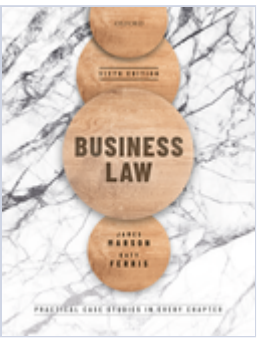


Business Law (6th edn)
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# 12. Non-Physical Damage and Liability for Economic Loss

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## Abstract

This chapter continues on from the previous chapter in discussing liability in negligence for physical damage and considers the potential liability that businesses and individuals may face when they provide advice in the nature of their business, when they cause economic losses not associated with physical damage, and where the claimant suffers a psychiatric injury or nervous shock due to the acts of the tortfeasor. Recently, there has been an increase in instances of imposing liability on employers for the stress and associated health problems suffered by their employees. In the absence of physical damage, restrictions are placed on the imposition of liability for pure economic loss, although such loss has been widened to include damages for negligent misstatements. Of crucial importance is that businesses are aware of the implications of providing information in the course of their professional activities that may cause an investor or client loss through negligence.

**Keywords:** liability in negligence, physical damage, tortfeasor, pure economic loss, negligent misstatements

Loss may have been incurred due to a negligent act, but where this is in the absence of physical damage (merely economic loss), recovery of the loss from the tortfeasor has been restricted. Such instances can include the negligent statements made by professionals. As businesses may be involved in providing professional advice (lawyers, accountants, and so on) this is particularly relevant. Further, there has been an increase recently of imposing liability on employers for the stress and associated health problems suffered by their employees. One or all of these matters may affect a business and it is important to identify where responsibility and potential liability exist.

## Business Scenario 12

Jing inherited £40,000 on her father's death. In the course of a conversation in her office with Imran, a financial journalist, Imran asked her what she intended to do with her inheritance. Jing replied that she had not made up her mind and was seeking ideas. Imran then said 'Of course it is not really my business to give investment advice, but if I were you I should invest in Graphica Ltd, a new computer design company. Although their shares are low at the moment, they are tipped to rise dramatically as they have developed a new software package'.

Acting on this advice, Jing invested all her money in Graphica Ltd. Unfortunately, Imran had confused Graphica Ltd with Graphs Unlimited; the former company was on the verge of bankruptcy, the latter had developed the new software package. Shortly after Jing invested, Graphica Ltd went into liquidation and Jing lost her entire investment.

Before Imran's mistake had become apparent, Jing had passed on his advice to David, a friend, who had invested £10,000 in Graphica Ltd.

Advise Jing and David who wish to claim damages from Imran.

## Learning Outcomes

- Identify how liability for pure economic loss is established (**12.2**)
- Explain the nature of liability for negligent misstatements and how such liability may be restricted (**12.3**)
- Explain the difference between 'primary' and 'secondary' victims in claims of psychiatric damage and negligence (**12.4**).

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## 12.1 Introduction

This chapter continues from the discussion of liability in negligence for physical damage to consider the potential liability businesses and individuals may have when they provide advice in the nature of their business, when they cause economic losses not associated with physical damage, and where the claimant suffers a psychiatric injury/nervous shock due to the acts of the tortfeasor. Restrictions are placed on the imposition of liability for **pure economic loss**, although such loss has been widened to include damages for negligent misstatements. It is of crucial importance that businesses are aware of the implications of providing information in the course of their professional activities that may cause an investor/client loss through negligence.

## 12.2 Pure economic loss

**Chapter 11** identified liability in negligence and how this was linked with some form of physical loss or damage. In part, this limits the possibility of 'opening the floodgates' to many claimants and, as stated by Cardozo J in *Ultramares v Touche*, exposing defendants to a potential liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'. In cases of psychiatric injury, for instance, the courts have produced rules that restrict the possibility of many claims, particularly to those identified as '**secondary**' victims.

### Consider

Jing and David have suffered economic loss due to advice provided by a third party. As this is not associated with physical loss they must establish that the law recognizes that the third party owed them a duty of care and had breached this duty. The extent of their loss is foreseeable, yet whether there exists a special relationship between the parties to hold the third party liable for these loses is important.

