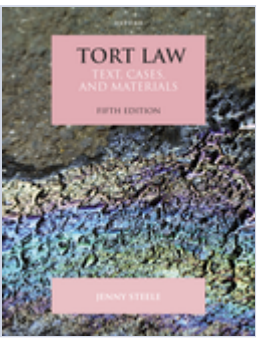

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

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5. Duty of Care: Applications

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter deals with particular applications of the duty of care concept that determine the boundaries of the tort. Various cases on duty of care are examined in terms of recognized categories relating to negligently inflicted psychiatric damage, 'pure economic loss', and negligence liability of public authorities. The chapter also considers the assumption of responsibility criterion developed from the case of *Hedley Byrne v Heller* [1964] AC 465, as well as applications of the '*Caparo* approach' used in establishing whether a duty is owed. Finally, it looks at emerging organizing concepts which appear to span different categories of case law.

Keywords: duty of care, tort, psychiatric damage, pure economic loss, negligence, liability, public authorities, Hedley Byrne v Heller, Caparo approach, assumption of responsibility

Central Issues

i) We explored the general nature of the duty of care in Chapter 4. Here, we turn our attention to particular applications of the duty concept. These cases help to define the reach and scope of the tort of negligence. We consider the cases on duty of care in terms of recognized categories. It will become clear, however, that some organizing ideas reach across the categories; and this has been re-emphasized by the Supreme Court in *Robinson* and *Poole*, as well as other decisions.

ii) Our first set of cases relates to negligently inflicted psychiatric damage. Attention in this category has long focused on claims by 'secondary victims', whose psychiatric injury is caused by witnessing (or otherwise experiencing) death, personal injury, or imperilment of others. In these cases, very restrictive rules have developed. But such cases are not typical of all claims for psychiatric damage, and a significant number of 'primary victim' cases are now decided without direct reference to the special control devices. This illustrates that it is not the form of loss *per se* that is the problem.

iii) We next turn our attention to cases of 'pure economic loss'. These cases have long been recognized as posing particular difficulties. Again, it is not the form of loss that is problematic. We will suggest that some order can be imposed on the case law here. There are two specific exclusionary rules regarding 'relational economic losses' (where the claimant's interest in damaged property is merely contractual), and cases of mere defectiveness in a product. It is outside these categories that the difficulties arise. Particularly important, but also elusive, has been the **assumption of responsibility** criterion developed from the leading case of *Hedley Byrne v Heller* [1964] AC 465. This idea has made its way into other areas of the tort of negligence, and has become a key organizing idea. Its status is considerably enhanced by recent decisions of the Supreme Court. Therefore, it is particularly important to consider whether it has any substance.

iv) The greatest volume of difficult case law surrounds the negligence liability of public authorities. Restrictive rules for this area were adopted in the case of *X v Bedfordshire* [1995] 2 AC 633, based on openly articulated policy reasons. However, there has been a gradual retreat
p. 202 from most of the propositions set out in *X v Bedfordshire*. Most recently, the new approach of the Supreme Court makes the distinction between causing and failing to benefit the key notion in this area. Here too, assumption of responsibility has emerged as a key concept. The liability of public authorities under the Human Rights Act provides important context to decisions in this area. The Government's Consultation on the Human Rights Act, published in 2021 and extracted in Chapter 1, is directly critical of some of the cases charted in this part of the Chapter. Less problematic for the most part has been the chipping away of immunities, considered in Section 4. Here too, the HRA has had an influence, though the developments could be explained in other ways.

v) Finally, we attempt an appraisal of the current state of play. We examine how far the new interpretation of *Caparo* will cast doubt on the continued use of policy reasoning that has been a hallmark since *Caparo* itself. We return to the notion of established categories, and the primary role currently attached to 'established principle' and key concepts such as assumption of responsibility. These key concepts may or may not have an easily identified core meaning. An interesting question is how far this matters, to the extent that they are capable of acquiring greater content through use.

1 Psychiatric Damage

The case law in this section relates to negligently inflicted psychiatric damage. Such cases have been divided into claims by 'secondary victims', and claims by 'primary victims'. 'Secondary victims' are those who suffer psychiatric damage as a result of injury to, or death or imperilment of, another. In these cases, policy-based restrictions have applied to limit the recognized duties to take care. Not all of these restrictions apply to claims by primary victims. Indeed in some primary victim claims, none of the restrictions apply. 'Primary victims' include those who suffer psychiatric damage through stress at work, and those who are physically endangered. Other categories of primary victim claim are also emerging, for example, where the defendant has assumed responsibility towards the claimant, or where there is a prior contractual relationship.

1.1 The Nature of 'Psychiatric Damage'

It is clear that psychiatric damage is capable of being recoverable in the tort of negligence. However, a sharp distinction has been drawn between recognized psychiatric conditions (which may constitute 'damage'), and normal emotional distress of one sort or another.

Lord Bridge, *McLoughlin v O'Brian*
[1983] 1 AC 410, at 431

> The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable ↵ psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.

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The Distinction between Physical and Psychiatric Harm: Injury or Means of Causation?

Is it possible to make a similarly clear distinction between psychiatric and *physical* disorders? Arguably, no clear distinction of this sort can be made.

Lord Wilberforce, *McLoughlin v O'Brian*
[1983] 1 AC 410, at 418

> Whatever is unknown about the mind-body relationship (and the area of ignorance appears to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind.

As long ago as 1901, in the case of *Dulieu v White*, Kennedy J speculated to similar effect:

Kennedy J, *Dulieu v White & Sons*
[1901] 2 KB 669, at 677

> ... For my own part, I would not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not actually accompanied by physical injury, although it may be impossible, or at least difficult, to detect the injury at the time in the living subject. I should not be surprised if the surgeon or the physiologist told us that nervous shock is or may be in itself an injurious affection of the physical organism.

The difficulty of distinguishing between psychiatric and physical harm has long been recognized, but it is not always given the significance it deserves. The difficulty of this distinction helps to explain the case of *Page v Smith*, for example. In that case, the injury suffered by the claimant (chronic fatigue syndrome or 'ME') was genuinely difficult to categorize as physical or psychiatric. In many cases it is not the lack of any physical manifestation of harm to the claimant, but the lack of any physical mechanism of causation, which is perceived to cause the problems.[1]

1.2 Control Devices

A number of control devices have been developed to limit recovery of psychiatric harm. These control devices create much of the difficulty of this area; but they also offer the key to understanding it.

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'Shock'

Where the event that brings about the psychiatric harm is death, injury, or endangerment *of another*, a claimant will be owed a duty in respect of psychiatric harm *only* if the harm results from a sudden shocking event.[2] Such cases are referred to as 'secondary victim' cases. It is not altogether clear in which other cases (if any) shock is a requirement. It is possible that shock is required in cases where the claimant fears for his or her own safety (*Dulieu v White; Page v Smith*). Shock is clearly not required where the claimant suffers psychiatric harm through being overworked, for example.

Traditionally, lawyers referred to psychiatric injuries as 'nervous shock'. That description of the injury has now fallen into disuse because it fails to reflect any accepted medical description of the harm. But as we have just said, the requirement that the psychiatric damage must (at least in secondary victim cases) be *caused by* sudden shock continues.

Brennan J, *Jaensch v Coffey* (1984)
155 CLR 549, at 566–7

> The notion of psychiatric illness induced by shock is a compound, not a simple, idea. Its elements are, on the one hand, psychiatric illness and, on the other, shock which causes it. … I understand 'shock' in this context to mean the sudden sensory perception—that is, by seeing, hearing or touching—of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognisable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential.

While the requirement of 'shock' is older than the control devices developed in *Alcock*, the interpretation of what is (objectively) 'shocking' now falls to be considered in light of that decision. Here, it has continued to cause significant difficulties, as we will see. The 'sudden shock' criterion is a control device, which has not been applied in primary victim cases.

Reasonable Fortitude and Specific Foreseeability

There are three control devices working together in the applicable test for 'foreseeability'. According to the House of Lords in *Page v Smith*, and the Court of Appeal in *McLoughlin v Jones*, this special test applies in *secondary victim cases*, but the decision of the House of Lords in *Rothwell* raised the question of whether it is confined to these.

In any case in negligence, foreseeability of harm is essential to establishing that a duty of care is owed, and that the harm is not too remote from the breach. But in cases of psychiatric harm to a secondary victim, the following distinctive question applies:

Would it be foreseeable that *a person of 'ordinary fortitude'* might suffer *psychiatric injury, in the circumstances as they occurred*?

p. 205 ↵ In this deceptively simple question, there are three departures from the normal approach to foreseeability.

(a) The approach in the statement above constitutes **an exception to the egg-shell skull rule** (discussed in Chapter 6). According to that rule, a defendant must generally 'take his (or her) victim as he finds him' (or her). In secondary victim cases involving psychiatric damage, it must be foreseeable that *a person of ordinary fortitude* would suffer psychiatric harm in the circumstances. If a secondary victim has a particular susceptibility to psychiatric harm (an 'egg-shell personality'), he or she may not be owed a duty. A duty will only be owed if a person of ordinary fortitude might foreseeably suffer harm in the same circumstances.[3]

(b) **Psychiatric injury** must be foreseeable in secondary victim cases. As Denning LJ expressed it, again deceptively simply, 'the test for liability for shock is foreseeability of injury by shock' (*King v Phillips* [1953] 1 QB at 440).

(c) Foreseeability is also assessed in a different way. This third distinctive feature of foreseeability in secondary victim cases is not always noticed. In secondary victim cases, foreseeability of the psychiatric harm is judged with hindsight, on the basis of the events as they actually occurred. The ordinary approach in the tort of negligence is to judge foreseeability at the time of the negligent act or omission. The special kind of foreseeability which is judged with hindsight, and which applies to secondary victim claims, can be referred to as **specific foreseeability**. The ordinary kind of foreseeability has been called **foreseeability in the practical sense** (see further, Chapter 6). Foreseeability in the practical sense is generally regarded as a moral notion (what harm would the reasonable person have foreseen and guarded against?).

The third distinctive feature of foreseeability in secondary victim cases is identified as a control device by Brooke LJ in the following passage. He identifies reasonable fortitude (at [24]), and the judgment of foreseeability with hindsight (at [25]), as *separate* control devices, just as we have explained above.

Brooke LJ, *McLoughlin v Jones*
[2001] EWCA Civ 1743; [2002] QB 1312

24 It is now well established that English law has created special control and other mechanisms to determine the incidence of legal liability in [secondary victim cases]. One of these is that the law supposes the claimant to be a person of ordinary phlegm or fortitude. This requirement was justified by Lord Porter in *Bourhill v Young* [1943] AC 92, 117 in these terms:

> "The driver of a car or vehicle, even though careless, is entitled to assume that the
p. 206 ordinary frequenter of the streets has sufficient fortitude to endure such incidents as ↵ may from time to time be expected to occur in them, including the noise of a collision and the sight of illness to others, and is not to be considered negligent towards one who does not possess the customary phlegm."

25 Another, mentioned by Lord Wright in *Bourhill v Young*, at p110, is that the court asks itself in such a case what the hypothetical reasonable man, viewing the position ex post facto, would say it was proper to foresee. Lord Lloyd of Berwick rationalized this test in *Page v Smith* [1996] AC 155, 188 by saying:

> "This makes sense … where the plaintiff is a secondary victim. For if you do not know the outcome of the accident or event, it is impossible to say whether the defendant should have foreseen injury by shock. It is necessary to take account of what happened in order to apply the test of reasonable foreseeability at all."

26 Neither of these rules is apposite when the relationship between the parties is founded on contract, whether the breach of duty relied upon is a breach of a contractual term, or a breach of a duty of care arising out of the parties' contractual relationship which sounds in damages in tort. …

Brooke LJ made clear that neither foreseeability of harm to a person of reasonable fortitude, nor specific foreseeability based on hindsight, was applicable in *McLoughlin v Jones* itself, where there was a pre-existing contractual relationship between defendant and claimant, as solicitor and client (negligence on the part of the solicitor was said to have led to imprisonment of the claimant). This was a 'primary victim' claim.

There is real uncertainty concerning the scope of application of the 'specific foreseeability' control device following the decision of the House of Lords in *Rothwell v Chemical and Insulating Co* [2007] UKHL 39. Lord Hoffmann appeared to construe all psychiatric damage cases, other than those arising in instances like *Page v Smith*, as requiring specific foreseeability. Yet the claimant (a former employee exposed to asbestos dust and now suffering anxiety neurosis) can hardly be seen as a secondary victim. It remains possible therefore that the 'specific foreseeability' control device is of application to all psychiatric damage cases, other than cases like *Page v Smith*, but that in the majority of 'primary victim' cases it has not been a major issue, because many of these cases turn in any event on the foreseeability of psychiatric harm to the particular claimant in the particular circumstances. If so then in future the landmark cases of *Alcock* and *Page v Smith* would come to represent isolated special cases where all control devices, and no control devices (respectively) apply. The rest of the field would be governed by specific foreseeability as a general control device.

Further 'Control Devices': The *Alcock* Criteria

Further control devices have been applied in secondary victim cases, introducing particular requirements described in terms of 'proximity'. These are clearly restricted to 'secondary victim' cases, not least because they turn on the nature of the relationship with the endangered party and the shocking event. Often, there is no such person or event in a primary victim case. But as exemplified by *White v Chief Constable of South Yorkshire Police* (Section 1.4), there are cases which may be interpreted in different ways. It has been stated
p. 207 ↵ by the House of Lords that the additional control devices are 'arbitrary', so that they need not (and indeed cannot) be fully justified in terms of principle (*White v Chief Constable of South Yorkshire Police*). The existence of potentially arbitrary control devices poses the greatest challenge in this area. We will explain the *Alcock* criteria when we deal with secondary victim cases. But first, we consider primary victim claims.

1.3 'Primary Victim' Claims

Given the attention devoted to secondary victim cases, it may be surprising to note that there is a wide range of cases in which claimants have recovered damages for psychiatric harm, where they are 'primary' victims.

Primary Victim Cases where the Claimant is Physically Injured or Endangered

Physical Injury Accompanied by Psychiatric Harm

It is common for those suffering physical injury to recover damages not only in respect of their physical injuries but also for any mental effects (including psychiatric damage) associated with these injuries. Psychiatric injuries are no less real than the physical effects and in some circumstances they may be more

long-lasting. Clearly, psychiatric harm and mental illness can also contribute to the financial consequences of an injury, including loss of earnings.

Physical Endangerment but the Only Harm Is Done Through the Psychiatric Route

It is also well recognized that endangerment *without* physical impact may itself lead to mental and physical effects. Where a claimant is physically endangered, illness or injury sustained as a result of fear or 'shock' is clearly potentially recoverable.

Dulieu v White [1901] 2 KB 669

The plaintiff (who was pregnant) was behind the bar of a public house when a horse-drawn van was negligently driven into the building. There was no physical contact with the plaintiff. The Court of Appeal accepted that as a consequence of the shock, she became seriously ill and gave birth prematurely. It was held that such an injury could be compensated, but Kennedy J expressed a limitation to his decision in the following terms:

Kennedy J, *Dulieu v White*, at 675

> ... It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A. has, I conceive, no legal duty not to shock B's nerves by the exhibition of negligence towards C, or towards the property of B or C.

This is where Kennedy J drew the line in 1901.

p. 208 ### *Page v Smith* [1996] AC 155

This case involved a moderate-impact road accident in which the plaintiff was mildly physically endangered but suffered no immediate physical harm. After the accident, however, he suffered the exacerbation of a pre-existing condition, 'ME'. ME is very hard to categorize as either psychiatric or physical in its nature, but it had clearly been brought about 'by the psychiatric route'. By a majority, the House of Lords held that the plaintiff could in principle recover damages, subject to further consideration by the Court of Appeal of 'factual causation' (had the worsened condition truly been caused by the accident?).

