue services include the police and fire authorities, the coastguard and the ambulance service, although it should be noted that in *Kent* v *Griffiths* Lord Woolf situated the ambulance service within hospital services and thus 'the staff of the ambulance service owed a similar duty of care to that owed by doctors and nurses operating in the health service'.

c. 1. The Station Officer's act was 'a positive act of misfeasance which foreseeably caused the fire to get out of control'.

2. The proximity approach:

> proximity will arise where someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon that skill, and there is direct and substantial reliance by the plaintiffs on the defendant's skill.

d. The peculiarity... is that they do not as a rule create the danger which causes injury to the plaintiff or loss to his property.

e. The act of turning off the water sprinklers.

Activity 8.2

Applied comprehension

a. He agrees with the majority of the Supreme Court that it was nonfeasance but goes on to discuss how difficult this distinction is.

b. (See p.37.) There are a number of problems but a key one is: how widely or narrowly should the boundaries of the 'established categories' be drawn? This can be another way of applying incremental development of duty of care.

c. (See pp.41 and 42.) Principle can be seen to be based on purely 'legal' arguments used in precedents, while policy concerns non-legal considerations invoked by judges. These are often speculative and some argue that policy should be the concern only of Parliament.

d. (See p.42.) This is the idea that the imposition of a duty of care will unduly influence behaviour and allocation of resources in a detrimental way. The decision in *Hill* v *Chief Constable of West Yorkshire* is a classic example. The author gives the example of *Stovin* v *Wise*.

e. Students will have their own views to the questions raised by the author at p.51.

Chapter 9

ACTIVITY 9.1

CORE COMPREHENSION – BREACH OF DUTY

a. 15 years old.

   … were engaged in playing around, hitting each other's white plastic 30 cm rulers as though in a play sword fight, when one or other of the rulers snapped and a fragment of plastic entered Teresa's right eye with the very unhappy result that she lost all useful sight in that eye…

b. … each had been guilty of negligence, that Teresa's injury was the foreseeable result and that, accordingly, her claim against Heidi succeeded subject to a reduction of 50 per cent for contributory negligence.

c. … The question for the Judge is not whether the actions of the defendant were such as an ordinarily prudent and reasonable adult in the defendant's situation would have realised gave rise to a risk of injury, it is whether an ordinarily prudent and reasonable 15-year-old schoolgirl in the defendant's situation would have realised as much.

d. 'The standard of care being objective, it is no answer for him, [that is a child] any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced.'

   (citation from *McHale* v *Watson* [1966] 115 CLR 199)

e. '… upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard.'

   (citation from *McHale* v *Watson* [1966] 115 CLR 199)

f. 'the standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience.'

   'The question as to whether the Plaintiff can be said to have been guilty of contributory negligence depends on whether any ordinary child of 13½ can be expected to have done any more than this child did. I say "any ordinary child". I do not mean a paragon of prudence; nor do I mean a scatter-brained child; but the ordinary girl of 13½.' (citing *Gough* v *Thorne* [1966] 1 WLR 1387)

g. … she has suffered a grave injury through no fault of her own. But unfortunately she has failed to establish in my view that anyone was legally responsible for that injury and, accordingly, her claim should have failed.

h. 'in the absence of relevant statutory provision, children, like everyone else, must accept as they go about in society the risks from which ordinary care on the part of others will not suffice to save them. One such risk is that boys of 12 may behave as boys of 12…'

Activity 9.2

Applied comprehension – the *Bolitho* gloss

a. The *Bolitho* gloss impacted on negligence claims in that 'the court, and not the medical profession, became the final arbiter of medical breach'.

b. The 'no exceptions' argument –

… if the court was the final arbiter in respect of these professionals [accountants, lawyers, underwriters, etc.], then so too should it be with the medical profession.