Turning to liability where the claimant has 'only' suffered economic loss (as opposed to situations where it is linked to physical damage such as loss of income following a car accident) the recovery in damages of such losses is very limited. Clearly, if the economic losses have been sustained due to a negligent act and the parties had entered into a contract, then damages are recoverable. However, the parties have to agree to be bound by the terms of a contract and tortious liability is established on the basis of a civil wrong, often in the absence of any contractual agreement. This is not to say that pure economic loss is not important, but it is rather difficult for the courts to identify where the liability in such instances will extend, or be limited. This can be seen in the following case:

### *Weller v Foot and Mouth Research Institute* (1966)

#### Facts:

p. 302 The defendants negligently allowed the foot and mouth virus to escape from their research laboratory and the consequences were that cattle had to be destroyed and restrictions ↵ were imposed on the transport and trade of the cattle in the affected area. The claimant was an auctioneer who had lost profits in sales due to the restriction, and brought an action to recover the losses due to this negligent act. It was held that as this was a case of pure economic loss, the claim must fail.

**Authority for:**

Actions for losses attributed to pure economic loss are not compensatable as they are not linked with economic losses associated with physical damage/loss (e.g. lost wages (economic loss) following a car accident (physical damage)).

The sense of the judgment may be seen in a wider discussion of the issue of liability, and the rights to limit or restrict liability. For example, this claim was by an auctioneer whose trade was affected due to the outbreak. However, what about local butchers in the area that may have lost sales due to the limit in supplies of beef? Would consumers have a claim if the outbreak had limited the supply of this meat and they were 'forced' to purchase some other meat product? Clearly, there had to be a limit to claims in this respect, unless an aspect of physical damage was involved.

### *Spartan Steel v Martin & Co. Contractors Ltd* (1973)

**Facts:**

Contractors who were digging in a public road had negligently cut an electricity cable and the claimant's factory lost power, damaging some furnaces that had molten steel in them, which cooled and hardened due to the loss of power.

**Authority for:**

It was held that the claimant could recover for the damage to these furnaces and the loss of the molten metal, but were prevented from successfully claiming for losses to further work that it was unable to carry out due to this power-cut, as this was pure economic loss.

The general rule preventing claims based on pure economic loss is subject to exceptions. This is particularly so where a special relationship exists between the parties that elevates the defendant's responsibility to the claimant.

### *Ross v Caunters* (1980)

**Facts:**

A firm of solicitors had sent a will to their client to be signed and witnessed, but they failed to inform the client that the witness should not be a beneficiary or spouse. The will was returned, and not checked by the solicitors, and when the testator died, it was ↵ discovered that one of the witnesses

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was the spouse of a beneficiary and hence could not claim under the will. A damages action was brought against the solicitors.

### Authority for:

It was held that the claimant could succeed. A special relationship was established and it was reasonably foreseeable that a beneficiary could be affected by their negligence.

## *Commissioners of Customs and Excise v Barclays Bank Plc* (2006)

### Facts:

The House of Lords had to consider the liability of the bank that had been instructed, through a court-ordered injunction, to freeze accounts of two companies that owed significant sums of money to Her Majesty's Revenue and Customs (HMRC). The aim of the injunctions was to prevent access to the money that, it was argued to the court, would be taken out of the country and thus make it very difficult/impossible for HMRC to recover. The bank, following the injunction, sent a letter stating it would abide by the order, but negligently allowed withdrawals (within hours of the injunction being served) to remove large quantities of money from the accounts, and this money was not recoverable by HMRC. As such, the claim was brought against the bank for the loss.

### Authority for:

It was held that no liability was established. Barclays had no choice as to whether it would be involved in the injunction that froze the accounts in question. Liability for pure economic loss will only be recoverable where the person has a responsibility, or has assumed a responsibility for their statement to the claimant; a duty of care can be demonstrated to exist between the parties; and the tests as established in *Caparo v Dickman* are satisfied.

Business specialists and advisors may, in the course of providing advice, cause their client loss due to negligence. The seminal case outlining such liability is *Bolam v Friern Hospital Management Committee.*

## *Bolam v Friern Hospital Management Committee* (1957)

### Facts:

The claimant was suffering a mental illness and part of his treatment required him to undergo electroconvulsive therapy. The doctor failed to administer relaxant drugs and the claimant consequently suffered serious injury. Evidence was admitted to the court demonstrating the divided

opinion amongst professionals whether the drugs should be used (associated with a limited risk of death) or not (associated with a limited risk of fractures).

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**Authority for:**

In finding the doctor not in breach of the duty of care, the House of Lords established what became known as the 'Bolam test': A medical professional will not be guilty of negligence where they have acted in accordance with practice accepted as proper by a reasonable body of medical practitioners skilled in that particular art.