The majority approach was to assess the foreseeability of *personal injury* (which included both physical and psychiatric harm) from the point of view of the defendant at the time of the negligence. In Chapter 3, we called this **foreseeability in the practical sense**. It is practical in that it focuses on what the defendant could reasonably have foreseen, at the time of the carelessness. This is the usual test applied to foreseeability in the tort of negligence; but it is not the approach applied to 'secondary' victim cases. Foreseeability in the practical sense does not require that the means by which damage actually came about should be foreseeable. This was important in *Page v Smith*, because the impact of the vehicles was not particularly forceful. Only in respect of a

person with a *pre-existing disposition to illness* could it be foreseeable that *this* particular impact would lead to *psychiatric* harm. Therefore, if the test for foreseeability applicable to *secondary* victims was applied in this case, the claim would fail.

In the following passage, Lord Lloyd (for the majority) makes clear that the test of foreseeability for 'secondary' victims is a special test which has no place in the case of primary victims.

Lord Lloyd of Berwick, *Page v Smith*
[1996] AC 155, at 188–9

> My noble and learned friend, Lord Keith of Kinkel, has drawn attention to an observation of Lord Wright in *a* [1943] A.C. 92, 110, that in nervous shock cases the circumstances of the accident or event must be viewed ex post facto. There are similar observations by Lord Wilberforce and Lord Bridge in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 420 and 432. This makes sense, as Lord Keith points out, where the plaintiff is a secondary victim. For if you do not know the outcome of the accident or event, it is impossible to say whether the defendant should have foreseen injury by shock. It is necessary to take account of what happened in order to apply the test of reasonable foreseeability at all. But it makes no sense in the case of a primary victim. Liability for physical injury depends on what was reasonably foreseeable by the defendant before the event. It could not be right that a negligent defendant should escape liability for psychiatric injury just because, though serious physical injury was foreseeable, it did not in fact transpire. Such a result in the case of a primary victim is neither necessary, logical nor just. To introduce hindsight into the trial of an ordinary running-down action would do the law no service.

In fact, both Lord Browne-Wilkinson, and Lord Lloyd thought that in the case of a car accident such as this, both physical and psychiatric harm *were* foreseeable, judging this in the 'practical' way. Judged at the time of the careless driving, the defendant could have foreseen *either* physical harm, *or* psychiatric damage. But Lord Lloyd went on to explain that foreseeability of psychiatric injury was not essential in such a case, provided that *some* personal injury (of whatever kind) was foreseeable.

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> **Lord Lloyd, at 190**
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> … The test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the plaintiff to 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 …'. There are numerous other statutory definitions to the same effect. In the case of a secondary victim, the question will usually turn on whether the foreseeable injury is psychiatric, for the reasons already explained. In the case of a primary victim the question will almost always turn on whether the foreseeable injury is physical. But it is the same test in both cases, with different applications. There is no justification for regarding physical 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 plaintiff, it matters not whether the injury in fact sustained is physical, psychiatric or both. …

Lord Lloyd argues here that secondary victim cases are logically different from primary victim cases. In the case of a primary victim (of the sort represented by the plaintiff in this case), personal injury is foreseeable and a duty of care is easily established. That being the case, the *kind* of 'personal injury' suffered is irrelevant. In a secondary victim case, there is no likelihood of physical impact involving the claimant. Thus, the *only* way that damage can foreseeably be done is through the psychiatric route, and foreseeability of injury by this route must be established.

Page v Smith was severely criticized by Lord Goff in the course of his dissenting judgment in *White v Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509 (extracted in Section 1.4), though it was defended by Lord Griffiths in the same case. In Lord Goff's view, the special meaning of foreseeability has historically been applied to primary victims as much as to secondary victims and ought to have applied in *Page v Smith* also. The case has also been subject to criticism focusing not on its generous approach to foreseeability, but on its apparently restrictive approach to the definition of a *primary victim*. It is suggested, however, that Lord Lloyd did not intend to *limit* the category of primary victims to those who are endangered. This interpretation of his words was later adopted in *White v Chief Constable of South Yorkshire Police*. But it is equally likely that Lord Lloyd concentrated on primary victims who were physically endangered simply because that was the kind of primary victim case before him. He did not say that the *only* such parties are primary victims.

Considerable difficulty surrounds the question of when a party who is *not* physically endangered will count as a primary victim. We will specify some categories of victim who are not physically endangered, but who are recognized to be 'primary' victims, immediately below. More recently, the House of Lords has restricted the categories of primary victim in cases where there *is* physical impact or endangerment of somebody. Most of the primary victim cases below involve no endangerment at all.

In an important set of cases—brought by mothers whose children have suffered injury at birth—it has been held that claimants will be treated as primary victims. In *YAH v Medway NHS Trust Foundation Trust* [2018] EWHC 2964 (QB); [2019] 1 W.L.R. 1413, the claim was brought by a mother, whose child had suffered severe injuries at birth, but whose appreciation of this was delayed until she was able to see the child. The decision that she was a primary victim was based on the established principle that the mother and child are—until

p. 210 birth—one and the same. Therefore, the mother was endangered, and she did not lose her ↵ status as primary victim once the child was born. In truth, the mother would have a personal injury claim based on the extended and traumatic birth process, not only based on the injury to the child. *Page v Smith* was taken to establish that the 'shock' requirement is not essential for a primary victim, whether or not they are endangered, since the events in *Smith* were not of a 'shocking' kind.[4] The same conclusion had been reached in the earlier case of *(A Child) v Calderdale and Huddersfield NHS Foundation Trust* [2017] EWHC 824 (QB), in relation to the period of time when an unborn child remained in the mother's birth canal. In this case too, *Page v Smith* was applied. Importantly, in the *Calderdale* decision, it was also held that the conditions of liability of a secondary victim were satisfied. Even as a secondary victim, the mother of a baby who was born apparently lifeless had a 'sudden appreciation' of an 'objectively shocking' event. The following decision of the House of Lords is difficult to reconcile with *Page v Smith* and it has been taken by some judges, as well as by some commentators, to leave the authority of *Page v Smith* very vulnerable. An alternative is to see that case as dealing with a different set of circumstances from those in *Rothwell*, which is a 'fear of the future' rather than 'fear of impact' case.

Rothwell v Chemical and Insulating Co Ltd [2007] UKHL 39; [2008] 1 AC 281

The claimants had all developed 'pleural plaques' as a result of occupational exposure to asbestos dust, but these plaques were not considered by the House of Lords to amount to 'material physical injury'. Anxiety caused by the fear of future disease (a heightened risk of which is associated with the plaques) was also not recoverable damage. One of the claimants (Mr Grieves) had not only suffered anxiety, but also developed an anxiety neurosis concerning the prospect of future disease, and this would be capable of giving rise to liability if it could be established that a duty was owed. The House of Lords, like the Court of Appeal, decided that such a duty of care was *not* owed.

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> #### Lord Hoffmann, *Rothwell*
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> 2 … The right to protection against psychiatric illness is limited and does not extend to an illness which would be suffered only by an unusually vulnerable person because of apprehension that he may suffer a tortious injury. The risk of disease is not actionable and neither is a psychiatric illness caused by contemplation of that risk.

The key means of distinguishing *Page v Smith* appears from this summary, namely that the earlier decision has no application to a case of fear of *future* injury. But it may also be noted that a reference to the claimant's status as an 'unusually vulnerable person' has been imported into this case, where the claimant appears to be a 'primary' victim. That control device does not generally exist in primary victim cases.

All members of the House of Lords in *Rothwell* distinguished *Page v Smith*, broadly on the same grounds though with some variation. For example:

> **Lord Hoffmann, *Rothwell***
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> 32. … I do not think it would be right to depart from *Page v Smith*. It does not appear to have caused any practical difficulties and is not, I think, likely to do so if confined to the kind of situation which the majority in that case had in mind. That was a foreseeable event (a collision) which, viewed in prospect, was such as might cause physical injury or psychiatric injury or both. Where such an event has in fact happened and caused psychiatric injury, the House decided that it is unnecessary to ask whether it was foreseeable that what actually happened would have that consequence. Either form of injury is recoverable.
>
> 33. In the present case, the foreseeable event was that the claimant would contract an asbestos-related disease. If that event occurred, it could no doubt cause psychiatric as well as physical injury. But the event has not occurred. The psychiatric illness has been caused by apprehension that the event may occur. The creation of such a risk is, as I have said, not in itself actionable. I think it would be an unwarranted extension of the principle in *Page v Smith* to apply it to psychiatric illness caused by apprehension of the possibility of an unfavourable event which had not actually happened.

There is room to debate elements of this particular formulation. For example, it treats the 'disease' as the 'event' and therefore separate from the damage, whereas it might be more natural to treat the onset of disease as damage; and it may be asked whether the initial exposure to asbestos might not be the relevant 'event' (which has, therefore, actually happened). Perhaps for this reason, some members of the House added to this sort of reasoning a reference to lack of 'directness' between the negligently caused exposure to risk, and the injury. This was used to distinguish the 'stress at work' cases, as well as *Page v Smith*.

> **Lord Hope, *Rothwell***
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> 55. … the causal chain between his inhalation of the asbestos dust and the psychiatric injury is stretched far beyond that which was envisaged in *Page v Smith* [1996] AC 155. That case was concerned with an immediate response to a sudden and alarming accident, for the consequences of which the plaintiff had no opportunity to prepare himself. In this case Mr Grieves inhaled asbestos dust for about eight years. It was not until the end of that period that he became worried. This was because of the risk that he or his wife or daughter might contract a disease in the future. And his depression did not occur until he was told twenty years later about the results of his chest X-ray. He believed then that his worst fears were being realized. But this was because of the information that he had now been given by his doctor, not because of anything that happened or was done to him by his employers while he was inhaling the asbestos. His exposure at work was not to stress, but to risk: Sarah Green, 'Risk Exposure and Negligence' [2006] 122 LQR 386, 389.

This too gives rise to potential problems. As we will see in Chapter 6, it is often difficult to establish that a result is 'because of' one operating cause to the exclusion of all others, and for the most part tort law does not even try to do this.

Lord Hoffmann's approach is different from the others in that he tells us more about the general question of the role of specific foreseeability, particularly through his discussion of 'stress at work' cases. Unlike Lord Hope, he did not treat such cases as being neatly distinguishable from cases of risk at work. In fact, he reasoned from the stress at work cases, to his conclusion.

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Lord Hoffmann, *Rothwell*

25 [In *Barber v Somerset*] Hale LJ said that 'the threshold question is whether this kind of harm to this particular employee was reasonably foreseeable.' She rejected the general applicability of the test of whether psychiatric injury was foreseeable in a person of 'ordinary fortitude' because an employer's duty was owed to each individual employee and not an undifferentiated member of the public. An employer may know (or it may be that he should know) of a particular vulnerability in an employee. In that case, he has a duty to treat him with appropriate care. On the other hand, in the absence of some particular problem or vulnerability, the employer was entitled to assume (in a case of occupational stress) that the employee is 'up to the normal pressures of the job'. Applied to the broader question of psychiatric illness, that means that in the absence of contrary information, the employer is entitled to assume that his employees are persons of ordinary fortitude.

26 In the present case, the employer would be unlikely to have any specific knowledge of how a particular employee was likely to react to the risk of asbestos-related illness more than 30 years after he had left his employment. An assumption of ordinary fortitude is therefore inevitable.

Lord Hoffmann emphasized that 'stress at work' cases require a high degree of foreseeability of harm to the specific claimant. If there is no evidence to show that the claimant is particularly susceptible to psychiatric harm through stress, then the 'presumption of reasonable fortitude' applies. If foreseeability of physical injury is regarded as irrelevant for the purposes of the *Rothwell* case—which is done by distinguishing *Page v Smith*—then this case is just like a stress at work claim in which there is no evidence of vulnerability on the part of the claimant. Given that a person of ordinary fortitude would not suffer psychiatric harm, foreseeability is not established.

An important implication of all of the judgments of the House of Lords in *Rothwell* is that there is a control device applicable to psychiatric injury cases which do not fall within *Page v Smith*, namely the form of required foreseeability. Lord Hoffmann was most explicit about the nature of this restriction, which is (at least) the incorporation of the presumption of reasonable fortitude (rebuttable where the defendant ought to have known of the susceptibility). Because there has been no suggestion that this was a 'secondary victim' case, it would appear that at least this control device applies to primary victims who are not covered by *Page v Smith*. It is also possible that the full force of 'specific foreseeability'—foreseeability judged with hindsight in the light of the specific events—would be applied to such a case.

‘Stress at Work’ Cases

Cases in this category do not typically involve the threat of physical impact. Damage is done ‘by the psychiatric route’, generally speaking without threat of injury of any other kind.[5] The claimant is not a ‘secondary’ victim but could be described as the primary beneficiary of a distinct duty to avoid psychiatric harm. The possibility of a negligence action in such cases was recognized only relatively recently, in the case extracted below, but the reasoning in that case has been applied and developed subsequently.

p. 213

Walker v Northumberland County Council [1995] 1 All ER 737

The plaintiff was employed by the defendant as an area social services officer. He managed four teams of social services fieldworkers in an area with a high proportion of child care problems. In 1986 the plaintiff suffered a nervous breakdown and had three months away from work. Before his return, the plaintiff’s superior agreed that assistance would be available to lessen the burden of his work. In the event, he had very limited assistance. Six months later he suffered a second breakdown and had to leave work permanently. Colman J held that an employer owed a duty to take reasonable steps to avoid exposing an employee to a health-endangering workload. The duty had not been breached at the time of the first breakdown, since this was unforeseeable in the light of information available to the employer. But it *had* been breached at the time of the second breakdown.

> #### Colman J
>
> There has been little judicial authority on the extent to which an employer owes to his employees a duty not to cause them psychiatric damage by the volume or character of the work which the employees are required to perform. It is clear law that an employer has a duty to provide his employee with a reasonably safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable. Whereas the law on the extent of this duty has developed almost exclusively in cases involving physical injury to the employee as distinct from injury to his mental health, there is no logical reason why risk of psychiatric damage should be excluded from the scope of an employer’s duty of care or from the co-extensive implied term in the contract of employment. That said, there can be no doubt that the circumstances in which claims based on such damage are likely to arise will often give rise to extremely difficult evidential problems of foreseeability and causation. This is particularly so in the environment of the professions, where the plaintiff may be ambitious and dedicated, determined to succeed in his career in which he knows the work to be demanding, and may have a measure of discretion as to how and when and for how long he works, but where the character or volume of the work given to him eventually drives him to breaking point. Given that the professional work is intrinsically demanding and stressful, at what point is the employer’s duty to take protective steps engaged? What assumption is he entitled to make about the employee’s resilience, mental toughness and stability of character, given that people of clinically normal personality may have a widely differing ability to absorb stress attributable to their work?