The 'conflict of interests' argument –

'… Practices may develop in professions… not because they serve the interest of the clients, but because they protect the interests or convenience of members of the profession'.

c. … whether the doctor acted in accordance with a practice accepted as proper for an ordinarily competent doctor by a responsible body of medical opinion; and secondly, if 'yes', whether the practice survived *Bolitho* judicial scrutiny as being 'responsible' or 'logical'. That two-step analysis was explicitly confirmed as being the appropriate one…

d. 1. the *Bolam* test only applies to matters of clinical or professional judgment, or to tasks that require the exercise of special skill and knowledge

2. the *Bolam* test only pertains to questions requiring expert opinion, and not to disputes about mere questions of fact

3. *Bolam* does not apply where the doctor's expert opinion does not represent the views of a responsible body of doctors nor a recognised practice within the medical profession.

e. The doctor's expert only has to persuade the court that his views are capable of withstanding logical analysis, but he does not have to satisfy the court that the views of the patient's expert are not capable of withstanding logical analysis. Obversely, however, the patient's expert has to do both, if *Bolitho* is to be applied.

f. 1. The peer professional opinion has overlooked that a 'clear precaution' to avoid the adverse outcome for the patient was available.

2. A question of resources and conflicts of duty.

3. Failure to weigh the comparative risks and benefits of the chosen course of conduct.

4. Where the accepted medical practice contravenes widespread public opinion.

5. Where the doctor's peer medical opinion cannot be correct when taken in the context of the whole factual evidence.

6. Where the doctor's expert medical opinion is not internally consistent.

7. The peer professional opinion has adhered to the wrong legal test.

g. … the issue was whether pathologists were negligent in failing to inform the relatives (mainly parents of children who had died either at, or shortly after, birth) that, at post-mortem examinations of their children, some organs might be removed and retained for later scientific study.

h. No feedback provided.

Chapter 10

ACTIVITY 10.1

CORE COMPREHENSION – CAUSATION AND REMOTENESS

a. See [27].

b. See [15].

c. See [27].

d. See [16] and [43].

e. In the past, suicide was viewed as criminal conduct and for reasons of public policy the recovery of damages in the event of a suicide was difficult, if not impossible. See [16].

ACTIVITY 10.2

APPLIED COMPREHENSION – MESOTHELIOMA CLAIMS

a. … It is caused by exposure to the inhalation of asbestos dust, and has a gestation period measured typically in decades. The more fibres inhaled, the greater the risk of contracting mesothelioma. But, beyond that, its specific causation is highly uncertain… the process of causation may involve (different) fibres acting in a way which gives rise to a series of as many as six or seven genetic alterations, ending with a malignant cell in the pleura. [1]

b. See [1].

c. See [3].

d. See [3].

e. See [4].

f. See [4].

g. See [5].

h. See [6].

i. Courts which have embarked on it have had to focus on disputes gradually shifting from (a) the position between victims and those responsible for their exposure, on which substantial authority now exists under English law, to (b) the position between persons so responsible and their insurers. [1].

   See also [7].

Chapter 11

ACTIVITY 11.1

CORE COMPREHENSION – CONTRIBUTORY NEGLIGENCE

a. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 (see [45]).

b. See [2].

c. The standard of care of an ordinary 13-year-old was applied. See [12].

d. See the quote in [12].

e. Two reasons pertained to the 13-year-old, namely 'insufficient regard' to the circumstances of the 13-year-old and a more moderate characterisation of her conduct, shifting from 'an act of reckless folly' to 'negligent conduct'.

   One reason pertained to the adult driver, namely that the 'defender's behaviour was culpable to a substantial degree'.

The fourth reason highlighted a failure of the lower court to consider 'the causative potency of the parties' actings'. (See [15].)

f. See point (4) of the quote at [15].

g. See [16].

h. See [20].

i. In relation to blameworthiness… Hale LJ noted that a car could do much more damage to a person than a person could usually do to a car, and that the potential 'destructive disparity' between the parties could be taken into account as an aspect of blameworthiness. [26]

Hale LJ stated in *Eagle* v *Chambers*… :

'It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle.' [50]

j. See [27] and [28].

k. 'An appeal court will not lightly interfere with an apportionment fixed by the judge of first instance. It will only do so if it appears that he has manifestly and to a substantial degree gone wrong.' (at [32] citing Lord Justice-Clerk Wheatley in *Beattie* v *Halliday*)

'the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.' (at [34] citing Lord Fraser in *G* v *G*)

'the wide difference between [the House's] view and that held in the court of first instance warranted a variation in the proportional amount awarded.' (at [37] citing Lord Porter in *National Coal Board* v *England*)

l. That blame should be apportioned in equal share, i.e. 50:50. See [43]–[44].

m. The Extra Division were entitled to view her behaviour as both very seriously blameworthy and of major causative significance and also, because of the extent of her blameworthiness, to attribute to her the major share of responsibility. [57]