The 'Bolam test' of professional advice refers to whether the advisors were acting in accordance with a practice of competent respected professional opinion. The court held the test continues to be appropriate and, when applied to the present case, the advice of the defendant satisfied this test. The court did find the defendant failing in the communication between the parties, although this dimension to the case was not subject to the Bolam test. The defendant was required to clearly articulate the risks to the client, which ultimately, having had a history for over a period of ten years, the defendant satisfied. Holding for the defendant, the court may have implicitly broadened the Bolam test to include the level of communication of risk involved when providing financial advice.

### *O'Hare v Coutts & Co.* (2016)

**Facts:**

The claimant had been provided with investment advice from the defendant private bank on the basis of proceeds they obtained following the sale of a chemical engineering business. However, the claimant was unhappy with the level of communication between them and the defendant's employee. Further, they alleged that the products recommended were unsuitable, having no capital protection, and therefore exposed the claimant's wealth to significant risk of loss. The claimant accepted the investment advice, but argued that this did not mean the advice was correct.

**Authority for:**

The High Court clarified the distinction between the adoption of sales techniques in persuading a client to take a financial risk from offering competent advice.

The Supreme Court offered further instruction in the rules establishing where a duty of care exists between the parties in relation to economic loss and negligent misstatements. This is important in establishing where responsibilities exist and the extent of a representor's responsibility for loss.

### *Steel v NRAM Ltd* [2018]

#### Facts:

Ms Steel was a solicitor acting for a company, HCL. It instructed her to act in a proposed sale for units with NRAM (NRAM was not represented by solicitors in the transaction). On the night before the
p. 305 completion of the sale, Steel misrepresented details of a secured ↵ loan and when HCL later went into liquidation, NRAM discovered its loan was unsecured and sought to recover it's loses from Steel. The question for the court was whether Steel and her law firm had assumed responsibility to NRAM, even though it was not her client, for the false representations.

#### Authority for:

The Supreme Court's judgment was important as it remarked on the *Caparo* judgment and how this had been wrongly interpreted for years. The old threefold test was not endorsed by the court, rather the question was the reasonableness of the representee's reliance that was crucial to the assumption of responsibility. The tests which should now be applied are:

1. whether it was reasonably foreseeable that the claimant would suffer loss/damage;
2. whether it was reasonable for the victim to have relied on the representation; and
3. should the representor have reasonably foreseen that the claimant would do so?

The result was that NRAM had not reasonably relied on Steel's statement. In commercial transactions, said the Supreme Court, a lender would/should not rely on a statement of the borrower. NRAM had access to the contract, which it did not check for the accuracy of Steel's statement, and it was reasonable for her not to foresee that NRAM would rely on her representation.

Losses can be suffered in cases where business professionals make statements that a person relies on, but the statement turns out to have been negligently made, and this leads to pure economic loss. Can claims be made for such negligent misstatements?

## 12.3 Negligent misstatements

In some cases businesses provide expert advice that clients and others rely on when investing money, making financial/investment decisions, and so on, and when these have been negligently made, the recipient may suffer losses. For example, advice may be provided on where to invest money, which shares to buy, and whether credit should be advanced to a firm. Claims on the basis of a statement having been negligently made, prior to case law in 1964, had to be made in the tort of deceit and required that the defendant had acted dishonestly, rather than just negligently. This position was changed in *Hedley Byrne & Co. v Heller*.

## *Hedley Byrne & Co. v Heller* (1963)

### Facts:

p. 306 Hedley Byrne was an advertising company and its bankers approached the bank of Heller regarding the financial stability and credit history of one of Heller's clients, ↵ a third party, Easipower Ltd. Hedley Byrne required this information as it intended to enter into contracts with the third party and wanted to ensure the company was creditworthy. Heller provided a reference as to the third party's creditworthiness, but further added that the information was intended for private use and did not impose any liability or responsibility on the provider of the reference. However, despite the reference in favour of the third party, the truth was that the firm was not of sound financial standing, and following the advance of credit, the claimants lost several thousands of pounds and brought the claim against the bank that had provided the negligent misstatement.

### Authority for:

The House of Lords held that this case involved a 'special relationship of proximity' (beyond the 'standard' level of proximity established in *Donoghue v Stevenson*) between the parties and this would enable a claim (in theory). The problem (for the claimant) in this particular case was the bank's exclusion clause, disclaiming responsibility for any losses due to the statement, which prevented the damages action succeeding (although the point of law regarding the possibility of claims remained). However, such a disclaimer if used today would have to satisfy the requirements of the Unfair Contract Terms Act 1977 as being reasonable. So a business may not always be able to evade liability by the inclusion of a disclaimer.