Colman J predicted that issues of foreseeability and causation would be particularly significant in the development of employers' liability, and this has proved to be correct. In *Hatton v Sutherland* [2002] EWCA Civ 76, the Court of Appeal accepted that a duty of care was owed in respect of psychiatric harm caused by stress at work, and set out guidance on the issues relating to breach of the duty. On the facts, there had been no breach of duty. One of the claimants appealed, and in *Barber v Somerset County Council* [2004] UKHL 13, the House of Lords upheld the appeal. The House of Lords unanimously approved the guidelines offered by the Court of Appeal though disagreeing with the conclusion reached in the particular case in hand. The following guidelines (extracted from the Court of Appeal) therefore carry significant authority.

p. 214 **Hale LJ, *Hatton v Sutherland***
[2002] EWCA Civ 76; [2002] 2 All ER 1

> [43] From the above discussion, the following practical propositions emerge.
>
> (1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do ... The ordinary principles of employer's liability apply. ...
>
> (2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors).
>
> (3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.
>
> (4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.
>
> (5) Factors likely to be relevant in answering the threshold question include: (a) The nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department? (b) Signs from the employee of impending harm to health. Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example, because of complaints or warnings from him or others?
>
> (6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching inquiries of the employee or seek permission to make further inquiries of his medical advisers.
>
> (7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.

> (8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.
>
> (9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties.
>
> p. 215 (10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this.
>
> (11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.
>
> (12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.
>
> (13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care.
>
> (14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.
>
> (15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.
>
> (16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event. …

Since *Walker*, claims for employment-related psychiatric illness have become common.[6] A key recent example is *BAE Systems v Konczak* [2017] EWCA Civ 1188, dealing with the question of how to apportion harm between the stressful effects of an employer's negligence, and other factors, applying and developing the remarks of Hale LJ in the extract above, propositions 15 and 16. According to the Court of Appeal in *BAE Systems*, a court 'should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused'. Arguably, this amounts to a gloss on Hale LJ's proposition 15 (in the extract above), since it suggests that courts should *strive* to distinguish between the different cases. The question here is whether the *harm* suffered can be divided, a question which is not necessarily easy to answer where psychiatric harms are concerned. The court plainly thought this necessary, in order to avoid over-compensation. It was considered a particularly important issue when considering a claim where a vulnerable employee was 'tipped over the edge' by stress caused by the employer.

Beyond Employment and Maternity Cases: Assumptions of Responsibility and Contractual Relationships

There are other cases where the claimant will be regarded as a primary victim in the absence of physical danger. In *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 WLR 1421, the police asked the plaintiff, a volunteer worker on a youth homelessness project, to act as 'appropriate adult' during interviews of a suspect, West. This was in accordance with the Codes of Practice under section 66 of the Police and Criminal
p. 216 Evidence Act 1984, ↵ requiring such a person to be present if the suspect is mentally disordered. West proved to be a serial killer and the details of his murders were exceptionally harrowing. The plaintiff claimed that she was not warned of the circumstances of the case, was offered no counselling until after West committed suicide in custody, and was told (falsely) that she would not be required to give evidence in court. She brought an action against the police for damages, claiming that she had suffered post-traumatic stress disorder, psychological injury, and a stroke. A first instance judge held that no duty was owed. The Court of Appeal allowed her appeal in part. Although no duty should be recognized which would interfere with the conduct of police interviews, it was nevertheless possible that a duty to provide counselling may be owed, and there may also be a duty in respect of any false assurances given.

Brooke LJ emphasized that there is a wide range of cases where a duty of care is now recognized in respect of psychiatric illness, and that many of these are cases where there is no 'physical' imperilment at all. He stressed that some such cases are decided on the basis of an 'assumption of responsibility' (see further Section 2 of this chapter). In respect of the present claims, so far as they related to the *conduct of the interviews*, there was no such assumption of responsibility.

Brooke LJ

Most of the cases in the books are concerned with situations in which a plaintiff suffers psychiatric illness as a result of his own imperilment—as in *Page v. Smith*—or reasonable fear of danger to himself, or as a result of the physical injury or imperilment of a third party (or parties) which has been caused by the defendant. ...

There is, however, a less familiar line of cases in which, as in the present case, a defendant has neither imperilled nor caused physical injury to anyone. One example is *Walker v. Northumberland County Council*. There was, of course, no difficulty in identifying the existence of such a duty in the context of an employer-employee relationship.

Another example is *Attia v. British Gas Plc*., where a plaintiff suffered reasonably foreseeable psychiatric illness as a result of the defendant causing damage to her property: she had to witness her house burning down as a result of the defendants' negligence. This court declined to strike the claim out, and allowed it to go to trial on the facts.

In addition to these two types of case which can be readily categorised, the Law Commission has identified a miscellaneous group of cases in which recovery may be available for a negligently inflicted psychiatric illness (assuming that the standard elements of the tort of negligence can be made out): see its report, Liability for Psychiatric Illness (1998) (Law Com. No. 249), p. 29, para. 2.51. These include a case where a patient suffers a psychiatric illness because of negligent treatment by his/her psychiatrist (cf. *X (Minors) v. Bedfordshire County Council* [1995] 2 A.C. 633); where a prisoner foreseeably suffers a psychiatric illness as a result of ill-treatment by prison officers (cf. *Reg. v. Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58, 165–166, *per* Lord Bridge of Harwich) and where recipients of distressing news suffer reasonably foreseeable psychiatric illness as a result of the news being broken in an insensitive manner: *A.B. v. Tameside & Glossop Health Authority* [1997] 8 Med.L.R. 91 and *Allin v. City & Hackney Health Authority* [1996] 7 Med.L.R. 167. These are useful illustrations, but there is not yet any English case of the types described in which it has not been comparatively easy to establish that the requisite duty of care exists, whether from a psychiatrist's duty to his patient, the prison service's assumption of responsibility for the care of prisoners, or, in
p. 217 the two medical cases I have mentioned, from the defendant ↵ health authorities' acceptance that they owed a relevant duty of care to their patient or former patients. ...

A case which appears to break new ground, but which was not mentioned by the Law Commission, is *Swinney v. Chief Constable of Northumbria Police Force* [1997] Q.B. 464. The plaintiffs, who were wife and husband, claimed that they were suffering from psychiatric illnesses because they had been threatened with violence and arson after some confidential information furnished by the first plaintiff to the police had been stolen from a police vehicle broken into by criminals. This court did not pay any particular attention to the fact that the claims were for damages for psychiatric illness. It allowed the action to proceed to trial on the facts because it was arguable that the police had assumed responsibility towards the first plaintiff and that there were no policy grounds on which the claim should be barred from proceeding. In evaluating all the public policy considerations that might

> apply, Peter Gibson L.J. said, at p. 486A, that it seemed to him plain that the position of a police informer required special consideration from the viewpoint of public policy; see also Hirst L.J., at p. 484A–C, and Ward L.J., at p. 487A–C.
>
> *Swinney's* case illustrates vividly the way in which, after *Page v. Smith*, the courts in future are not going to have their way blocked by some supposed difference in kind between physical injury and psychiatric injury which may ipso facto bar cases of the latter type. …

There is indeed a wide range of cases in which there is recognized to be a duty not to cause psychiatric damage to the claimant, contradicting any general perception that such damage by its very nature constitutes a 'problem'. In addition to the cases mentioned by Brooke LJ in the valuable summary above, we may add the recognized duty of a school to protect its pupils against bullying (*Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7); the duty of an employer not to expose employees to bullying by fellow employees (*Waters v Commissioner of Police for the Metropolis* [2000] 1 WLR 1607); the duty of a doctor toward a patient (*Re Organ Retention Litigation* [2005] QB 506); the duty of a solicitor to conduct a client's defence with due care (*McLoughlin v Jones* [2002] 1 QB 1312, psychiatric injury after a period of imprisonment); and the duty of a prison to safeguard the well-being of a vulnerable prisoner.

1.4 Secondary Victims

A secondary victim is one whose psychiatric injury flowed from the injury to, or death or endangerment of, another party. In some of the earliest case law to recognize a duty in respect of psychiatric harm, it was proposed that only if the plaintiff herself is injured or endangered can there be recovery (*Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222; *Dulieu v White* (Section 1.1); *Bell v Northern Railway of Ireland* (1890) 26 LR Ir 428). In later cases, it was accepted that some of those who were not endangered could recover for psychiatric harm, but only if their injury is the effect of 'shock' suffered in a relevant way. In *Hambrook v Stokes* [1925] 1 KB 141, a mother saw a lorry careering down a hill and round a bend, where she knew her three children to be. There was a collision, which was out of sight, and the plaintiff feared that her children were involved. The Court of Appeal held that in these circumstances, the mother was owed a duty so far as she suffered psychiatric injury as a consequence of what she saw and perceived directly.

p. 218

McLoughlin v O'Brian [1983] 1 AC 410

The plaintiff's husband and three of her children were involved in a serious road accident caused by the negligence of the first defendant. The plaintiff was informed of the accident around two hours after the event and was driven to the hospital where her family had been taken. There she learned that her youngest daughter had been killed. In the midst of chaotic and harrowing scenes, she saw her husband and other children who were still being treated. She alleged that she had suffered severe shock resulting in psychiatric illness including depression and personality change. At first instance, her claim for psychiatric injury was dismissed on the basis that the injury was unforeseeable. The Court of Appeal accepted that her injury was foreseeable, but ruled that even so no duty was owed to a plaintiff who was not present at the scene of the accident and had not seen its consequences until two hours later.

There is agreement that compensation of secondary victims without the addition of control devices may lead to over-extensive liability.

Lord Wilberforce, at 420

> … there remains, in my opinion, just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.
>
> As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock.' Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. In my opinion, the result in *Benson v. Lee* [1972] V.R. 879 was correct and indeed inescapable. It was based, soundly, upon:
>
> > "direct perception of some of the events which go to make up the accident as an entire event, and this includes … the immediate aftermath …" (p. 880.)
>
> … Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. … The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered.
>
> p. 219 ↵ My Lords, I believe that these indications, imperfectly sketched, and certainly to be applied with common sense to individual situations in their entirety, represent either the existing law, or the existing law with only such circumstantial extension as the common law process may legitimately make. They do not introduce a new principle. Nor do I see any reason why the law should retreat behind the lines already drawn. I find on this appeal that the appellant's case falls within the boundaries of the law so drawn. I would allow her appeal.

> **Lord Bridge, at 442–3**
>
> My Lords, I have no doubt that this is an area of the law of negligence where we should resist the temptation to try yet once more to freeze the law in a rigid posture which would deny justice to some who, in the application of the classic principles of negligence derived from *Donoghue v. Stevenson* [1932] A.C. 562, ought to succeed, in the interests of certainty, where the very subject matter is uncertain and continuously developing, or in the interests of saving defendants and their insurers from the burden of having sometimes to resist doubtful claims. I find myself in complete agreement with Tobriner J. in *Dillon v. Legg*, 29 A.L.R. 3d 1316, 1326 that the defendant's duty must depend on reasonable foreseeability and:
>
> > "must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future."

This judgment moved the line of recovery only slightly, so that it incorporates an extended understanding of the 'immediate aftermath'. More broadly, the speeches of Lords Wilberforce and Bridge contain the essential elements of the 'control devices' which were, later, authoritatively stated in *Alcock v Chief Constable of South Yorkshire Police* (extracted below). For a claimant who has no physical involvement in an accident to recover damages for psychiatric injury, it is clear that they must show **closeness** of more than one form: closeness to the victim in terms of relationship, and physical closeness in time and place, are essential elements. Also important is the 'means by which the shock is caused'. Although the judgments do not altogether rule out recovery for shock caused in some way other than through direct and unaided perception of the event, Lord Wilberforce states that any sufficient alternative would need to be 'equivalent to' such direct perception—for example, through watching simultaneous television broadcasts. Lord Bridge was willing to countenance a relaxation in this requirement in appropriate circumstances.

Beyond these common elements, there appears to be a major distinction in approach between the judgments of Lord Wilberforce, and Lord Bridge. Lord Wilberforce gives greater emphasis to policy considerations, and he recognizes that 'foreseeability' in the psychiatric damage cases is a 'limiting' device (though he gives the false impression that this is the same test that is applied throughout the tort of negligence). Lord Wilberforce also regards the requirements of 'closeness' in relationship and in time and space, and of directness of perception, as clearly set by the existing authorities. Lord Bridge on the other hand appears to suggest that the relevant questions are all questions of 'foreseeability', and he argues that the limiting rules should be supported by reasoned justifications. Lord Bridge maintained that this area of law could be developed cogently through incremental evolution. This latter approach has been abandoned by the House of Lords.

p. 220

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

This case, like *White*, arose from the disaster at the Hillsborough Football Stadium on 15 April 1989, in which 96 people died and thousands of others were physically or mentally injured. The essence of the events is briefly outlined in the extract from Lord Keith's judgment, below. Over the intervening years, a fuller understanding of the horror of those events and the shortcomings of the official response to them has only gradually and painfully emerged, with an Independent Review reporting in September 2012.[7] The Review

vindicated those close to the disaster who had been deeply unsatisfied with the official account of events. Following the Review, the result of an initial inquest into the disaster was quashed and a new inquest ordered. This inquest concluded on 26 April 2016, 27 years after the disaster, with a jury determination that the 96 people who died had been unlawfully killed. Contrary to what the police continued to argue, Liverpool fans did not contribute to the dangers through their behaviour.[8] The civil litigation in *Alcock* and in *Hicks v Chief Constable of South Yorkshire* (Chapter 9, Section 2.2) can be seen as part of the families' efforts to uncover the truth. Seen in light of what is now accepted to be the truth, the role of tort in that process is disappointing. In these cases, as in *White v Chief Constable* (a claim brought by police officers), the chief concern of the House of Lords was with avoiding extensive liability and could be called protectionist.

The *Alcock* claims themselves were brought by relatives of some of the supporters who were killed, injured, or endangered through negligence in the policing of the crowd. The claim was for psychiatric harm to the relatives themselves. This case, restrictive as it was, remains the leading authority on the criteria of recovery by 'secondary victims'.

Lord Keith of Kinkel, at 392

My Lords, the litigation with which these appeals are concerned arose out of the disaster at Hillsborough Stadium, Sheffield, which occurred on 15 April 1989. On that day a football match was arranged to be played at the stadium between the Liverpool and the Nottingham Forest football clubs. It was a semi-final of the F.A. Cup. The South Yorkshire police force, which was responsible for crowd control at the match, allowed an excessively large number of intending spectators to enter the ground at the Leppings Lane end, an area reserved for Liverpool supporters. They crammed into pens 3 and 4, below the West Stand, and in the resulting crush 95 people were killed and over 400 physically injured. Scenes from the ground were broadcast live on television from time to time during the course of the disaster, and recordings were broadcast later. The Chief Constable of South Yorkshire has admitted liability in negligence in respect of the deaths and physical injuries. Sixteen separate actions were brought against him by persons none of whom was present in the area where the disaster occurred, although four of them were elsewhere in the ground. All of them were connected in various ways with persons who were in that area, being related to such persons or, in one case, being a fiancée. In most cases the person with whom the plaintiff was concerned was killed, in other cases that person was injured, and in one case turned out to be uninjured. All the plaintiffs claimed damages for nervous shock resulting in psychiatric illness which they alleged was caused by the experiences inflicted on them by the disaster.

p. 221

Lord Ackner, at 402–3: The Three Elements

Because ‘shock’ in its nature is capable of affecting such a wide range of persons, Lord Wilberforce in *McLoughlin v. O’Brian* [1983] 1 A.C. 410, 422, concluded that there was a real need for the law to place some limitation upon the extent of admissible claims and in this context he considered that there were three elements inherent in any claim. It is common ground that such elements do exist and are required to be considered in connection with all these claims. …

The three elements are (1) the class of persons whose claims should be recognised; (2) the proximity of such persons to the accident—in time and space; (3) the means by which the shock has been caused.

I will deal with those three elements seriatim.