ACTIVITY 11.2

Applied comprehension – defence of illegality

a. *ex turpi causa non oritur actio,* meaning 'no action can be founded upon a wicked act'.

b. i. The claimant – he had participated in a burglary.

ii. He claimed against the driver of the car for injury suffered whilst holding on to the outside of a 'getaway' car speeding from the scene of the burglary.

iii. The action failed 'because as a matter of public policy, English law refuses to recognise a duty of care owed by one participant in a crime to another in respect of an act done in furtherance of the common purpose'.

c. Not every illegal act bars the claimant from recovering in negligence… The difficulty lies in assessing the circumstances in which illegality will bar a claim.

d. Mr Gray suffered from a serious psychiatric condition, an injury which resulted from being a victim of the Ladbroke Grove train crash. Thames Train Ltd had compensated him for his injury. Two years later, in a separate incident, Mr Gray stabbed a pedestrian to death. He was found guilty of manslaughter due to diminished capacity and detained in hospital. He sought compensation from the rail company for loss of earnings whilst in prison and future loss of earnings, arguing that the conviction of manslaughter would reduce his ability to find employment. (Introductory paragraph of case extract.)

e. … but for the tort, Mr Gray would not have killed. (At [44].)

f. See [28].

g. … The maxim *ex turpi causa* expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations. [30]

h. See [29] and [50].

i. See [50].

j. The distribution of (public) resources argument and causation issues. See [51].

Chapter 12

ACTIVITY 12.1

CORE COMPREHENSION – COMMON LAW EMPLOYERS' LIABILITY

a. The extent to which the employer's duty of care includes workplace-induced stress.

b. Although involving very different subject matter, they were united by the applicability of the same legal principle, as stated above at (a).

c. See para.11 – there are three main differences: who knows what; who is mainly in control of the issue; and shared responsibility.

d. See para.22 – there are no special control mechanisms in this area.

e. See para 26 and 27 – the nature and extent of work being done by the employee and signs from the employee himself.

f. See paras 32–34.

g. See para.24 – research indicates the key factor is the interaction between the individual and the job. You may disagree!

h. Her claim was unsuccessful.

i. See paras 47–50 – essentially, there was held to be lack of foreseeability.

ACTIVITY 12.2

APPLIED COMPREHENSION

a. (See p.134.) The author believes that the balancing exercise has an air of unreality about it. This is because the potential consequences of breach may not be proportional to the scale of the risk, foreseeability is rather broad in this context, difficulties of proportionality and the impact of the resources of the defendant employer.

b. It is a mechanism for distributing costs of preventative measures and costs of accidents in society.

c. (See pp.132 and 133.) Likelihood of the occurrence, seriousness of outcome and cost of preventative measures.

d. (See p.137.) Bigger organisations may be expected to take greater precautions; for instance, see *British Railways Board* v *Herrington*.

e. The concept is pervasive in this area but is particularly evident in the interpretation of 'reasonable practicability'.

Chapter 13

Activity 13.1

Core comprehension – vicarious liability

a. 1. The law of agency.

2. The imposition of a 'non-delegable' duty of care.

3. Vicarious liability.

b. The employer–employee relationship.

The quasi-employment relationship.

c. The employer is not liable for every act of the employee but only for acts that are committed in the course of the employee's employment… the better view is that the employee must commit a wrong in the course of employment; if the employee is not liable, neither is the employer.

d. He who does anything by another does it by himself.

e. … It is reasonable that he who has made choice of an unskilled or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed…

f. Williams identifies the 'deep pockets' argument.

… We have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant.

g. The employer 'does not in fact have to meet these liabilities out of his own pocket. The cost of the liabilities is distributed over a large section of the community, and spread over some period of time'.

h. … in this case the cost… may be distributed amongst those who, in a commercial sense, constitute the enterprise itself, i.e. the shareholders and staff and employees of the enterprise.

i. … It is sound simply because, by and large, it is the most convenient and efficient way of ensuring that persons injured in the course of business enterprises do not go uncompensated.

Activity 13.2

Applied comprehension – close connection test

a. '… Vicarious liability in tort requires, first, a relationship between the defendant and the wrongdoer, and secondly, a connection between that relationship and the wrongdoer's act or default, such as to make it just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer's conduct.' [1]

b.

- Legal theories.
- Models of enterprises.
- Social attitudes.
- The court's sense of justice and fairness.