A further, very important case demonstrating where liability may or may not be imposed was in *Caparo Industries Plc v Dickman and Others*. The case was raised in **Chapter 11** (**11.5.1.3**) but to briefly recap, the claimants owned shares in a company and relied on accounts prepared by the defendants to purchase more. The accounts were negligently prepared. However, the accounts were prepared as a requirement under the Companies Act 1985 and not on the basis of providing financial advice for any third party, including shareholders. The House of Lords determined that no duty of care existed between the claimant and the defendant. To hold the auditors liable would be to have enabled too many claimants possible recourse to claims for negligence for publicly produced documents. Lord Oliver remarked on the issue:

> **The opportunities for the infliction of pecuniary loss from the imperfect performance of everyday tasks upon the proper performance of which people rely for regulating their affairs are illimitable and the effects are far reaching. A defective bottle of ginger beer may injure a single consumer but the damage stops there. A single statement may be repeated endlessly with or without the permission of its author and may be relied upon in a different way by many different people. Thus the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality.**

The Lords would not impose liability on the auditors. They stated that a 'special relationship' must exist
p. 307 between the parties and this was not evident in the case. Importantly, in ↵ terms of liability for a negligent misstatement, the Lords established four factors that had to exist to determine when liability would be imposed. These were:

1. the advice is required for a purpose which is made known, either actually or inferentially, to the advisor at the time when the advice is given;
2. the advisor knows that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose;
3. it is known that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry;
4. it is so acted upon by the advisee to his detriment.

### Consider

Applying the tests to Imran we can see that he was enjoying a conversation with an acquaintance and provided some information based on his knowledge of the financial market. Imran certainly communicated the advice to Jing, although it may seem strange that a person would invest a significant sum of money on the basis of a conversation without seeking verification or professional advice before proceeding. Jing did act on the advice and has suffered a loss as a result. However, as Jing apprised David of this information, Imran would have had no knowledge that this would be passed on (and actioned) and hence could not be liable to David.

Such an example of the application of this test was demonstrated a year after *Caparo* in the case of *James McNaughten v Hicks.*

## *James McNaughten v Hicks* (1991)

### Facts:

Accountants were asked to prepare information and draft accounts to be used for the basis of negotiations in the takeover of the firm. The accounts had been negligently produced, and led to the claimant suffering financial loss. It was held that no liability arose, as the defendants were not aware of the precise use of the information prepared by them. As these were draft accounts, it was fair to assume that further investigation would be made before a financial decision was taken.

### Authority for:

The case demonstrated the necessity of the defendant being aware of the claimant's use of the information that was being provided. Therefore, the following points should be considered:

1. the purpose for which the statement was made;
2. the purpose for which the statement was communicated;
3. the relationship between the advisor, advisee, and any relevant third party;
4. the size of any class to which the advisee belongs;
5. the state of knowledge of the advisor;
6. reliance by the advisee.

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This case may be compared to *Yorkshire Enterprise Ltd v Robson Rhodes*.

## *Yorkshire Enterprise Ltd v Robson Rhodes* (1998)

### Facts:

The claimants had invested significant sums of money into a company that soon went into liquidation. They made the investment following accounts and correspondence between the claimants and the negligent accountants. It was held that liability would be imposed as the accountants were aware of why the claimants wanted the information, and what they had intended to do with this information. Further, to impose liability in these circumstances was considered reasonable.

### Authority for:

When considering whether liability will be imposed in cases of negligent misstatement, the following points should also be considered:

1. there must have been negligence when the statement was made;
2. the statement must be given by an expert acting in the course of their expertise;
3. there must be a duty of care owed to the person who acts on the statement—an assumption of responsibility;
4. there must be reliance on the statement by the persons to whom it was addressed;
5. there must be foreseeable loss arising out of the reliance;
6. following *Caparo*, it must be fair, just, and equitable to impose the duty.

### Consider

Applying the tests from *James McNaughten v Hicks* and *Yorkshire Enterprise Ltd v Robson Rhodes* it appears that no liability will be established between the parties.

**Note:** however, that the Lords stated in *Commissioners for Customs and Excise v Barclays Bank Plc* (see **12.2**) that the tests established in the previously noted cases were correct and had led to justice being served, but they are specific to the cases to which they relate, and sweeping statements regarding the application of tests are not possible. The cases have to be considered on their facts.

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## 12.4 Non-physical (psychiatric) damage

An element of negligence that may affect businesses is where physical injury has not occurred to a claimant, but rather there is an element of psychiatric damage. Recently, this issue has become important to businesses where an employee suffers from stress at work, and the employer takes no action to remedy the situation. Given high pressure targets people often work under, not only will stress-related illness cost the employer in terms of sick leave and lack of productivity, it may now also lead to tortuous liability. The following cases demonstrate where liability may be imposed, and hence identify how businesses may seek to minimize the risk of such claims.