(1) The Class of Persons Whose Claim should be Recognised

When dealing with the possible range of the class of persons who might sue, Lord Wilberforce in *McLoughlin v. O’Brian* [1983] 1 A.C. 410 contrasted the closest of family ties—parent and child and husband and wife—with that of the ordinary bystander. He said that while existing law recognises the claims of the first, it denied that of the second, either on the basis that such persons must be assumed to be possessed with fortitude sufficient to enable them to endure the calamities of modern

life, or that defendants cannot be expected to compensate the world at large. He considered that these positions were justified, that other cases involving less close relationships must be very carefully considered, adding, at p. 422:

> "The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

I respectfully share the difficulty expressed by Atkin L.J. in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, 158–159—how do you explain why the duty is confined to the case of parent or guardian and child and does not extend to other relations of life also involving intimate associations; and why does it not eventually extend to bystanders? As regards the latter category, while it may be very difficult to envisage a case of a stranger, who is not actively and foreseeably involved in a disaster or its aftermath, other than in the role of rescuer, suffering shock-induced psychiatric injury by the mere observation of apprehended or actual injury of a third person in circumstances that could be considered reasonably foreseeable, I see no reason in principle why he should not, if in the circumstances, a reasonably strong-nerved person would have been so shocked. In the course of argument your Lordships were given, by way of an example, that of a petrol tanker careering out of control into a school in session and bursting into flames. I would not be prepared to rule out a potential claim by a passer-by so shocked by the scene as to suffer psychiatric illness.

As regards claims by those in the close family relationships referred to by Lord Wilberforce, the justification for admitting such claims is the presumption, which I would accept as being rebuttable, that the love and affection normally associated with persons in those relationships is such that a defendant ought reasonably to contemplate that they may be so closely and directly affected by his conduct as to suffer shock resulting in psychiatric illness. While as a generalisation more remote relatives and, a fortiori, friends, can reasonably be expected not to suffer illness from the shock, there can well be relatives and friends whose relationship is so close and intimate that their love and affection for the victim is comparable to that of the normal parent, spouse or child of the victim and should for the purpose of this cause of action be so treated.

p. 222

At 404–6

(2) The Proximity of the Plaintiff to the Accident

It is accepted that the proximity to the accident must be close both in time and space. Direct and immediate sight or hearing of the accident is not required. It is reasonably foreseeable that injury by shock can be caused to a plaintiff, not only through the sight or hearing of the event, but of its immediate aftermath.

Only two of the plaintiffs before us were at the ground. However, it is clear from *McLoughlin v. O'Brian* [1983] 1 A.C. 410 that there may be liability where subsequent identification can be regarded as part of the 'immediate aftermath' of the accident. Mr Alcock identified his brother-in-law in a bad condition

in the mortuary at about midnight, that is some eight hours after the accident. This was the earliest of the identification cases. Even if this identification could be described as part of the 'aftermath,' it could not in my judgment be described as part of the *immediate* aftermath. *McLoughlin's* case was described by Lord Wilberforce as being upon the margin of what the process of logical progression from case to case would allow. Mrs McLoughlin had arrived at the hospital within an hour or so after the accident. Accordingly in the post-accident identification cases before your Lordships there was not sufficient proximity in time and space to the accident.

(3) The Means by which the Shock is Caused

Lord Wilberforce concluded that the shock must come through sight or hearing of the event or its immediate aftermath but specifically left for later consideration whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice: see p. 423. Of course it is common ground that it was clearly foreseeable by the defendant that the scenes at Hillsborough would be broadcast live and that amongst those who would be watching would be parents and spouses and other relatives and friends of those in the pens behind the goal at the Leppings Lane end. However, he would also know of the code of ethics which the television authorities televising this event could be expected to follow, namely that they would not show pictures of suffering by recognisable individuals. Had they done so, Mr Hytner accepted that this would have been a 'novus actus' breaking the chain of causation between the defendant's alleged breach of duty and the psychiatric illness. As the defendant was reasonably entitled to expect to be the case, there were no such pictures. Although the television pictures certainly gave rise to feelings of the deepest anxiety and distress, in the circumstances of this case the simultaneous television broadcasts of what occurred cannot be equated with the 'sight or hearing of the event or its immediate aftermath.' Accordingly shocks sustained by reason of these broadcasts cannot found a claim. I agree, however, with Nolan L.J. that simultaneous broadcasts of a disaster cannot in all cases be ruled out as providing the equivalent of the actual sight or hearing of the event or its immediate aftermath. Nolan L.J. gave, ante, pp. 386G–387A, an example of a situation where it was reasonable to anticipate that the television cameras, whilst filming and transmitting pictures of a special event of children travelling in a balloon, in which there was media interest, particularly amongst the parents, showed the balloon suddenly bursting into flames. Many other such situations could be imagined where the impact of the simultaneous television pictures would be as great, if not greater, than the actual sight of the accident.

p. 223

Conclusion

Only one of the plaintiffs, who succeeded before Hidden J., namely Brian Harrison, was at the ground. His relatives who died were his two brothers. The quality of brotherly love is well known to differ widely—from Cain and Abel to David and Jonathan. I assume that Mr Harrison's relationship with his brothers was not an abnormal one. His claim was not presented upon the basis that there was such a close and intimate relationship between them, as gave rise to that very special bond of affection which would make his shock-induced psychiatric illness reasonably foreseeable by the defendant.

> Accordingly, the judge did not carry out the requisite close scrutiny of their relationship. Thus there was no evidence to establish the necessary proximity which would make his claim reasonably foreseeable and, subject to the other factors, to which I have referred, a valid one. The other plaintiff who was present at the ground, Robert Alcock, lost a brother-in-law. He was not, in my judgment, reasonably foreseeable as a potential sufferer from shock-induced psychiatric illness, in default of very special facts and none was established. Accordingly their claims must fail, as must those of the other plaintiffs who only learned of the disaster by watching simultaneous television. I, too, would therefore dismiss these appeals.

Lord Oliver of Aylmerton added some very important comments regarding the distinction between 'primary' and 'secondary' victims; and the nature of 'proximity'.

> **Lord Oliver, at 407–8**
>
> It is customary to classify cases in which damages are claimed for injury occasioned in this way under a single generic label as cases of 'liability for nervous shock.' ... Broadly ... [the cases] divide into two categories, that is to say, those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others. ...

Lord Oliver considered case law including *Dulieu v White* (Section 1.1) and *Schneider v Eisovitch* [1960] 2 QB 430, where the plaintiff had been directly involved in the same accident in which her husband had died. These were 'primary victim' cases.

> **At 408**
>
> Into the same category, as it seems to me, fall the so called 'rescue cases.' It is well established that the defendant owes a duty of care not only to those who are directly threatened or injured by his careless acts but also to those who, as a result, are induced to go to their rescue and suffer injury in so doing. The fact that the injury suffered is psychiatric and is caused by the impact on the mind of becoming involved in personal danger or in scenes of horror and destruction makes no difference.
>
> > "Danger invites rescue. The cry of distress is the summons to relief … the act, whether impulsive or deliberate, is the child of the occasion:" *Wagner v. International Railway Co*. (1921) 232 N.Y. 176, 180–181, *per* Cardozo J.
>
> p. 224 ↵ So in *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912, the plaintiff recovered damages for the psychiatric illness caused to her deceased husband through the traumatic effects of his gallantry and self-sacrifice in rescuing and comforting victims of the Lewisham railway disaster.
>
> These are all cases where the plaintiff has, to a greater or lesser degree, been personally involved in the incident out of which the action arises, either through the direct threat of bodily injury to himself or in coming to the aid of others injured or threatened. Into the same category, I believe, fall those cases such as *Dooley v. Cammell Laird & Co. Ltd* [1951] 1 Lloyd's Rep. 271, *Galt v. British Railways Board* (1983) 133 N.L.J. 870, and *Wigg v. British Railways Board*, The Times, 4 February 1986, where the negligent act of the defendant has put the plaintiff in the position of being, or of thinking that he is about to be or has been, the involuntary cause of another's death or injury and the illness complained of stems from the shock to the plaintiff of the consciousness of this supposed fact. The fact that the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to that plaintiff was or was not reasonably foreseeable.
>
> In those cases in which, as in the instant appeals, the injury complained of is attributable to the grief and distress of witnessing the misfortune of another person in an event by which the plaintiff is not personally threatened or in which he is not directly involved as an actor, the analysis becomes more complex.

The '*Alcock* Criteria'

To be successful, a 'secondary victim' must satisfy each of the following criteria.

Category of Relationship

The plaintiff must be in a close and loving relationship with the primary victim. In certain cases (spouse, parent, or child …), the law will presume such a close and loving relationship, though the defendant may rebut this presumption by bringing evidence that the relationship was not close and loving. In other cases, no close

ties of affection are presumed, and therefore the plaintiff must prove that they existed. This applies even to siblings.

Physical Proximity

The plaintiff must be close to the accident in time and space. Although the 'immediate aftermath' will suffice, identification of a body some eight hours later was held in this case not to be close enough.

Immediate Perception and 'Shock'

The injury must have been caused by a 'shocking event' and there must be either direct sight or hearing of the event, or something equivalent to this. In *Alcock*, some of the plaintiffs saw the events unfold on television. However, it was held that because the broadcasts did not show the suffering of individuals, they were not sufficient to give rise to the sort of 'shock' that would be equivalent to witnessing an event. It was again left
p. 225 open whether broadcasts could ever be equivalent to direct perception, but it was ↵ pointed out that a broadcast which showed individual suffering would be in breach of the Broadcasting Code of Ethics and might well amount to a *novus actus interveniens* (see Chapter 6, Section 3).

The requirement of suddent shock caused by an objectively horrifying event continues to cause considerable difficulty, illustrated at the end of our analysis of *Alcock*.

Arbitrary or Principled?

There are substantial differences in approach between the judgments extracted, despite their agreement on the outcome of the case. Lord Ackner continued to seek sound reasons of principle for the limitations placed on recovery by 'non-participating' plaintiffs. Specifically, he explains the need for a close and loving relationship (the first criterion above) in terms of foreseeability. If there is a particularly close and loving relationship, he explains, then the defendant ought to foresee that psychiatric harm to that plaintiff is likely to follow. But this is a long way from the usual, 'practical' form of foreseeability. The defendant would never be aware of the precise relationship between the primary victim, and any friends or relatives who may be within sight and hearing of events. Indeed the defendant would not be likely to know who was present, let alone the details of their relationships (see S. Hedley, 'Morbid Musings of the Reasonable Chief Constable' [1992] CLJ 16). The truth is, foreseeability here is itself a 'control device', as we have recognized throughout this chapter, and as was recognized in *Page v Smith*. Lord Oliver on the other hand appealed not to foreseeability but to 'proximity'. Although he thought that proximity did not operate as a precise test, he suggested that it captured the real issues of policy that arose—where, in other words, to draw the line.

Bystanders

This category provides a particular challenge for a 'foreseeability' approach. Even the restrictive form of foreseeability would allow that, in an extreme case, a mere bystander may be able to recover. Some incidents are so shocking that even a person of reasonable fortitude having no relationship with the immediate victims

would foreseeably suffer harm if they witnessed the incident closely and directly. If on the other hand the true justification for the control devices lies in avoiding claims by remote parties, then the courts might be reluctant to recognize a duty to bystanders even in the case of an extremely shocking event.

In *McFarlane v EE Caledonia* [1994] 2 All ER 1, the Court of Appeal tended to the latter course. The Court could not reconcile the existence of control devices in *Alcock* (above), with the possibility that a mere bystander may exceptionally be owed a duty on the grounds of specific foreseeability. The Court of Appeal preferred not to undermine the control devices.

Summary

Despite Lord Ackner's attempts to provide a principled basis for the *Alcock* criteria, the end result does not pass the most basic test, of offering satisfactory reasons why the disappointed party should have lost. For a brother to be required to provide *evidence* of close ties of love and affection is unseemly. To have Cain and Abel cited in evidence against presuming such close ties will have added insult to the injury. Jane Stapleton has justly described the law as stated in the *Alcock* case in the following terms:

p. 226 **J. Stapleton, 'In Restraint of Tort' in P. Birks (ed.), *The Frontiers of Liability*, vol 2 (Oxford University Press, 1994), 95**

> That at present claims can turn on the requirement of 'close ties of love and affection' is guaranteed to produce outrage. Is it not a disreputable sight to see brothers of Hillsborough victims turned away because they had *no more* than brotherly love towards the victim? In future cases will it not be a grotesque sight to see relatives scrabbling to prove their especial love for the deceased in order to win money damages and for the defendant to have to attack that argument?

Similar discomfort has been caused by the requirement that there must be proximity to an objectively shocking event. Where events have been in lay terms horrifying, and have caused recognisable illness to the observer, the courts must nevertheless distinguish whether they are *objectively* shocking.

Proximity to Objectively Shocking Events

The requirement of proximity to an objectively shocking event has, for example, ruled out claims for a series of clinical events leading to the death of a relative (*Liverpool Women's Hospital v Ronayne* [2015] EWCA Civ 588); or for a dawning realization after seeing the aftermath of a fatal accident that a loved one was the victim of it (*Young v MacVean* [2015] CSIH 70). In *King v Royal United Hospitals Bath NHS Foundation Trust* [2021] EWHC 1576 (QB), events which were recognized to be 'horrifying', leading to the death of the claimant father's son in a neo-natal unit, were nevertheless not considered an objectively shocking event in the terms required in *Alcock*. Patently, the requirement aims to close 'the floodgates of liability', and in *Ronayne* (for example), the requirement was described as 'arbitrary and pragmatic'.

A particular issue which has required the attention of the courts concerns claimants who witness the death of a relative, who is the primary victim of negligence, but where this occurs some time after the initial negligence. There is proximity, in other words, to the death but not to the initial event which caused it. In

Taylor v Novo [2013] EWCA Civ 194, the claimant's mother had been injured at work. Some time later, she collapsed and died as a consequence of her injuries, in the presence of the claimant. The Court of Appeal decided that the *Alcock* criterion of proximity to a shocking event had not been satisfied. A similar issue has also arisen in cases of clinical negligence, for example, where there has been a failure to diagnose a condition which later leads to death. In *Paul v Wolverhampton NHS Trust* [2022] EWCA Civ 12, the Court of Appeal considered itself bound to follow *Taylor v Novo* and to reject a number of claims relating to clinical negligence. The Court would, if not bound by the earlier decision, have reached a different conclusion, regarding this as an area where there was some scope for interpretation within the *Alcock* criteria, and considered the question suitable for consideration by the Supreme Court.

Sir Geoffrey Vos MR, Paul v The Royal Wolverhampton NHS Trust

12. I have concluded, in brief, that the five elements required to establish legal proximity in secondary victim cases apply as much to clinical negligence cases as they do to accident cases. The question of what is a relevant horrific event is not dependent either on the completion of the primary victim's cause of action for negligence or the first manifestation of injury to the primary victim. For a secondary victim to be sufficiently proximate to claim for psychiatric injury against the defendant whose clinical negligence caused the primary victim injury, the horrific event cannot be a separate event removed in time from the negligence. If the negligence and the horrific event are part of a continuum as they were in *Walters*, there is sufficient proximity.

p. 227

Novo <https://uk.westlaw.com/Document/ICE67C6F0902A11E2B4A7F70EF9F9ECAC/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=6e46d8beb6ef42e69624391e0edca031&contextData=(sc.Search)> is binding authority for the proposition that no claim can be brought in respect of psychiatric injury caused by a separate horrific event removed in time from the original negligence, accident or a first horrific event. I accept that, although there is no logical reason for these rules, they are the way Auld J in *Somerset* <https://uk.westlaw.com/Document/ICE1EA2F0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=6e46d8beb6ef42e69624391e0edca031&contextData=(sc.Search)> and the Court of Appeal in *Novo* <https://uk.westlaw.com/Document/ICE67C6F0902A11E2B4A7F70EF9F9ECAC/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=6e46d8beb6ef42e69624391e0edca031&contextData=(sc.Search)> built upon the five elements and adapted them to the clinical negligence context. If I were starting with a clean sheet, I can quite see why secondary victims in these cases ought to be seen to be sufficiently proximate to the defendants to be allowed to recover damages for their psychiatric injury. Since, however, this court is bound by *Novo* <https://uk.westlaw.com/Document/ICE67C6F0902A11E2B4A7F70EF9F9ECAC/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=6e46d8beb6ef42e69624391e0edca031&contextData=(sc.Search)>, it is for the Supreme Court to decide whether to depart from the law as stated by Lord Dyson in that case.