> '…in part to legal theories, of which there have been several; in part to changes in the structure and size of economic and other (e.g. charitable) enterprises; and in part to changes in social attitudes and the courts' sense of justice and fairness'. [10]

c. '… expansion of commerce and industry'. [12]

'… whoever employs another is answerable for him, and undertakes for his care to all that make use of him'. [12]

d. '… The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed **broadly**.' [44]

e. '… Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt.' [45]

f. '… It was Mr Khan's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul mouthed way and ordering him to leave was inexcusable but within the "field of activities" assigned to him.' [47]

g. '… He was following up on what he had said to the claimant. It was a seamless episode.' [47]

'… it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers'. [47]

h. '… Mr Khan's motive is irrelevant. It looks obvious that he was motivated by **personal racism** rather than a desire to benefit his employer's business, but that is neither here nor there.' [48]

i. '… To search for certainty and precision in vicarious liability is to undertake a quest for a chimaera. Many aspects of the law of torts are inherently imprecise. For example, the imprecise concepts of fairness, justice and reasonableness are central to the law of negligence. The test for the existence of a duty of care is whether it is fair, just and reasonable to impose such a duty. The test for remoteness of loss is one of reasonable foreseeability. Questions such as whether to impose a duty of care and whether loss is recoverable are not always easy to answer because they are imprecise. But these tests are now well established in our law.' [54]

j. '… the court has to make an evaluative judgment in each case having regard to all the circumstances and having regard to the assistance provided by previous decisions on the facts of other cases.'

k. Example: In the sexual abuse cases the law of vicarious liability developed to include the 'type of relationship' within the vicarious liability regime as a response to evolving workforce relationships which included members of their workforces in 'akin to employment' relationships. However, in the present case the type of relationship was not new; it dealt with the traditional employer/employee relationship. Therefore, the 'close connection' test continues to serve the intended concept of justice. (72 words, paraphrasing [55–56])

Chapter 14

ACTIVITY 14.1

CORE COMPREHENSION – DEFECTIVE PREMISES

a. … whether a local authority, whose agents and servants had failed to inspect or had inspected negligently the foundations of a building under construction, could be liable in tort towards an ultimate purchaser of that building when it developed defects which posed an imminent threat to safety and health.

b. 1. whether negligently inflicted economic loss could be compensated through the law of torts

2. the notion of duty of care and when and how the courts should decide that it came into existence.

c. … Anns characterised the plaintiffs' loss as 'material, physical damage' even though Lord Denning had, extrajudicially, made it clear that this was a mis-description – one presumes in order to help a 'deserving' plaintiff. For a time the House of Lords persisted with this notion but, eventually, it came to accept that the loss was purely economic.

d. … 'one element of the structure should be regarded as distinct from another element so that damage to one part of the structure caused by a hidden defect in another may qualify to be treated as damage to "other property".' In Murphy one of them, at least, regarded this theory as totally 'artificial'.

e. The result may be that architects and consulting engineers who give bad advice leading to the construction of shoddy buildings may be liable to their owners, but the builders, whose negligence produces the same result, will not.

f. The inconsistency:

… the second purchaser of a building has no action against the local authority or the builder but may still have an action against the surveyor who has been employed by the building society to value the premises in question prior to granting a mortgage to the second purchaser/mortgagor.

Why?

… A technical explanation for this could be found by invoking the notoriously vague notion of proximity and arguing that it is not satisfied in the case of local authority inspector and house owner/mortgagor. But that, surely, would not be so where the house owner pays a fee to the local authority for the inspection needed when an extension of his house is being planned.

g. … if a buildings stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway.

(Note: you will study the law of nuisance in Chapter 17 and will then better understand the distinction being made 'between negligence and nuisance'.)

h. … if the builder is not liable, neither should the local authority be liable. The wisdom of the first part of this argument may be doubtful on policy grounds; but the linkage of the two liabilities, in a manner that makes them co-extensive, is seriously questionable and, it is submitted, has yet to be properly justified.

Activity 14.2

Applied comprehension – damage to buildings

a. The builders had been negligent in constructing a wall which did not comply with good building practice and failed to prevent a fire spreading from one area of the building to another.