There are increasing situations where liability is imposed for non-physical injuries, such as employees being placed under stresses at work, or where rescuers (such as those employed in the emergency services) suffer through the traumatic nature of their job. Whilst injuries suffered in such situations may not involve physical damage, their effects are no less serious, no less debilitating, and no less important to the imposition of

liability. Despite the wider issue of psychiatric injury, employers/managers in particular need to be aware of their responsibilities and be proactive in reducing the possibility of injury resulting from exposure to unreasonable stress.

Whilst in an employment relationship it is incumbent on an employer (at common law and through legislative measures) to protect an employee's health and safety; negligence in this respect may also lead to a damages claim against the employer. As such, an employer's obligations transcend many jurisdictions of law and it is necessary to view the law in its entirety, rather than how it is artificially presented in textbooks. Claims for psychiatric injuries have increased for businesses with the increased stress and burdens placed on employees, and where it is reasonable for an employer to be aware of this, and they do not take positive and sufficient action to remedy the problem, they may be held liable.

### *Intel Corp. (UK) v Daw* (2007)

#### Facts:

Mrs Daw suffered stress due to unreasonable workloads placed on her from several managers at the firm. She had raised her concerns to her employer over the workload and how it was adversely affecting her health, and she was found in tears by one of her line managers, but the employer failed to take immediate action. Daw became clinically depressed and this led to a breakdown. The original trial awarded her £134,000 for her injury and loss of earnings and the Court of Appeal agreed.

#### Authority for:

An employer's offer of access to a short-term counselling service would not have reduced the risk of the employee's injury. Further, employers have a duty to protect the health and safety of their employees and the employer failed in its duty to provide a safe system of work.

p. 310 ↵ A similar line of reasoning was used in *Barber v Somerset County Council.*

### *Barber v Somerset County Council* (2004)

#### Facts:

The case involved a teacher who alleged to have suffered a stress-induced illness caused by an unreasonable workload. The teacher returned to work but the workload had not been reduced (albeit the employer stated this was due to the constraints of resources).

**Authority for:**

The House of Lords held that the employer had not taken any steps to reduce his workload or provide him with support, and therefore it was reasonably foreseeable that the employee, already known as being vulnerable in this regard, would suffer some form of injury. (This is one of the reasons why the Government introduced the 'family-friendly' employment policies—to assist in creating an acceptable work-life balance.)

It should be noted that employers are entitled to expect employees to withstand the 'normal pressures of the job'—*Sutherland v Hatton*—but despite the difficulties in determining when pressure leads to stress, and stress to injury to health, there will be signs that enable a reasonable employer to identify these and take action. Indeed, the Advisory, Conciliation and Arbitration Service has produced a guide for employers on how to identify signs of depression in the workplace, along with a booklet on health and wellbeing that includes checklists and policies to avoid breaching their duty to protect the employees' health and safety.

There may also exist situations where persons are exposed to situations where they are not necessarily employees, but liability for psychiatric injury is imposed. *Bourhill v Young* has already been discussed in **11.5.1.2** Mrs Bourhill's claim failed, *inter alia*, due to the lack of proximity between the claimant and defendant, but raised the interesting element of whether to hold a defendant liable in cases of psychiatric harm. Negligence so far has dealt with some form of physical damage or injury and the application of rules to determine whether liability should be imposed. When the harm involves what is referred to as 'nervous shock', the claimant must demonstrate that the type of harm they sustained was reasonably foreseeable. This is particularly so in light of the judges' comments in *Bourhill* that the person must exhibit 'phlegm and fortitude' in the event of witnessing acts that may be upsetting. As in *Bourhill* where the pregnant fishwife had witnessed the aftermath of an accident, this did not place her in direct and immediate danger. Those persons who have experienced injury, even psychiatric injury, from having been placed in fear of personal danger are referred to as '**primary victims**'. The other type of claimant who suffers psychiatric injury after witnessing an event involving injury to others comes under the heading 'secondary victims'. It should be noted that the expression 'nervous shock' is important in identifying that the claims in this matter relate to sudden events which are distressing, rather than a protracted event or series of events (such as seeing a relative die slowly from a disease) which, whilst equally distressing, do not, generally, amount to a claim under this area of law.

p. 311 ↵ The law determines a claimant, having suffered a psychiatric injury, as a primary or secondary victim. This is a somewhat harsh distinction and has led to claims that the word 'secondary' implies 'less deserving', and may imply that physical injury is 'superior to, or morally more entitled to compensation than, psychiatric illness' (see Jones in the Further Reading section at the end of this chapter). A case that demonstrates potential problems in determining whether a claimant is to be considered a primary or secondary victim was seen in *Macfarlane v EE Caledonia Ltd.*

### *Macfarlane v EE Caledonia Ltd* (1994)

**Facts:**

The claimant was an oil rig painter in the North Sea and was in a support vessel some 550 metres from the Piper Alpha oil rig when it exploded. Due to the traumatic scenes (including having fire balls come within 100 metres of the vessel), and being aware of Macfarlane's friends being on the oil rig, he developed a psychiatric injury for which the first court awarded him damages.