Employees and Rescuers Who Witness Injury to Others: Primary or Secondary Victims?

White v Chief Constable of South Yorkshire Police [1999] 2 AC 455 (on appeal from Frost v Chief Constable of South Yorkshire Police [1998] QB 254)

This case also arose from the Hillsborough football stadium disaster. A number of police officers brought claims for psychiatric injury suffered as a result of involvement in the event and its aftermath. Liability was admitted in respect of those officers who were most actively involved in the immediate area of the ground where the deaths and injuries occurred. Five plaintiffs were chosen as representative of the roles played by the other plaintiffs. Four were on duty at the stadium; the fifth was responsible for stripping bodies and completing casualty forms in hospital. Waller J dismissed the claims, although he accepted that the Chief Constable owed a duty to his officers analogous to an employer's duty to employees (see *Walker v Northumberland*, earlier in the present chapter). The Court of Appeal allowed appeals by the four officers who had been on duty at the stadium, on the ground that the Chief Constable's duty of care to a police officer in relation to psychiatric injury suffered in the course of employment arose irrespective of whether the employee would otherwise have been classified as a primary or a secondary victim. Likewise, a tortfeasor owed a rescuer a duty of care irrespective of whether the rescuer was physically endangered.

In the House of Lords, the defendant's appeal was allowed. The House of Lords ruled (by a majority on each point):

1. That the employer's duty to employees did not extend to avoiding psychiatric harm where the employee would (without the contract of employment) be a secondary victim. The '*Alcock* criteria' applied. They were of course unable to show close ties of love and affection with the victims, and therefore failed to satisfy the criteria.
2. That a rescuer who had not been exposed to the risk of physical injury was not a 'primary victim' and also had to satisfy the *Alcock* criteria.

Lord Hoffmann, at 505–7

... Should the employment relationship be a reason for allowing an employee to recover damages for psychiatric injury in circumstances in which he would otherwise be a secondary victim and not satisfy the *Alcock* control mechanisms? I think, my Lords, that the question vividly ↵ illustrates the dangers inherent in applying the traditional incrementalism of the common law to this part of the law of torts. If one starts from the employer's liability in respect of physical injury, it seems an easy step, even rather forward-looking, to extend liability on the same grounds to psychiatric injury. It makes the law seem more attuned to advanced medical thinking by eliminating (or not introducing) a distinction which rests upon uneasy empirical foundations. It is important, however, to have regard, not only to how the proposed extension of liability can be aligned with cases in which liability exists, but also to the situations in which damages are not recoverable. If one then steps back and looks at the rules of liability for psychiatric injury as a whole, in their relationship with each other, the smoothing of the fabric at one point has produced an ugly ruck at another. In their application to other secondary victims, the *Alcock* control mechanisms stand obstinately in the way of rationalisation and the effect is to produce striking anomalies. Why should the policemen, simply by virtue of the employment analogy and irrespective of what they actually did, be treated different from first aid workers or ambulance men?

p. 228

... In principle ..., I do not think it would be fair to give police officers the right to a larger claim merely because the disaster was caused by the negligence of other policemen. In the circumstances in which the injuries were caused, I do not think that this is a relevant distinction and if it were to be given effect, the law would not be treating like cases alike.

At 508

The second way in which the plaintiffs put their case is that they were not 'bystanders or spectators' but participants in the sense that they actually did things to help. They submit that there is an analogy between their position and that of a 'rescuer,' who, on the basis of the decision of Waller J. in *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912, is said to be treated as a primary victim, exempt from the control mechanisms.

In *Chadwick's* case, the plaintiff suffered psychiatric injury as a result of his experiences in assisting the victims of a railway accident. He spent 12 hours crawling in the wreckage, helping people to extricate themselves and giving pain killing injections to the injured. Waller J. said, at p. 921, that it was foreseeable that 'somebody might try to rescue passengers and suffer injury in the process.' The defendants therefore owed a duty of care to the plaintiff. He went on to say that it did not matter that the injury suffered was psychiatric rather than physical but in any event 'shock was foreseeable and ... rescue was foreseeable.' Thus the judge's reasoning is based purely upon the foreseeability of psychiatric injury in the same way as in other cases of that time.

At 509–11

There does not seem to me to be any logical reason why the normal treatment of rescuers on the issues of foreseeability and causation should lead to the conclusion that, for the purpose of liability for psychiatric injury, they should be given special treatment as primary victims when they were not within the range of foreseeable physical injury and their psychiatric injury was caused by witnessing or participating in the aftermath of accidents which caused death or injury to others. It would of
p. 229 course be possible to create such a rule by an ex post ↵ facto rationalisation of *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912. In both *McLoughlin v. O'Brian* [1983] 1 A.C. 410 and ... *Alcock v. Chief Constable of South Yorkshire* [1992] 1 A.C. 310, members of the House referred to *Chadwick's* case [1967] 1 W.L.R. 912 with approval. But I do not think that too much should be read into these remarks. In neither case was it argued that the plaintiffs were entitled to succeed as rescuers and anything said about the duty to rescuers was therefore necessarily obiter. If one is looking for an ex post facto rationalisation of *Chadwick's* case, I think that the most satisfactory is that offered in the Court of Appeal in *McLoughlin v. O'Brian* [1981] Q.B. 599, 622 by my noble and learned friend, Lord Griffiths, who had been the successful counsel for Mr Chadwick. He said:

> "Mr. Chadwick might have been injured by a wrecked carriage collapsing on him as he worked among the injured. A duty of care is owed to a rescuer in such circumstances ..."

If Mr Chadwick was, as Lord Griffiths said, within the range of foreseeable physical injury, then the case is no more than an illustration of the principle applied by the House in *Page v. Smith*, namely that such a person can recover even if the injury he actually suffers is not physical but psychiatric. And in addition (unlike *Page v. Smith*) Waller J. made a finding that psychiatric injury was also foreseeable.

Should then your Lordships take the incremental step of extending liability for psychiatric injury to 'rescuers' (a class which would now require definition) who give assistance at or after some disaster without coming within the range of foreseeable physical injury? It may be said that this would encourage people to offer assistance. The category of secondary victims would be confined to 'spectators and bystanders' who take no part in dealing with the incident or its aftermath. On the authorities, as it seems to me, your Lordships are free to take such a step.

In my opinion there are two reasons why your Lordships should not do so. The less important reason is the definitional problem to which I have alluded. The concept of a rescuer as someone who puts himself in danger of physical injury is easy to understand. But once this notion is extended to include others who give assistance, the line between them and bystanders becomes difficult to draw with any precision. For example, one of the plaintiffs in the *Alcock* case [1992], a Mr O'Dell, went to look for his nephew. 'He searched among the bodies ... and assisted those who staggered out from the terraces:' p. 354. He did not contend that his case was different from those of the other relatives and it was also dismissed. Should he have put himself forward as a rescuer?

But the more important reason for not extending the law is that in my opinion the result would be quite unacceptable. I have used this word on a number of occasions and the time has come to explain what I mean. I do not mean that the burden of claims would be too great for the insurance market or

> the public funds, the two main sources for the payment of damages in tort. The Law Commission may have had this in mind when they said that removal of all the control mechanism would lead to an 'unacceptable' increase in claims, since they described it as a 'floodgates' argument. These are questions on which it is difficult to offer any concrete evidence and I am simply not in a position to form a view one way or the other. I am therefore willing to accept that, viewed against the total sums paid as damages for personal injury, the increase resulting from an extension of liability to helpers would be modest. But I think that such an extension would be unacceptable to the ordinary person because (though he might not put it this way) it would offend against his notions of distributive justice. He would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.
>
> ... It may be said that the common law should not pay attention to these feelings about the relative merits of different classes of claimants. It should stick to principle and not concern itself with distributive justice. An extension of liability to rescuers and helpers would be a modest incremental
> p. 230 development in the common law tradition and, as between these ↵ plaintiffs and these defendants, produce a just result. My Lords, I disagree. It seems to me that in this area of the law, the search for principle was called off in *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310. No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle. I agree with Jane Stapleton's remark that 'once the law has taken a wrong turning or otherwise fallen into an unsatisfactory internal state in relation to a particular cause of action, incrementalism cannot provide the answer:' see *The Frontiers of Liability*, vol. 2, p. 87.
>
> Consequently your Lordships are now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as a system of rules which is fair between one citizen and another.

Lord Hoffmann's judgment contains some unusually open statements concerning the arbitrary nature of the law on psychiatric harm and indeed on the distributive failings of the law of tort in general. If (he argues) we recognize that very few of those in need of compensation are able to establish claims in tort, it becomes clear that abolishing some or even all recovery for psychiatric injury would 'add little to the existing stock of anomaly' to be found in the law of tort (at 504). Lord Hoffmann said, loud and clear, that there was no longer scope for incremental development in this area, as a result of *Alcock*. Lord Steyn said the same thing:

> **Lord Steyn, at 500**
>
> The only sensible strategy for the courts is to say thus far and no further ... In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way that is coherent and morally defensible.

These comments amount to an abandonment of the traditional common law method, and of incremental development under *Caparo*, in respect of this category of case.

Rescuers after *White*

According to Lord Hoffmann, the majority in this case merely declined to *extend* the boundaries of liability to rescuers who were not themselves primary victims, because they were not physically endangered. The definition of a primary victim as one who is physically endangered was said to be drawn from *Page v Smith*. But as Lord Goff pointed out in his dissent, it is most unlikely that Lord Lloyd in *Page v Smith* was seeking to set out an *exclusive* test for primary victims. The majority was introducing a new control device.

Lord Goff, at 486 (dissenting)

> #### A New Control Mechanism?
>
> As I have already recorded, it was submitted by Mr Collender on behalf of the appellants, relying on certain passages in the opinion of Lord Lloyd in *Page v. Smith* [1996] A.C. 155, 184A-B, 187E-F, that it
> p. 231 was a prerequisite of the right of recovery by primary victims in ↵ respect of psychiatric injury suffered by them that they should have been within the range of foreseeable physical injury. I have already expressed the opinion that no such conclusion can be drawn from Lord Lloyd's opinion in *Page v. Smith*. I understand, however, that, even if my view on that point is accepted as correct, some of your Lordships nevertheless consider that a new control mechanism to the same effect should now be introduced and imposed by this House as a matter of policy.
>
> I am compelled to say that I am unable to accept this suggestion because in my opinion (1) the proposal is contrary to well established authority; (2) the proposed control mechanism would erect an artificial barrier against recovery in respect of foreseeable psychiatric injury and as such is undesirable; and (3) the underlying concern is misconceived.

Lord Goff considered reasons (1) and (2) in the light of the case law before continuing:

> **(3) The underlying concern is misconceived**
>
> ... I sense that the underlying concern, which has prompted a desire to introduce this new control mechanism, is that it is thought that, without it, the policemen who are plaintiffs in the present case would be 'better off' than the relatives in the *Alcock* case who failed in their claims, and that such a result would be undesirable. To this, there are at least three answers. First, the control mechanisms which excluded recovery by the relatives in the *Alcock* case would, in my opinion, have been equally applicable to the policemen in the present case if on the facts they had (like the relatives) been no more than witnesses of the consequences of the tragedy. Second, the question whether any of the relatives might be able to recover because he fell within the broad category of rescuer is still undecided; and, strangely, the control mechanism now proposed to exclude the claims of the policemen in the present case would likewise exclude the claims of relatives if advanced on the basis that they were rescuers. Third, however, it is in any event misleading to think in terms of one class of plaintiffs being 'better off' than another. Tort liability is concerned not only with compensating plaintiffs, but with awarding such compensation against a defendant who is responsible in law for the plaintiff's injury. It may well be that one plaintiff will succeed on the basis that he can establish such responsibility, whereas another plaintiff who has suffered the same injury will not succeed because he is unable to do so. In such a case, the first plaintiff will be 'better off' than the second, but it does not follow that the result is unjust or that an artificial barrier should be erected to prevent those in the position of the first plaintiff from succeeding in their claims. The true requirement is that the claim of each plaintiff should be judged by reference to the same legal principles.
>
> For all these reasons I am unable to accept the need for, or indeed the desirability of, the new control mechanism now proposed.

In summary, doctrinal confusion was described as beyond remedy; and then extended to rescuers.

Unwilling Participants Other than Rescuers

Lord Hoffmann expressly left open the possibility that claims may be brought by other unwilling participants, particularly those who reasonably believe that they are responsible for death or serious injury to others. This category of case was described by Lord Oliver in *Alcock* in terms of harm to a 'participant'. He treated such
p. 232 participants as primary victims. ↵ Lord Oliver's comments were based partly on previous cases such as *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271 (a crane operator whose crane, due to a fault, dropped its load towards fellow workers was owed a duty of care in respect of psychiatric damage).

The current restrictive approach both to rescuers and to 'unwilling participants' is illustrated by *Monk v Harrington* [2008] EWHC Civ 1879 (QB); [2009] PIQR P3. The claimant witnessed the aftermath of an accident at work during the construction of the new Wembley Stadium, in which a platform fell 60 feet, killing a worker below and injuring another. The claimant was foreman at the site and went quickly to the scene in order to assist, crawling under the platform in order to offer first aid. Although he was classified as a rescuer, he was not physically endangered nor (the court held) reasonably in fear for his own safety, and he therefore could not count as a primary victim. Because the claimant had also played a role in supervising the erection of the platforms, he argued that belief in his own responsibility played a part in causing his psychiatric illness. This

took the form, in part, of an obsessive concern with safety which ultimately led to his being unable to return to work elsewhere. The court rejected this part of his claim also. This was an unreasonable belief on his part, for which the defendants could not be responsible. Determination of the case turned on an evaluation of the claimant's evidence given the clear and restrictive legal principles set out in *White*. But the case makes it legitimate to wonder whether it is really appropriate to force claimants whose mental harm is not denied to claim that they were fearful for their own safety, rather than appalled by witnessing at close proximity fatal injuries to a fellow human being.

1.5 Conclusions

Where secondary victims are concerned, the law has always imposed certain restrictions. It has proved difficult to provide a reliable justification which would allow the courts to distinguish between successful and unsuccessful cases. Justifications have ranged from foreseeability, through floodgates, to proximity. We have pointed out that foreseeability itself is applied in a particular form in respect of psychiatric injury. In *White*, the various control devices set out in the case of *Alcock v Chief Constable of South Yorkshire Police* were first declared to be arbitrary, and then extended to categories (employees and rescuers) who had not previously been subject to them, in order to avoid apparent inconsistency between classes of claimant.

Meanwhile, however, duty techniques such as 'voluntary assumption of responsibility' in combination with the test for *breach* of duty have been applied by the Court of Appeal in order to distinguish between recoverable and unrecoverable psychiatric damage in a wide range of cases where there was no endangered party at all. This might suggest that there is nothing intrinsically problematic about psychiatric damage. Rather, there is a problem where the person suffering the eventual illness is not the immediate victim of a physical impact, nor close to the event. *White* suggests that incremental change is now impossible, and *Rothwell* makes it unlikely that change would take the form of increasing liability.