… In 1995 a fire broke out in the storage area. It spread from the storage area to the rest of the dairy and caused much damage… Although a wall was constructed in the right place… the fire passed over the top of the wall. This it would not have done had the wall been constructed in accordance with good building practice.

b. No feedback provided.

c. … the defendant did owe a duty of care to the claimant. It was a duty to take reasonable care to safeguard him against damage to property other than the Dairy building itself, namely the damage set out in categories B, C, D and E… insofar as the items mentioned therein had not merged with or become part of the structure

of the Dairy, and in respect of loss of profit and increased costs of working caused by fire damage to such property. The defendant did not owe a duty of care to the claimant in respect of damage to the Dairy itself, that is loss in category A, or in respect of loss of profit and increased costs of working caused by the fire damage to the Dairy itself.

d. Such damage is to be regarded as pure economic loss in respect of which no duty is owed in the absence of a contractual or other special relationship of proximity.

e. (i) ... had there been no change of ownership the builders would have been liable in tort for the damage to the building.

(ii) ... although the builders were under a duty owed to the original owners to build the wall in such a way that it contained any fire for a certain period and although they broke that duty, the original owners can not sue because they have suffered no damage and the subsequent owners can not sue because the duty owed to them only extends to chattels in the building and not to the building itself.

f. ... the concept of one building is not hard edged. One building built at one time by one person for one purpose is at one extreme, but one can have buildings which are gradually added to over the centuries and used for different purposes, such as a modern shop added to the end of a Georgian residential terrace at the other extreme... However, in the present case the whole of the dairy was built at the same time by the builders, marketed as a unit, bought as a unit to be used as a unit and was used as a unit. I have no doubt that any holding either that (1) the rooms on one side of the wall ... as constituting a different building from the rooms on the other side of the wall, or that (2) the wall ... as constituting a different building from the rooms on one side of it, would be a thoroughly undesirable approach to the issues before us.

g. ... in most cases of the direct infliction of physical loss or injury through carelessness, it is self evident that a civilised system of law should hold that a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem. Thus the three so called requirements of a duty of care are not to be treated as wholly separate and distinct requirements but rather as convenient and helpful approaches to the pragmatic question whether a duty should be imposed in any given case. (citing the *Marc Rich* case)

h. Firstly, following *Donoghue* v *Stevenson* and the numerous cases in which the principle in that case had been applied the duty was to avoid damaging persons or their property 'other than to the very piece of property from the defective condition of which' the danger arose. Secondly the effect of accepting that the scope of the duty was wide 'would be in substance to create as between two persons who are not in any contractual relationship with each other, obligations of one of those persons to the other which are only really appropriate as between persons who do have such a relationship between them... In my view the imposition of warranties of this kind on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement.

i. ... that decision [i.e. *Murphy*] establishes clearly that the duty of care owed under *Donoghue* v *Stevenson* principles excludes economic loss consequent upon damage to the chattel in question itself; and where the damage in question is damage to a building, that damage is to be treated as economic loss and irrecoverable in the absence of a contractual or other special relationship.

It upheld the reasoning of the judge in the lower court namely:

... In my view, however, there is no conceptual or qualitative difference (and certainly none which I feel able to formulate) between the case of defective foundations which fail to cope with shrinkage or heave in the subsoil and to support the building, resulting in cracked walls and pipes, and the case of a

defective roof which fails to cope with and to keep out water, and the case of the defective fire stop wall which fails to cope with and to contain fire which goes on to injure other parts of the same building. If the resulting injury to the fabric of the building itself is to be seen as purely economic loss in the first two of those cases it must, in my view, be seen as economic loss in the third.

Chapter 15

ACTIVITY 15.1

Core comprehension – visitor and trespasser

a. He was 18. The accident occurred at Brereton Heath Country Park. In about 1980 Congleton Borough Council acquired the land. See [2].

   … he ran out into the water and dived. He had done the same thing many times before. But this time the dive was badly executed because he struck his head hard on the sandy bottom. So hard that he broke his neck at the fifth vertebra. He is now a tetraplegic and unable to walk. [3]

b. The common law had distinguished between invitees, in whose visit the occupier had some material interest, and licensees, who came simply by express or implied permission. Different duties were owed to each class. [6]

c. The Act… amalgamated (without redefining) the two common law categories, designated the combined class 'visitors' (section 1(2)) and provided that (subject to contrary agreement) all visitors should be owed a 'common duty of care'. [6]

d. '(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.' (Quoted at [6])

e. '(3)… (a) an occupier must be prepared for children to be less careful than adults; and (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.' (Quoted at [6])

f. 1. Warnings

      '(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.'