**Authority for:**

The Court of Appeal rejected his claim as a rescuer as his activities in this regard were insufficient (moving blankets and helping the walking wounded), and further there was a lack of proximity between the defendant and Macfarlane. It was not reasonably foreseeable that he would suffer psychiatric harm or that a person of reasonable fortitude would have been affected as Macfarlane was. Therefore, Macfarlane was not considered a primary victim, and there was insufficient 'close relationship of love and affection between the plaintiff [the old term for a claimant] and victim' to establish him as a secondary victim.

## 12.4.1 Primary Victims

These are claimants who assert they have suffered some form of psychiatric injury as a result of being in the zone of physical danger of fearing for their own safety. This is tested on the basis of the reasonable foreseeability of the defendant's actions.

### *Dulieu v White and Sons* (1901)

**Facts:**

The spouse of a publican suffered from severe shock and distress when a horse-drawn carriage crashed into the public house where she was working at the time.

**Authority for:**

The claimant had not suffered physical injury, but the court found there to be sufficient evidence for him to reasonably believe that she may be injured and this enabled the claim to be successful.

p. 312 ↵ More recently, the House of Lords considered the issue of foreseeability.

### *Page v Smith* (1995)

#### Facts:

The claimant had been involved in an accident with a car driven by the defendant, but whilst not suffering any physical injury, a pre-existing condition of ME (myalgic encephalomyelitis) was worsened. A claim for damages was made.

#### Authority for:

It was still necessary to distinguish between primary and secondary victims in actions involving psychiatric injury, but where the claimant is a primary victim and it can be demonstrated that the defendant owed to them a duty of care not to cause physical injury, then it is sufficient to ask whether the defendant should have reasonably foreseen that the claimant may suffer personal injury as a result of the defendant's negligence. It is unnecessary to question whether the defendant should have foreseen the injury by shock.

## 12.4.2 Secondary Victims

Secondary victims have a more difficult task in proving that they have the right to damages. Reasonable foreseeability is again the test to be invoked, but this is on the basis of the proximity of relationship. There must exist some direct relationship between the injured party and the claimant that would enable a claim (as no physical injury has been sustained, and the claimant was not in fear of their own safety). Such a close relationship may exist between siblings, or between spouses.

### *Hinz v Berry* (1970)

#### Facts:

A woman who observed her husband being severely injured, leading to his death, and seven of their children injured in a car accident was entitled to recover damages for nervous shock (£4,000).

#### Authority for:

The Court of Appeal held, beyond the award made, no damages could be properly awarded for the grief and sorrow caused by a person's death or the subsequent worries for the remaining family.

Two cases that demonstrate how the courts may infer liability in respect of proximity were decided as a result of the football disaster at Sheffield Wednesday F.C.'s ground, Hillsborough, in 1989 where 96 people lost their lives.

### *Alcock v Chief Constable of South Yorkshire* (1991)

#### Facts:

p. 313 The case arose at the FA Cup semi-final match between Liverpool and Nottingham Forest held at Hillsborough in April 1989. The facts involved a policing error where too ↵ many of the Liverpool supporters were ushered into an enclosure that was incapable of holding so many fans. Some of the fans were late, and the match had already started, and there was a consequent surge of the fans to gain entry to view the match. The match was played when there existed metal barrier fencing around the perimeter of the fans' standing areas, and there was no seating in the area to restrict numbers. Due to the volume of fans directed into the enclosure, many at the front were unable to escape and crushed against the fencing. When the extent of the disaster was recognized and assistance was provided, 96 people were dead, and more than 400 more required attention at hospital.

The negligence action was initiated by those affected by the disaster including friends and relations of the 96 dead. These people had suffered psychiatric injury, rather than physical injury, and claimed under nervous shock. Most of the claimants in the action claimed as 'secondary victims' who had witnessed the disaster at the football ground, on television, and on the radio. The House of Lords held that none of the claimants satisfied the requirements to hold the police liable in negligence.