2 Pure Economic Losses

2.1 Recovery of Losses

This section relates to the recovery of 'pure economic losses'. Economic losses suffered by the claimant will be regarded as 'pure' if they do not flow from any personal injury to the claimant nor from any physical damage to his or her property.

p. 233 ↵ Like psychiatric injury, pure economic loss is often described as a problematic form of damage. The problems in question are, however, rather different. Although 'floodgates' arguments are sometimes encountered in this area (for example, in cases of 'relational' economic loss, Category A, Section 2.1), there are other reasons why *a duty to take care not to cause foreseeable economic loss to the claimant* is not always appropriate.

Hale LJ, *McLoughlin v Jones*
[2002] QB 1312

> 58 Psychiatric injury is different in kind from economic loss. The law has traditionally regarded both with some scepticism. It has restricted the scope of any duty to avoid causing purely economic loss: this is obviously right. The object of a great deal of economic activity is to succeed while others fail. Much economic loss is intentionally, let alone negligently, caused. Only, therefore, where unlawful means are used or the defendant has assumed some responsibility towards another to avoid such loss should there be liability. The considerations in relation to psychiatric injury are rather different: hardly anyone sets out to cause such injury to competitors or anyone else (if they do, the tort of intentionally inflicting harm under the principle in *Wilkinson v Downton* [1897] 2 QB 57 is committed). The law's scepticism has rather to do with the infinite scope of adverse psychiatric reactions and the other difficulties identified by Lord Steyn in the *Frost* case. …

Hale LJ reminds us here of the limited scope of liability in 'the economic torts' (considered in Chapter 2). It is not always appropriate to impose liability for *deliberate* infliction of economic loss, in the absence of unlawful means. By definition, it cannot always be appropriate to impose a duty of care to avoid causing foreseeable economic loss through negligence. Even proximity is unlikely to supply the necessary additional factors. This is very different from the argument that 'over-extensive' liability may follow, which Hale LJ perceives to be the main concern in cases of psychiatric harm. Rather, it is an argument that cases of economic loss do not always require a remedy.

Even so, the issues arising are not entirely concerned with the nature of the injury. Cases involving economic loss frequently share certain other features. The damage is often caused 'indirectly'; the relationship between claimant and defendant is sometimes remote; and the number of potential parties is sometimes large. In these respects, economic loss claims bear comparison with claims by 'secondary victims' considered in Section 1.4 of the present chapter. Courts also have regard to a broader legal policy context including the availability of other protection for the claimant and the possibility for conflict with the law of contract.[9] Factors of this sort are considered in determining whether a duty to take care is owed.

Concerns of this nature are not *only* relevant to cases of pure economic loss. The House of Lords determined that if similar considerations are relevant to a case involving *physical damage to property*, then a restricted approach to the duty of care may be taken in that case also: *Marc Rich v Bishop Rock Marine (The Nicholas H)*
p. 234 [1996] AC 211. This may appear ↵ questionable in light of the decision of the Supreme Court in *Robinson v Chief Constable of West Yorkshire* (extracted in Chapter 4, and further below), which set out a strongly 'categorized' approach to negligence cases. Tellingly, the Supreme Court argued in *Robinson* that the issues dealt with in *Marc Rich* were really particular issues which 'applied to' economic loss—not noting that it was in fact a case of property damage.[10]

Marc Rich v Bishop Rock Marine (The Nicolas H) [1996] AC 211

In the course of a voyage, the vessel Nicholas H developed a crack in its hull. The shipowners requested their classification society, NKK, to perform a survey of the damage. A classification society is a non-governmental organization *<https://en.wikipedia.org/wiki/Non-governmental_organization>* that verifies compliance with safety and technical standards. D, an employee of NKK, carried out the survey and at first recommended that the vessel put in to dry dock for permanent repairs, but after protests from the shipowners over the costs of such an action changed his mind and recommended temporary repairs only. Shortly afterwards the ship sank as a result of the crack and the entire cargo was lost. MR, the cargo owners, recovered a substantial sum from the shipowners, which represented the extent of the shipowners liability having regard to contractual terms, and sued NKK for the balance. Their claim succeeded at first instance but their decision was reversed by the Court of Appeal.

The House of Lords emphasized the significance of the nature of the relationship between the parties, and emphasized the need to be satisfied in all the circumstances that it was fair, just and reasonable to impose a duty of care. Although there was a sufficient degree of proximity in this case, it would be unfair, unjust and unreasonable to impose a duty of care on NKK as against the shipowners. As classification societies are not for profit organizations, shipowners would ultimately have to bear the consequence of holding classification societies liable, and this would be inconsistent with the bargain between shipowners and cargo owners based on an internationally agreed contractual structure. It would, moreover, be unjust, unfair and unreasonable towards classification societies because they act for the collective welfare and would not have the benefit of any contractual provisions limiting damages.

While the Supreme Court in the later case of *Robinson* was correct to point out that the issues raised in this decision match those which arise in many economic loss cases, it is clear that the loss suffered by the cargo owners was physical harm to their cargo and consequent economic loss—not *pure* economic loss. The decision exemplifies some of the factors that make economic loss cases problematic, for example, the nature of existing structures for assigning risk and temptation to divert losses to a ‘peripheral party’. It is, however, a case where the loss suffered by the claimant is not purely economic.

Lord Steyn, *Marc Rich v Bishop Rock Marine* [1986] AC 211, 235

> ## The requirements in physical damage cases
>
> Counsel for the cargo owners submitted that in cases of physical damage to property in which the plaintiff has a proprietary or possessory interest the only requirement is proof of reasonable foreseeability. For this proposition he relied on observations of Lord Oliver of Aylmerton in *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605 <https://uk.westlaw.com/Document/I821B84F0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>, 632–633. Those observations, seen in context, do not support his argument. They merely underline the
> p. 235 qualitative ↵ difference between cases of direct physical damage and indirect economic loss. The materiality of that distinction is plain. But since the decision in *Dorset Yacht Co. Ltd v. Home Office* [1970] A.C. 1004 <https://uk.westlaw.com/Document/IC3259AD0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)> it has been settled law that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the harm sustained by the plaintiff.

Lord Steyn's point here is that this is not an economic loss claim; but neither is it a case of 'directly' caused physical damage. Thus, the boundaries of the relevant categories are not as straightforward as the Supreme Court in *Robinson* appears to have suggested.

Lord Reed, *Robinson v Chief Constable of West Yorkshire*

> 28. In the present case, Hallett LJ ... relied on a passage in the speech of Lord Steyn in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] AC 211 <https://uk.westlaw.com/Document/IEE08C2E0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)>, 235, in which he remarked that 'the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases'. That was a case concerned with the loss of a ship and its cargo as a result of negligent advice, in which the reasoning was essentially directed to considerations relevant to economic loss. As Hobhouse LJ observed in *Perrett v Collins* [1999] PNLR 77 <https://uk.westlaw.com/Document/I1E02DDA0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)>, 92:
>
> > "*Marc Rich* should not be regarded as an authority which has a relevance to cases of personal injury or as adding any requirements that an injured plaintiff do more than bring his case within established principles. If a plaintiff is attempting to establish some novel principle of liability, then the situation would be different."

The point made above is that although *Marc Rich* did not involve infliction of personal injury, it was a case of physical damage. That damage, however, is not done directly. This suggests that courts following *Robinson* will need to think carefully about the relevant categorization. The nature of the loss is not a sufficient way of dividing the cases, and *Marc Rich* was not a case of economic loss—it was a case where questions that often arise in relation to economic loss also arose in relation to physical damage.

In fact, in *Marc Rich*¸ Lord Steyn did, in the spirit of both *Caparo* and *Robinson*, refer to the position reached in the existing law, as a way of indicating that this was a 'novel' case. That turned, however, not on the nature of the damage suffered, but on the nature of the defendant's role as a classification society. As we will see in Section 3 of this Chapter, this is the sort of category which has *not* been regarded as relevant by the Supreme Court in the recent case law on public authority and police negligence. But the point being made by Lord Steyn is that the absence of any such duty across a very long period of history suggests the presence of some reasons why not. These will not be effectively accessed by looking at the nature of the damage.

Lord Steyn, *Marc Rich v Bishop Rock Marine* [1986] AC 211, 231

> In this case the question is whether a classification society owed a duty of care to a third party, the owners of cargo laden on a vessel, arising from the careless performance of a survey of a damaged
> p. 236 vessel by the surveyor of the classification society which resulted in ↵ the vessel being allowed to sail and subsequently sinking. It is a novel question. In England no classification society, engaged by owners to perform a survey, has ever been held liable to cargo owners on the ground of a careless conduct of any survey. Your Lordships have also been informed that there is apparently no reported case in which such a duty has been recognised in any foreign court. Given the fact that surveyors of classification societies have regularly performed occasional surveys of laden vessels for over a century and a half the novel nature of the problem may not be entirely without significance. Ultimately, however, the problem must be considered in accordance with our tort law as it now stands without any a priori disposition for or against the legal sustainability of such a claim.

An alternative attempt to fit *Marc Rich* within the more recent case law might be to see it as a case of *failure to benefit*, in which there is no *assumption of responsibility to the cargo owner*. That, however, is not the explanation offered by Lord Reed in the case of *Robinson*, as extracted above. This discussion serves to illustrate the extent of the reinterpretation of the law required since *Robinson* and *Poole*, and some of the problems that this may cause.

Categories of Economic Loss Case

In Chapter 4, Section 3, we outlined the *Caparo* approach to establishing a duty of care in negligence. The hallmarks of the *Caparo* approach included the reinstatement of 'proximity' as a separate criterion which would *restrict* the operation of foreseeability; and the adoption of an 'incremental' technique in which courts will turn to established categories of case rather than to broad universal principles in order to reach their decisions. In a major article published soon after the decision in *Caparo*, Jane Stapleton criticized the new approach as likely to further entrench 'pockets' of liability.

Jane Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 LQR 249, at 284

> The central flaw in the House of Lords' approach to economic loss is the assumption—most explicit in *Caparo*—that difficult issues of duty should be analysed within and by analogy to pockets of 'relevant' case law. With respect, this can become a process akin to the tail wagging the dog, because the selection of the 'relevant' pocket can, at the outset, preclude consideration of factors or 'policies' which would provide a more coherent overall approach.

Stapleton's key point was that by dividing the case law into categories, artificial barriers would be set up and too much attention would be paid to irrelevant considerations (such as whether the damage was caused by an act or a statement), distracting attention from the more important policy issues that ought to drive decision-making in this area. Some of these, she argued, could be seen as relevant to all categories of economic loss.

Stapleton was correct to argue that the apparent distinction between 'losses caused by words' and 'losses caused by acts' is not a reliable way to divide the case law. It is now clear that *Hedley Byrne v Heller* extends beyond losses caused by statements. But this is only part of the picture when it comes to economic losses. We
p. 237 can identify two specific areas within ↵ the field of economic losses where exclusionary rules apply. It is suggested though that even here, the exclusionary rules are not applied *because* the loss is purely economic, but for more specific reasons. The above discussion of *Marc Rich v Bishop Rock Marine* should help in beginning to identify the kinds of reasons in play, which may be described as relating primarily to the relationship between the parties, rather than the type of loss suffered, though these issues are more likely to arise in a case of economic loss. These are categories A and B below. The new direction taken by the Supreme Court is represented in the field of economic losses by the decision in *Steel v NRAM* [2018] UKSC 13; [2018] 1 WLR 1190. Since this decision fell directly within the scope of *Hedley Byrne* liability, it is too early to say quite how far ranging its influence will be.

The following categories are used to explain the law in this section.

A. Economic loss caused by **damage to property of another party**. This sort of loss can also be referred to as **'relational' economic loss**. It is not recoverable in English law, with one exception (*The Greystoke Castle*, discussed in Section 2.2), and a significant qualification (*Shell UK Ltd v Total UK Ltd*, discussed in Section 2.3). One reason against liability is the prospect of actions by an indeterminate number of claimants (*Spartan Steel*). If physical harm is done to the property (or person) of one party, this may have a 'ripple effect' on the *financial* interests of many others. But this reason for the exclusionary rule is not always valid. Supplementary reasons include reluctance to interfere with contractual allocations of risk, and desire to encourage other means of protecting the claimant's interests (*Spartan Steel; The Aliakmon*).

B. Economic loss caused by **acquiring a product that turns out to be defective**. This sort of loss is also not recoverable in English law. In *Murphy v Brentwood*, it was explained that such cases are simply not covered by *Donoghue v Stevenson*. Cases of this kind involve no injury to the person or to property other than the defective product itself. To recognize a duty here would make significant inroads into the rules of contract, because these cases involve a 'bad bargain' rather than harm to separate property. This approach is most controversial when it is applied to realty (specifically buildings) rather than to

chattels, and in these cases, *Murphy v Brentwood* has been rejected in a number of common law jurisdictions. *Murphy* cannot be said to state a truly *arbitrary* rule (it is clear why it sets the boundaries where they are set), but is it overly restrictive given the policy context?

C. Economic loss caused by **reliance on negligent statements**. This kind of case was the subject of the key decision in *Hedley Byrne v Heller. Hedley Byrne* set out specific criteria for recognizing a duty of care where the claimant has relied upon a statement made by the defendant. There is much debate surrounding the exact criteria set out in *Hedley Byrne* and concerning its rationale and limits. But criteria drawn from *Hedley Byrne* are extensively in use in the English case law, even if they no longer capture the same concepts that were intended in that case. The relationship between the *Hedley Byrne* criteria, and the 'three-stage test' under *Caparo v Dickman*, caused problems. Following the Supreme Court's denial, in *Robinson v Chief Constable of West Yorkshire*, that there is, in fact, a 'three stage test' at all, the significance of *Hedley Byrne* was re-established and its status as the leading case of recoverable economic loss was newly confirmed in the decision in *Steel v NRAM* [2018] UKSC 13; [2018] 1 WLR 1190. This will not, however, resolve all the difficulties in relation to liability for economic losses.

D. **'Extended' *Hedley Byrne* liability**. *Hedley Byrne* liability has been recognized as extending beyond its particular context, in which statements were delivered by one party directly to another party. First, *Hedley Byrne* liability has been extended to cases that involve more than one party, including some where the claimant does not rely on the statement at all. Second, liability on the basis of *Hedley Byrne* has been found outside the area of negligent statements, including cases of professional services more generally. In fact, these cases form the historical background to *Hedley Byrne*, and if anything it was the application in that case to mere statements (outside an existing relationship) that constituted the 'extension'. There seems to have been further movement at the margins of this category, suggesting that the existing boundaries are provisional. The problem here is certainly not rigidity of categories, but the elusive nature of the relevant criteria. Chief among these criteria is the idea of an 'assumption of responsibility'. The significance of this idea is reinforced by the decision in *Steel v NRAM*, but if anything its content has become more uncertain.

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The English solution has generally been to maintain the specific exclusionary rules in categories A and B against challenge. These reflect particular issues relating to the relationship between the parties. In other cases, there is an attempt to develop some general principles to explain the division between recoverable and unrecoverable losses.

Are 'Categories' Appropriate?