   2. Reasonable steps taken to control the work of independent contractors

      '(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.'

   3. *Volenti* – willing assumption of risks

      '(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).'

      (All at [7])

g. See [8].

h. See subs.(3) quoted at [9].

i. See s.1(4) quoted at [9].

j. See [13].

k. See [13].

ACTIVITY 15.2

APPLIED COMPREHENSION

a. (See p.47.) Lord Dyson MR reconciled the inconsistency by focusing on the response to the risk rather than the foreseeability of the risk; the reasonable response to the risk was taken to be the issuing of a warning.

b. (See p.49.) In Tomlinson Lord Hoffmann made clear the different purposes of applying the concept of 'obvious danger' between the OLA 1957 and the OLA 1984.

c. In the former, it is concerned with the question of breach and contributory negligence. In the latter, it goes to the basic question of the existence of a duty.

d. In the 1957 Act, the duty of care always exists between and occupier and a visitor, whereas under the 1984 Act, the duty will only exist if the requirements of s.1(3)(a)–(c) are satisfied.

e. In the conclusion, the author seems to be arguing that the statutes were introduced to replace the common law (and its shortcomings). However, they are now interdependent again, perhaps the common law is more simple and principled.

Chapter 16

ACTIVITY 16.1

CORE COMPREHENSION – CHARACTERISTICS OF NUISANCE

a. 'Ought this inconvenience to be considered in fact as more than fanciful and more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes of living, but according to plain and sober and simple notions among the English people.' (para.12.02)

b. … in respect of smell caused by the emission of diesel fumes from the coaches and noise from the 'revving' of their engines. (para.12.03)

c. ... noises caused by the carrying out of repairs and cleaning were held not sufficiently serious to warrant relief. (para.12.03)

d. … judges are meticulous in examining the precise extent of the interference to see whether it exceeds that to be expected in an area in which that general type of interference has to be tolerated. (para.12.04)

e. 'In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy, and that the defendants' machinery is of first class character.' (para.12.04)

f. The 'locality' principle was applied in the defendants' favour in a situation in which the passage of heavy dockyard traffic was considered to have converted an area from a residential to a commercial one. (para.12.05)

g. i. … The plaintiff owned a small hotel with a garden which was surrounded by grazing land. In 1975 the local council, which owned the grazing land, built a housing estate upon it. A playground, which unfortunately adjoined the plaintiff's garden, was provided for the children. (para.12.07)

ii. The court perceived social utility in the space provided for children to play.

'… to hold the balance between the young and the old'. (para.12.07)

iii. … He also granted an injunction which restricted the opening of the playground to the hours between 10 am and 6.30 pm and limited its use to children aged twelve years and under. He did not, however, agree to order the closure of the playground for a period during the afternoon 'when more elderly people sometimes want to have a sleep'. (para.12.07)

h. Noise (the *Gaunt case).*

'… a nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard and not regarded'. (para.12.10)

i. Expert evidence does, however, have its limits. In the final analysis the court has to form an impression of the volume of noise in terms of day to day experience. (para.12.13)

ACTIVITY 16.2

Applied comprehension – planning permission and nuisance

a. First, the grant, or terms and conditions, of a planning permission may permit the very noise (or other disturbance) which is alleged by the claimant to constitute a nuisance… Secondly, the grant, or terms and conditions, of a planning permission may permit the defendant's property or another property in the locality to be used for a certain purpose… [77]

b. See [81].

c. … it was nonetheless a correct outcome, as the planning authority 'had made a decision in the public interest and the consequences had to be accepted.' [84]

d. A strategic planning decision affected by considerations of public interest would be more likely to apply to a major development than planning permission for 'a change of use of a very small piece of land'. See [85].

e. … it seems wrong in principle that, through the grant of a planning permission, a planning authority should be able to deprive a property owner of a right to object to what would otherwise be a nuisance, without providing her with compensation, when there is no provision in the planning legislation which suggests such a possibility. [90]

Examples: (i) Planning Act 2008 (ii) Civil Aviation Act 1982 and Land Compensation Act 1973 (at [90]).

f. See [91].

g. … In *Hunter* v *Canary Wharf Ltd* [1997] AC 655, Lord Cooke (dissenting on this part of the case) highlighted these changes:

'the lineaments of the law of nuisance were established before the age of television and radio, motor transport and aviation, town and country planning, a "crowded island", and a heightened public consciousness of the need to protect the environment. All these are now among the factors falling to be taken into account in evolving the law….' [180]

h. The common law of nuisance is there to provide a residual control to ensure that new or intensified activities do not need lead to conditions which, within that pattern, go beyond what a normal person should be expected to put up with. [183]

i. i. … it is because it is part of the established pattern of uses in the area, and society attaches importance to having places for professional football within urban areas.

ii. … if there is something about the organisation, or lack of it, which takes the disturbance beyond what is acceptable under the reasonableness test. [185]

j. See [186].