#### Authority for:

The House of Lords identified the following tests to establish liability as a secondary victim:

1. there must exist close proximity between the claimant and the person suffering harm (such as a close tie of love and affection);
2. the claimant must have been present at the scene of the accident or there in the immediate aftermath;
3. the claimant must have perceived directly the events of the accident or the immediate aftermath.

The case demonstrated the rules that courts must adopt when claimants bring an action for negligence as secondary victims. Further, it demonstrates the problems and practical difficulties in establishing a successful claim where the claimant has not suffered any direct harm, or fear of harm, personally. The claim failed despite the claimants including brothers and sisters of the people who had died, and a sister who had to

identify the body of her dead brother (being eight hours after the event was not considered by the Lords to be in the 'immediate aftermath'). The decision has been criticized as being too harsh and being founded on the 'floodgates' argument. This line of legal reasoning was continued in *White v Chief Constable of South Yorkshire.*

### *White v Chief Constable of South Yorkshire* (1998)

#### Facts:

Four police officers, who were present at the disaster and had provided assistance, including resuscitation and carrying the dead and dying over the fences, claimed for their psychiatric injuries as primary victims. The House of Lords determined, reversing the decision of the Court of Appeal, that the police officers could not succeed in their claim for compensation.

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#### Authority for:

Even though the claimants were in direct contact with the injured people, the Lords stated that only those who were physically injured or in danger of being physically injured could bring a claim, and if not the secondary victims had to establish their claim under the rules laid down in *Alcock*. It was held that rescuers, professional or not, and employees, who had witnessed such distressing events had no claim as primary or secondary victims unless they satisfied the tests above.

The Court of Appeal has identified criteria necessary when attributing liability in cases of psychiatric injury. In *French v Chief Constable of Sussex* the claimants were police officers who had been involved in events leading up to an armed robbery that resulted in a fatal shooting, although none of the claimants had witnessed the event. In assessing the employer's liability, Lord Phillips CJ summarized the main criteria in establishing liability (summarizing the duties set out in *Rothwell v Chemical & Insulating Co. Ltd*):

1. there exists a duty to exercise reasonable care not to cause psychiatric injury or to place the claimant in fear for their physical safety (*Dulieu v White,* see **12.4.1**);
2. the defendant that breaches the duty not to endanger the physical safety of the claimant will be liable if the breach causes not physical but psychiatric injury, even if it was not reasonably foreseeable that psychiatric injury alone might result (*Page v Smith*, see **12.4.1**);
3. there is no general duty to exercise reasonable care not to cause psychiatric injury as a result of causing death or injury of someone (the primary victim) which is witnessed by the claimant (the secondary victim)—*Alcock v Chief Constable of Yorkshire Police* (see **12.4.2**);
4. point 3 applies equally where the claimant is employed by the defendant;
5. as an exception to point 3 there is a duty not to cause psychiatric injury to the claimant as a result of causing the death or injury of someone loved by the claimant in circumstances where the claimant sees or hears the accident or its aftermath (*McLoughlin v O'Brian*).

The previous case law had dealt with the common law right to seek damages.

### *Rabone v Pennine Care NHS Foundation Trust* (2012)

#### Facts:

The claimants were parents of a young woman who committed suicide following a hospital Trust's breach of its duty of care towards her and obtained damages for their anguish.

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#### Authority for:

It was held that the Trust breached Art. 2 of the European Convention on Human Rights and s. 7(1) of the Human Rights Act 1998. Further, following the case law established by the European Court of Human Rights (*Kats v Ukraine*), the family members of the deceased were entitled to bring a claim in their own right. The parents were awarded £5,000 each. The Supreme Court has made it possible for claimants, who would not otherwise be able to seek damages under the common law, as not being a (secondary) victim, to obtain damages.

## Conclusion

This chapter has identified where liability may be imposed for pure economic loss (in the absence of associated physical injury). The wider implications of liability for businesses and individuals where they provide advice or information in their professional capacity and situations where the claimant has sustained psychiatric injury have also been addressed. Businesses have to appreciate where risk exists and be proactive in establishing mechanisms that limit/restrict resultant damage or loss. The use of exclusion clauses or paying 'lip service' to complaints of stress from employees will not remove liability in these areas—effective mechanisms need to be in place. The text continues by considering employers' potential liability for torts committed by their employees and for breaches of statutory duties.

## Summary of main points

## Pure economic loss

- Liability in cases of pure economic loss is restricted by the courts.
- Where economic loss is linked to physical damage/loss then the economic losses are recoverable.
- Actions will be allowed where a special relationship of proximity exists between the parties.