It will be obvious that we are taking a 'categorized' approach to the case law on economic loss. The virtues of categorization are hotly contested. Feldthusen, writing from a Canadian perspective, has suggested that a categorized approach is likely to shorten the length of judgments and enhance certainty: B. Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?' (2000) 8 Tort L Rev 33. Feldthusen's proposed list of categories is longer and more complete than the one adopted in this section, which reflects the development of English law.[11] Categorization has been particularly criticized by certain Australian writers (P. Cane, 'The Blight of Economic Loss: Is There Life After *Perre v Apand*?' (2000) 8 TLJ 1; J. Stapleton, 'Comparative Economic Loss: Lessons From Case-Law-Focused "Middle Theory"' 50 UCLA L Rev

531), who would prefer the courts to develop more satisfying criteria based on identifiable and generalized policy goals. At the same time as we saw in Chapter 4, the English law on duty of care more generally has moved towards an approach based on categories, partly for the reasons proposed by Feldthusen—to shorten the length of judgments and avoid unnecessary debate about policy reasons. The difficulty is, however, that the categories so far developed—such as personal injury caused by a positive action, or the distinction between acts and omissions—do not clearly match the categories already recognized in the law of economic loss. For our more modest purpose, namely explanation of the English case law, the above categorization will certainly be helpful. Unlike the categories set out by the Supreme Court, no grand claims are being made for our categories, and there is room for overlap between them.[12]

We now turn to the case law, organized in accordance with the four categories A–D above.

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2.2 Relational Economic Loss (Category A)

In a typical case of 'relational' economic loss, A causes damage to the property of B, causing C to lose money. C may lose money for a number of different reasons when the property of B is damaged. One such reason is that there may be a *contractual* link between C and the damaged property.

Cattle v The Stockton Waterworks Co (1875) LR 10 QB 453

The plaintiff was engaged by K (a landowner) to carry out work on K's land. Due to a leak in the defendants' pipes, the work had to be delayed, causing the plaintiff to lose money under the terms of the contract. Blackburn, Mellor, and Lush JJ held that the plaintiff could not maintain an action against the defendant water company in these circumstances, even if K could have done so. (Any such action might have been in negligence, or under the rule in *Rylands v Fletcher* (1868) LR 3 H 330: see Chapter 12.) Even at this early stage, the reason offered is one of proximity; but behind proximity lies a reluctance to open the floodgates to an indeterminate number of claims. Because of these considerations, there would be no recovery even in a case, such as this one, where no threat of excessive liability arose on the facts. This case still encapsulates the English approach to relational economic loss.

> **Blackburn J, at 457–8**
>
> In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so, we should establish an authority for saying that, in such a case as that of *Fletcher v. Rylands* ... the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge, J., in *Lumley v. Gye* [22 LJ QB 479], Courts of justice should not 'allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.' In this we quite agree. No authority in favour of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there was none that could have been cited.

The rule against recovery of relational economic loss clearly illustrates the fear of a potential 'ripple effect' if liability is imposed. The effect of damage to one party may be multiplied as others suffer economic losses, giving rise to 'indeterminate liability'.

A good example is *Weller v Foot and Mouth Disease Research Institute* [1966] 1 QB 569. The plaintiffs (who were cattle auctioneers) claimed that the defendant research institute had imported an African virus and allowed it to escape, causing the disease to spread to cattle and giving rise to financial harm to the plaintiffs since cattle markets had to be closed. Widgery J held that no duty was owed to the auctioneers. The then recent authority of *Hedley Byrne* (Section 2.4) made no difference to the general rule on relational economic loss. (We should
p. 240 note that the auctioneers in this case did not even have a contractual interest in the ↵ cattle whose health was foreseeably affected by the virus. Theirs was a very general economic interest.) Slightly different issues arising from a much more recent outbreak of foot and mouth disease were considered in *D. Pride and Partners v Animal Health Institute* [2009] EWHC 296. Here, the defendants had settled claims brought by the owners of cattle which had to be culled because they were infected or were at risk of being infected. But no duty was held to be owed to farmers whose animals passed the point of maturity at which they would most profitably have been slaughtered, or whose animals suffered 'welfare problems'. Here, the exclusionary rule was applied to 'relational' harm that had been held to be arguably physical.

Spartan Steel & Alloys v Martin & Co [1973] QB 27

Through negligence in digging up a road, the defendant contractors inadvertently severed a power supply. The plaintiffs' factory was engaged in smelting. Loss of power supply for a period of 14 hours or more caused a number of forms of damage to the plaintiff which are set out in Lord Denning's judgment.

> **Lord Denning MR, at 34**
>
> At the time when the power was shut off, there was an arc furnace in which metal was being melted in order to be converted into ingots. Electric power was needed throughout in order to maintain the temperature and melt the metal. When the power failed, there was a danger that the metal might solidify in the furnace and do damage to the lining of the furnace. So the plaintiffs used oxygen to melt the material and poured it from a tap out of the furnace. But this meant that the melted material was of much less value. The physical damage was assessed at £368.
>
> In addition, if that particular melt had been properly completed, the plaintiffs would have made a profit on it of £400.
>
> Furthermore, during those 14 hours, when the power was cut off, the plaintiffs would have been able to put four more melts through the furnace: and, by being unable to do so, they lost a profit of £1,767.

Lord Denning considered the case law on relational economic loss and continued:

> **At 37–9**
>
> … I turn to the relationship in the present case. It is of common occurrence. The parties concerned are: the electricity board who are under a statutory duty to maintain supplies of electricity in their district; the inhabitants of the district, including this factory, who are entitled by statute to a continuous supply of electricity for their use; and the contractors who dig up the road. Similar relationships occur with other statutory bodies, such as gas and water undertakings. The cable may be damaged by the negligence of the statutory undertaker, or by the negligence of the contractor, or by accident without any negligence by anyone: and the power may have to be cut off whilst the cable is repaired. Or the power may be cut off owing to a short-circuit in the power house: and so forth. If the cutting off of the supply causes economic loss to the consumers, should it as [a] matter of policy be recoverable? And against whom?

p. 241 ↵ Lord Denning offered a number of reasons why pure economic loss should not, as a matter of policy, be recoverable in such a situation, including the following:

> The second consideration is the nature of the hazard, namely, the cutting of the supply of electricity. This is a hazard which we all run. It may be due to a short circuit, to a flash of lightning, to a tree falling on the wires, to an accidental cutting of the cable, or even to the negligence of someone or other. And when it does happen, it affects a multitude of persons: not as a rule by way of physical damage to them or their property, but by putting them to inconvenience, and sometimes to economic loss. The supply is usually restored in a few hours, so the economic loss is not very large. Such a hazard is regarded by most people as a thing they must put up with—without seeking compensation from anyone. Some there are who install a stand-by system. Others seek refuge by taking out an insurance policy against breakdown in the supply. But most people are content to take the risk on themselves. …
>
> The third consideration is this: if claims for economic loss were permitted for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false. … Rather than expose claimants to such temptation and defendants to such hard labour—on comparatively small claims—it is better to disallow economic loss altogether, at any rate when it stands alone, independent of any physical damage.
>
> The fourth consideration is that, in such a hazard as this, 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, that is, on the contractor on whom the total of them, all added together, might be very heavy. …
>
> These considerations lead me to the conclusion that the plaintiffs should recover for the physical damage to the one melt (£368), and the loss of profit on that melt consequent thereon (£400): but not for the loss of profit on the four melts (£1,767), because that was economic loss independent of the physical damage. I would, therefore, allow the appeal and reduce the damages to £768.

In this case, it was found that even where a plaintiff is clearly owed a duty in respect of physical damage to property, any ‘pure’ economic losses suffered in addition to physical damage are unrecoverable as either too remote, or outside the scope of the duty of care. These ‘pure’ economic losses are not consequent on damage to the plaintiff’s property, but on damage to some other property (in this case, the cable) in which the plaintiff has no proprietary interest. Thus, these losses are an example of ‘relational’ economic loss. It will be seen that in this case, there were also ***recoverable*** economic losses, which were judged not to be ‘purely’ economic, but to be **consequential upon** the damage to the metal in the melt. Into this category fell the lost profits on the *damaged* metal.

It is clear that Lord Denning considered it best that *relational* economic losses should be covered by a general exclusionary rule. On the particular facts of *Spartan Steel*, one of the more persuasive of the reasons he offers is his fourth: it is better that a series of small losses should be spread across the community, rather than being concentrated on the shoulders of one party. But this reason does not apply to all cases of relational economic loss. It would not apply to *Cattle*, for example. Neither would it apply to *The Aliakmon* (below). Therefore, we should also note his second reason. Losing one’s power supply is a fairly normal occurrence and most people take steps to deal with the risk that it will happen. They might do so through insurance, or through having an

p. 242 emergency generator. This is arguably the strongest reason ↵ in support of the category A exclusionary rule, because in order to encourage people (at least in a commercial setting) to take precautions before the event, it is best to have a clear rule: see further the discussion of the Canadian case law, later in this section.

In *Candlewood v Mitsui (The Mineral Transporter)* [1986] AC 1, the Privy Council confirmed that the general exclusionary rule for relational losses survived the new approach to the duty of care set out in *Anns v Merton* [1978] AC 728 (discussed in Chapter 4, Section 2.2). The Privy Council argued that the well-understood policy reasons behind the exclusionary rule were sufficient reason for its retention under the second limb of the *Anns* test, amounting to policy concerns that would justify negativing the duty of care.[13]

A long-standing exception to the rule is the case of *Morrison Steamship v Greystoke Castle* [1947] AC 265. A ship was damaged in a collision and had to put into port, discharging and reloading her cargo. The cargo owners became liable to the ship owners for 'general average contribution'. This refers to a means of pooling risk among cargo owners, by which they would have to pay a percentage of the costs of loading and reloading. It was held by the House of Lords that the cargo owners could claim against the defendant, whose negligence was partly to blame for the collision, even though their own property was not damaged. The House of Lords did not indicate that *Cattle v Stockton Waterworks* was in any way relevant to this case, citing only maritime authorities. In the course of their judgments, the House of Lords expressed the view that the plaintiff cargo owners were engaged in a 'common adventure' (Lord Roche) or 'joint adventure' (Lord Porter) with the ship owners. This idea has not been developed into a broader exception in English law, where it is regarded as confined to this special area of maritime law and the particular collusion of interests between the 'ship' and the 'cargo' (for further discussion see *The Nicholas H* [1996] AC 211, at 226–7, per Lord Lloyd of Berwick).

Leigh and Sillivan v Aliakmon Shipping Co Ltd [1986] AC 785 ('The Aliakmon')

In this case, the House of Lords refused to recognize a *limited* exception to the rule against recovery for relational economic loss. There was no prospect of indeterminate liability, and the case demonstrates a robust defence of the exclusionary rule in respect of relational economic loss.

Goods were damaged during shipment, through the negligence of charterers. Due to an unusual series of negotiations, the final contractual arrangements were not of a standard type. The end result was that the *risk of damage* had already passed to the plaintiffs on shipment, but *property* in the goods did not pass to the plaintiff until the goods were discharged and warehoused. The plaintiffs did not acquire any rights of suit in respect of damage done during shipment, their interest in the goods at that time being merely contractual. The sellers meanwhile had suffered no loss, so that they could not bring an action on their own account. This was an instance of property damage in respect of which neither buyer nor seller could bring an action, much to the benefit of the negligent party. On the other hand, the plaintiff buyers could argue that they were *prospectively* the legal owners of the damaged goods, a feature of their case that a sympathetic court might use to distinguish them from the unsuccessful plaintiffs in previous cases such as *Cattle v Stockton Waterworks*.

p. 243 ↵ In the Court of Appeal, Robert Goff LJ suggested that this could be treated as a case of 'transferred loss'. Such cases, he argued, were in a special category to which the policy arguments against recovering relational losses did not apply. The concept is explained in the following extract.

Robert Goff LJ
[1985] QB 350, at 399 (CA)

> In my judgment, there is no good reason in principle or in policy, why the c. and f. buyer should not have … a direct cause of action. … I am particularly influenced by the fact that the loss in question is of a character which will ordinarily fall on the goods owner who will have a good claim against the shipowner, but in a case such as the present the loss may, in practical terms, fall on the buyer. It seems to me that the policy reasons pointing towards a direct right of action by the buyer against the shipowner in a case of this kind outweigh the policy reasons which generally preclude recovery for purely economic loss. There is here no question of any wide or indeterminate liability being imposed on wrongdoers; on the contrary, the shipowner is simply held liable to the buyer in damages for loss for which he would ordinarily be liable to the goods owner. There is a recognisable principle underlying the imposition of liability, which can be called the principle of transferred loss. Furthermore, that principle can be formulated. For the purposes of the present case, I would formulate it in the following deliberately narrow terms, while recognising that it may require modification in the light of experience. Where A owes a duty of care in tort not to cause physical damage to B's property, and commits a breach of that duty in circumstances in which the loss of or physical damage to the property will ordinarily fall on B but (as is reasonably foreseeable by A) such loss or damage, by reason of a contractual relationship between B and C, falls upon C, then C will be entitled, subject to the terms of any contract restricting A's liability to B, to bring an action in tort against A in respect of such loss or damage to the extent that it falls on him, C.

This suggested innovation was not accepted by other members of the Court of Appeal, and it was also rejected on appeal by the House of Lords. Lord Brandon said that he would, even if he felt there to be a pressing need for such a remedy, be too 'faint-hearted' to introduce it given that it was clearly, in his view, against the established authorities. He also emphasized the importance of certainty, which was protected by the existence of the general rule. But he clearly felt that there was no need for such an innovation. If the buyers had been well advised, they would have negotiated a different form of contract, which would have provided them with a remedy in the event of loss. The exception proposed by Robert Goff LJ could not be said to create any excessive liability to defendants, since it would apply only to cases where the same loss which was foreseeably caused by damage to goods is transferred through the contractual structure, from the property owner, to a third party. Lord Brandon's reluctance to allow such a claim stems from a wish to protect the general rule for reasons unconnected with the specific parties.[14]

In later years, the House of Lords was far from 'faint-hearted' in this context (see category D, Section 2.4). In
p. 244 the House of Lords, Lord Goff later used a very similar argument ↵ to his proposed 'transferred loss' idea, in a case where intended beneficiaries sued a solicitor for depriving them of legacies under a will: *White v Jones* [1995] 2 AC 207. Clearly, *White v Jones* was not a case of 'relational' economic loss because there was no property damage, but given that the case did not involve reliance by the beneficiaries upon the solicitor and was not even a statements case, neither did it fit easily within the *Hedley Byrne* category of recoverable economic losses. Here, there is a jangling inconsistency between different categories of case law, though

whether blame should fall on the exclusionary rule in *The Aliakmon*, or on the creative interpretation of the law in *White v Jones*, is a matter for debate. Alternatively, the problem in these cases may be said to lie with rigidity in the rules of contract law.

It is possible to defend the exclusion of liability for relational losses, as requiring few judicial resources in most cases and giving rise to no less workable rules than the exclusionary rule with predictable exceptions Against this background, two more recent decisions of the Court of Appeal merit discussion.

Shell UK Ltd v Total UK Ltd [2010] EWCA Civ 180; [2011] QB 86

The result in this case is perhaps surprising given the solidity of the relational category over many years and the high authority of cases which have maintained the exclusionary rule. Fuel pipelines were damaged in an enormous explosion. Those pipelines were held on trust for Shell, among others. Was the negligent party liable to compensate Shell for the economic loss it suffered as a result of this damage? Shell was not the legal owner; but the Court of Appeal concluded that it could claim nevertheless. The key move was to treat the beneficial owner in the same way as the legal owner, *provided that* the legal owner was also joined in the proceedings.