Chapter 17

ACTIVITY 17.1

CORE COMPREHENSION – *RYLANDS* V *FLETCHER* BASICS

a. The rule in *Rylands* v *Fletcher* is a sub-species of nuisance, which is itself a tort based on the interference by one occupier of land with the right in or enjoyment of land by another occupier of land as such. [9]

b. … no claim in nuisance or under the rule can arise if the events complained of take place wholly on the land of a single occupier. [9]

c. … such a claim does not relate to any right in or enjoyment of land. [9]

d. … 'a large accumulated mass of water' stored up in a reservoir…

…the storage of chemicals, for the purpose of making munitions, which 'exploded with terrific violence'

… some 500,000 tons of mineral waste tipped on a steep hillside

… the industrial solvents being used by the tannery… [10]

e. … its effect is to impose liability in the absence of negligence for an isolated occurrence… It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be. [10]

f. 'It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.' ([11], citing the *Rickards* case)

g. An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing, subject to defences of Act of God or of a stranger, without the need to prove negligence. [11]

h. … the council did not accumulate any water, it merely arranged a supply adequate to meet the residents' needs. The situation cannot stand comparison with the making by Mr Rylands of a substantial reservoir. Nor can the use by the council of its land be seen as in any way extraordinary or unusual. It was entirely normal and routine… the conditions to be met before strict liability could be imposed on the council were far from being met on the facts here. [13]

Chapter 18

Activity 18.1

Core comprehension – *Richard* v *BBC*

a. Sir Cliff's action alleged breach of his Article 8 privacy rights; additionally a statutory breach of the Data Protection Act 1998.

b. (See para.3.) SYP apologised and settled the action, paying agreed damages and costs and was therefore not a defendant in this action.

c. Following a meeting, it was agreed that the SYP would give the BBC journalist advance notice of the search.

d. These are set out in para.276. The main issues in the case can be found at para.225.

e. *Murray* v *Express Newspapers*, *Axel Springer AG* v *Germany*, *In re S (A Child)*, *Rocknroll* v *NGN*.

f. (See para.317.) While there was public interest in the fact of police investigation into historic abuse allegations, there is no public interest in identifying persons under investigation in this case.

g. (See [paras 327–333.) The court took evidence on the serious personal impact of the publication upon the claimant.

h. It was the submission by the BBC of the broadcast for an award, further publicising and indicating pride in its conduct, that attracted aggravated damages.

Activity 18.2

Applied comprehension – *Weller* v *Associated Press*

a. The starting point is the two-part test established in *Campbell* v *MGM*:

   1. Objectively determined, did the claimant have a reasonable expectation of privacy in regard to the facts at issue?

   2. If yes, then the claimant's Article 8 rights must be weighed against the publisher's Article 10 rights.

   The way this is done in *Weller* is discussed later in the article.

b. The key factor contrary to any Article 10 arguments was that the case involved children and the 'best interests of the child' is a powerful consideration. The children had no influence over their exposure to being photographed.

c. It was significant that both the Court of Appeal and the Supreme Court denied the publisher's request to appeal the decision.

d. There may be safeguarding issues around the position of vulnerable children who have been adopted, are in care, or are fleeing or hiding from violence.

e. The publisher claimed that the images were 'innocuous' and were taken on a public street. Arguments can be made, although not in this case, that the photographs contribute to a debate of general interest. Alternatively, defendants might suggest that their publication provides social benefits or that it is in the public interest for individuals to be able to take and share photographs as an exercise of the right to freedom of expression.

f. In *Weller*, the photos were published in the *Daily Mail* newspaper, in hard copy and online. The children were identified and named. It is possible that, if the defendant is a private individual rather than a media organisation and/or the image is not published but only used for private purposes, then the balancing exercise between Articles 8 and 10 may be determined differently (i.e. in favour of the defendant).

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