## Negligent misstatements

- Liability requires a special relationship to exist between the parties. Liability is imposed where the person providing the information was aware of the purpose of their advice, it was provided specifically to the advisee, the person providing the information knew that the information would be acted upon without any further advice being sought, and acting on the advice was to the detriment of the advisee.

## Psychiatric injury

- A person who is not physically injured by the defendant's negligence, but has experienced trauma due to the consequences of the action, may be able to claim for their psychiatric injury (sometimes referred to as nervous shock).
- Claims for psychiatric injury will define the claimant as either a 'primary' or 'secondary' victim.
- Primary victims are persons who were not physically injured by the defendant's actions, but they were in reasonable fear for their personal safety (being in the zone of physical danger).

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- Secondary victims are persons who also were not physically injured, and who were not in fear for their own safety. However, where they have a close proximity with the victim of the accident and they were present at the scene or in the immediate aftermath, they may succeed in their action for damages.

## Summary questions

## Essay questions

1. To what extent is a professional advisor liable in civil law for their misstatement and how does the law seek to regulate their activities and liabilities?
2. 'The case of *Alcock v Chief Constable of South Yorkshire* identified the rules to be satisfied before a successful claim as a secondary victim could be made. The judgment demonstrates the problems and practical difficulties in successfully establishing a claim where the claimant has not suffered any direct harm, or feared personal harm. As such, liability for psychiatric damage in such cases is rarely held and for all practical purposes should be abolished.'

Critically analyse the above statement.

## Problem questions

1. Rayan runs a firm of estate agents who provide a service of surveying and valuing properties, including domestic dwellings.

Henry approaches Rayan and states that he would like a house valued at £500,000 to have a full survey before he decides whether to proceed with the purchase or not. Rayan accepts the contract and instructs an employee of his (Brian) to perform the survey. Brian visits the property, carries out the survey but is more interested in speaking with his friend on his mobile phone than performing his task diligently. Brian negligently performs the survey and misses very important defects in the property such as dry rot, and that the house is built on the tracks of a disused mine and may be subject to subsidence.

Based on the favourable report produced by Brian, Henry purchases the property and later discovers these faults. The house, due to the defects, is actually only worth £300,000 and as a consequence Henry has lost a large amount of his investment.

Advise Henry on any rights he may have to claim for the (potential) professional negligence of Rayan and the estate agencies.

2. Esteban and Jerry are commuters. They regularly caught the same train together. In this way they had become friends socially. One Monday morning, Esteban, a stockbroker, remarked to Jerry that British Bailout Ltd were an extremely attractive proposition on the stockmarket. Being a teacher, Jerry knew little about the state of the market, but expressed interest in the company's shares. Esteban assured him that the investment would 'make money hand over fist'. As a result, Jerry invested £1,000 in the company, which has just gone into liquidation. Jerry has lost his investment.

Explain the potential liability of Esteban for Jerry's economic losses.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-12-indicative-answers-to-end-of-chapter-questions?options=name>*.

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# Further reading

## Books and articles

Allen, S. (1997) 'Rescuers and Employees—Primary Victims of Nervous Shock' *New Law Journal*, Vol. 147, No. 6778, p. 158.

Barker, K. (2006) 'Wielding Occam's Razor: Pruning Strategies for Economic Loss' *Oxford Journal of Legal Studies*, Vol. 26, No. 2, p. 289.

Barrett, B. (2008) 'Psychiatric Stress—An Unacceptable Cost to Employers' *Journal of Business Law*, No. 1, p. 64.

Case, P. (2004) 'Secondary Iatrogenic Harm: Claims for Psychiatric Damage Following a Death Caused by Medical Error' *Modern Law Review*, Vol. 67, No. 4, p. 561.

Griffiths, N. (2004) 'Shock Induced Psychiatric Injury: Damage Limitation' *Personal Injury Law Journal*, Vol. 24, April, p. 18.

Hilson, C. (2002) 'Liability for Psychiatric Injury: Primary and Secondary Victims Revisited' *Professional Negligence*, Vol. 18, No. 3, p. 167.

Jones, M. (1995) 'Liability for Psychiatric Illness—More Principle, Less Subtlety?' *Web JCLI*, No. 4.

Mullender, R. (1999) 'Negligent Misstatement, Threats and the Scope of the Hedley Byrne Principle' *Modern Law Review*, Vol. 62, No. 3, May, p. 425.

## Online Resources

**Visit the online resources** *<https://oup-arc.com/access/marson6e-student-resources#tag_chapter-12>* for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.



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