The decision has been subject to criticism as producing a 'strange hybrid of tort and trust law', which is apparent in the proviso that the legal owner must also be a party (PG Turner, 'Consequential Economic Loss and the Trust Beneficiary' (2010) CLJ 445). One alternative route (though not the only one) would have been to allow the trustee (the legal owner) to recover a sum representing the beneficial owner's losses, and to account to the beneficial owner accordingly.[15] This would extend a principle that operates in the law of contract,[16] into the law of tort. Contentiously, the Court of Appeal rejected as 'legalistic' any sharp distinction between legal and equitable ownership, a move which has attracted further criticism.[17] The important point for our purposes is that the decision makes an inroad into the principle set out in *The Aliakmon*, and does so on the basis that a legalistic approach is to be rejected. The Court drew an analogy with the case of *White v Jones*, explored in Category D, in which Lord Goff developed the views he had expressed in *The Aliakmon* but which were not taken up by other judges in that case. This illustrates the significance of counter-currents in the law: what Lord Goff failed to do in *The Aliakmon* but later put into effect in another category has begun to have an influence in a case within the area of application of *The Aliakmon* itself.

p. 245 **Waller LJ, *Shell UK v Total UK* (judgment of the Court)**

> 143 We must confess to being somewhat influenced … by what Lord Goff of Chievely in *White v Jones* … called 'the impulse to do practical justice'. It should not be legally relevant that the co-owners of the relevant pipelines, for reasons that seemed good to them, decided to vest the legal title to the pipelines in their service companies and enjoy the beneficial ownership rather than the formal legal title. Differing views about the wisdom of the exclusionary rule are widely held but, however much one may think that, in general, there should be no duty to mere contracting parties who suffer economic loss as result of damage to a third party's property, it would be a triumph of form over substance to deny a remedy to the beneficial owner of that property when the legal owner is a bare trustee for that beneficial owner.

It has been argued that from the point of view of tort law, the result is satisfactory and that the policy issues which underpin *The Aliakmon* itself, being concerned with protection of existing contractual allocations of risk, simply do not exist in this case.[18] However, it is plain that the authority of *The Aliakmon* would have been directly challenged before the Supreme Court, had a settlement in the case not been reached a matter of weeks before it was due to be heard.[19] The case almost launched a full-scale assault on the existence of our first category, and in that sense it is the 'one that got away'.

Network Rail Infrastructure Ltd v Conarken Group Ltd [2011] EWCA Civ 644

This case also illustrates that the categories of economic loss are, in any principled or policy-based sense, porous. But by contrast to *Shell*, this case shows how policy issues akin to those that explain the 'relational' exclusion may be extended *outside* the boundaries of the category. In this instance, ordinary principles of negligence law were nevertheless applied to allow recovery; and the virtues of simplicity were underlined.

The question in *Network Rail* was economically significant. Damage to rail track and (for example) bridges by drivers is not uncommon and the financial consequences attached to the resulting disruption can be severe. The question here is whether those consequences lie with negligent drivers, or rather with their employers (for example, in the case of most heavy goods vehicles) and insurers; or with the claimants in this case.

The claimant company owns the railway infrastructure and enters into contracts with various companies which operate train services on its track. When track is damaged, and services are unable to operate, train operators are subject to penalties from the franchising authority. Network Rail is contractually bound to compensate the train operators in respect of these penalties, and certain other losses, according to a formula set out in the contracts. The question arising in this case was whether Network Rail is itself able to seek compensation to cover these compensatory payments. The contractual payments made are losses to Network Rail which are consequential on damage to its property, caused by negligence (in this instance, negligence on
p. 246 the part of motorists). The train operators themselves would ↵ have been unable to claim in tort had the contractual compensation not been payable, and the existence of the contract would therefore impose an additional liability on negligent parties (or their insurers), if the losses were recoverable. Those drivers were of course not privy to those contracts.

Despite these features, the court categorized the loss as 'consequential' rather than pure economic loss, and found it to be recoverable: applying ordinary *Wagon Mound* principles, loss of revenue is a foreseeable type of loss when damaging what is clearly commercial property (for example, power lines).[20] This is a form of 'taking your victim as you find him', which has been extended to the claimant's financial position since *Lagden v O'Connor* (Chapter 6). It was necessary that the agreement embodied a reasonable and genuine attempt at compensating for losses (even though, as we have said, those losses themselves would be unrecoverable); but close analysis of its terms was discouraged.

Jackson LJ, *Network Rail Infrastructure v Conarken Group*

> 153. Absent some exceptional circumstance or obviously unreasonable feature in the claimant's business arrangements, in my view it is not appropriate for the court to explore in detail the build-up of any loss of revenue following damage to revenue generating property. It is sufficient for the claimant to prove that the loss of revenue has occurred.
>
> 154. The law of tort should, so far as possible, be clear and simple. This court should not superimpose a requirement for expensive legal inquiry upon categories of case where there is an established entitlement to recover economic loss.

While the Court in *Shell UK* recognized an important exception to the 'relational' category, the Court in this case declined to expand the area of non-recovery. Both cases recognized limits to the relational category, which has hitherto embodied the strongest exclusionary rule. Despite the reluctance of the Court in *Shell* to allow 'form' to triumph over 'substance', in this second case categorization—and simplicity in determining who bore the relevant risks—seems to have been prioritized (or perhaps, simply found convenient).

2.3 Economic Losses Caused by Acquiring Defective Products or Premises (Category B)

In *Anns v Merton LBC*, as we saw in Chapter 3, the House of Lords held that a local authority may owe a duty of care in negligence in exercise of its powers of inspection under the Public Health Act 1936. The judgment was dominated by the interplay between statutory powers and common law duties (as to which, see the discussion in Section 3.2). Relatively little attention was paid to the definition of the *loss* suffered by the disappointed purchasers. Lord Wilberforce clearly thought that the loss was not purely economic:

p. 247 **Lord Wilberforce, *Anns v Merton LBC***
[1978] AC 728, at 759

> ... The damages recoverable include all those which foreseeably arise from the breach of the duty of care which, as regards the council, I have held to be a duty to take reasonable care to secure compliance with the byelaws. Subject always to adequate proof of causation, these damages may include damages for personal injury and damage to property. 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.
>
> To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, 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.

As a matter of 'classification', Lord Wilberforce was mistaken. The damage suffered was economic loss. No separate 'damage' had been done to property of the plaintiffs, other than the building itself, by the defendants' alleged breach of duty. Eleven years later in the case next extracted, the House of Lords seized upon this error. But did this case set the law on another wrong turning by exaggerating the importance of the type of loss?

D and F Estates v Church Commissioners [1989] AC 177

The defendants were employed in the construction of a block of flats. The plasterwork was carried out by subcontractors who were not parties to the action. The plaintiffs were lessees of a flat in the block. In the fullness of time, it was discovered that some of the plaster was loose. Some of it fell down. The plaintiffs brought an action in negligence claiming the cost of stripping and replacing the plaster, and a number of other items including loss of rent, cleaning of carpets, and damage to possessions in the flat. The judge at first instance held that the plaster had been incorrectly applied and that the defendants were in breach of duty. An appeal by the defendants was successful, and the House of Lords dismissed a further appeal by the plaintiffs. The damage amounted to irrecoverable economic loss falling outside the ambit of *Donoghue v Stevenson*.

What were the reasons for suggesting that this kind of economic loss can give rise to no liability in the tort of negligence? The logic in *D and F Estates* (and also in *Murphy v Brentwood*, below) is that a builder is like the manufacturer of any other product. The builder may owe duties in contract or in tort. Contract duties are generally owed only to those who are parties to the contract (see our discussion of *Donoghue v Stevenson*, Chapter 4, Section 2.1). (This latter point, concerning contract, must now be qualified for reasons discussed briefly in respect of Category D cases, Section 2.5). First and subsequent purchasers who wished to benefit from contractual terms should negotiate to secure such protection. Tort duties on the other hand may be owed to ultimate consumers of a product even though these consumers do not contract with the manufacturer, as we saw in respect of *Donoghue* itself.

p. 248 ↵ According to the House of Lords in *D and F Estates*, and later in *Murphy*, tort duties within *Donoghue v Stevenson* are only owed in respect of *damage done* by the item that is manufactured by the defendant. To go further than this, and to hold that the defendant is liable for repair costs or loss of investment in the property itself, would be (as Lord Bridge put it) 'to impose upon [the contractor] for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose' (at 207). A warranty, it is argued, will be available *free of charge*, and *for the benefit of non-contracting parties*, if a duty of care in tort is recognized in respect of losses of this nature. This justification is specific to losses arising from defects in quality. Although the cases concerning defective premises have been controversial, the same analysis has been applied to defective products, where recovery in tort is limited to damage done to separate property or to the person.[21]

Where did this Leave *Anns*?

D and F Estates was not the appropriate case in which to depart from *Anns*. There was no question of damage to the structure itself. Did the decision in *D and F Estates* nevertheless make the later departure in *Murphy v Brentwood* inevitable?

Lord Bridge attempted to point out a way in which *Anns* itself could be salvaged. This was the *'complex structure theory'*. Lord Bridge's comments were offered as a means of bringing *Anns v Merton* within the ambit of *Donoghue v Stevenson* liability, by suggesting that in the case of a complex structure (or even chattel) such as a house, a defect in one part of the property could be seen as causing damage to a 'separate' piece of property. The larger structure would then be treated as a separate item. For example, a defect in foundations could conceivably, on this approach, be said to cause damage to other property if it leads to cracks in walls and floors. But this could not be extended to the defective plaster. This 'theory' (which was really only a suggestion) was considered and rejected by the House of Lords in *Murphy. Anns* was beyond salvation by these means. However, the rejection of this theory came with qualifications, leaving some uncertainty in the law.

Murphy v Brentwood DC [1991] 1 AC 398

Two houses, constructed on landfill, required a concrete raft foundation. The plans for the raft were submitted to Brentwood District Council for approval, pursuant to its duty under section 64 of the Public Health Act 1936. Having no suitably qualified staff of its own, Brentwood District Council referred the plans to qualified structural engineers. Their report was favourable, and the plans were duly passed. As it turned out, there were errors in the design of the foundations which were not spotted by the engineers consulted by the council, and as a result the foundations as constructed were faulty.

The foundations cracked and there was damage to the walls and pipes of the house. The plaintiff could not raise the entire repair costs (£45,000) from his insurer. Instead he sold the house for £35,000 less than its market value if sound. (Incidentally, he recovered from his insurer the sum of £35,000 in respect of a claim for subsidence damage.) A first instance judge awarded the plaintiff £38,777 in respect of diminution in the value of the house, and expenses incurred as a result of damage to it. The Court of Appeal dismissed an appeal by the council.

p. 249 ↵ On appeal to the House of Lords, a specially constituted panel of seven judges invoked the practice statement of 26 July 1966 (*Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234), and departed from its previous decision in *Anns v Merton*. This is equivalent to overruling the earlier decision (see J. W. Harris, 'And *Murphy* Makes It Eight—Overruling Comes to Negligence' (1991) 11 OJLS 416–30).

Lord Keith of Kinkel, at 468

It being recognised that the nature of the loss held to be recoverable in *Anns* was pure economic loss, the next point for examination is whether the avoidance of loss of that nature fell within the scope of any duty of care owed to the plaintiffs by the local authority. On the basis of the law as it stood at the time of the decision the answer to that question must be in the negative. The right to recover for pure economic loss, not flowing from physical injury, did not then extend beyond the situation where the loss had been sustained through reliance on negligent mis-statements, as in *Hedley Byrne*. There is room for the view that an exception is to be found in *Morrison Steamship Co. Ltd v. Greystoke Castle (Cargo Owners)* [1947] A.C. 265. That case, which was decided by a narrow majority, may, however, be regarded as turning on specialties of maritime law concerned in the relationship of joint adventurers at sea. Further, though the purposes of the Act of 1936 as regards securing compliance with building byelaws covered the avoidance of injury to the safety or health of inhabitants of houses and of members of the public generally, these purposes did not cover the avoidance of pure economic loss to owners of buildings: see *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd* [1985] A.C. 210, 241. Upon analysis, the nature of the duty held by *Anns* to be incumbent upon the local authority went very much further than a duty to take reasonable care to prevent injury to safety or health. The duty held to exist may be formulated as one to take reasonable care to avoid putting a future inhabitant owner of a house in a position in which he is threatened, by reason of a defect in the house, with avoidable physical injury to person or health and is obliged, in order to continue to occupy the house without suffering such injury, to expend money for the purpose of rectifying the defect.

The existence of a duty of that nature should not, in my opinion, be affirmed without a careful examination of the implications of such affirmation. To start with, if such a duty is incumbent upon the local authority, a similar duty must necessarily be incumbent also upon the builder of the house. If the builder of the house is to be so subject, there can be no grounds in logic or in principle for not extending liability upon like grounds to the manufacturer of a chattel. That would open up an exceedingly wide field of claims, involving the introduction of something in the nature of a transmissible warranty of quality. The purchaser of an article who discovered that it suffered from a dangerous defect before that defect had caused any damage would be entitled to recover from the manufacturer the cost of rectifying the defect, and presumably, if the article was not capable of economic repair, the amount of loss sustained through discarding it. Then it would be open to question whether there should not also be a right to recovery where the defect renders the article not dangerous but merely useless. The economic loss in either case would be the same. There would also be a problem where the defect causes the destruction of the article itself, without causing any personal injury or damage to other property. A similar problem could arise, if the *Anns* principle is to be treated as confined to real property, where a building collapses when unoccupied.

p. 250

At 471

In my opinion it is clear that *Anns* did not proceed upon any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place.

Lord Bridge of Harwich, at 476–9: The Complex Structure Theory

In my speech in *D. & F. Estates* [1989] A.C. 177, 206G–207H I mooted the possibility that in complex structures or complex chattels one part of a structure or chattel might, when it caused damage to another part of the same structure or chattel, be regarded in the law of tort as having caused damage to 'other property' for the purpose of the application of *Donoghue v. Stevenson* principles. I expressed no opinion as to the validity of this theory, but put it forward for consideration as a possible ground on which the facts considered in *Anns* [1978] A.C. 728 might be distinguishable from the facts which had to be considered in *D. & F. Estates* itself. I shall call this for convenience 'the complex structure theory' … The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to 'other property.'

A critical distinction must be drawn here between some part of a complex structure which is said to be a 'danger' only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor on the other, can recover damages in tort on *Donoghue v. Stevenson* [1932] A.C. 562 principles. But the position in law is entirely different where, by reason of the inadequacy of the foundations of the building to support the weight of the super-structure, differential settlement and consequent cracking occurs. Here, once the first cracks appear, the structure as a whole is seen to be defective and the nature of the defect is known. Even if, contrary to my view, the initial damage could be regarded as damage to other property caused by a latent defect, once the defect is known the situation of the building owner is analogous to that of the car owner who discovers that the car has faulty brakes. He may have a house which, until repairs are effected, is unfit for habitation, but, subject to the reservation I have expressed with respect to ruinous buildings at or near the boundary of the owner's property, the building no longer represents a source of danger and as it deteriorates will only damage itself.

> For these reasons the complex structure theory offers no escape from the conclusion that damage to a house itself which is attributable to a defect in the structure of the house is not recoverable in tort on *Donoghue v. Stevenson* principles, but represents purely economic loss which is only recoverable in contract or in tort by reason of some special relationship of proximity which imposes on the tortfeasor a duty of care to protect against economic loss.

p. 251 ↵ On the whole, the judgments in *Murphy* do not set out (and certainly do not seek to justify) a *general* exclusionary rule for recovery of economic losses. Lord Keith's judgment comes the closest in stating that, at the time of the decision in *Anns*, liability for pure economic losses did not extend beyond the ambit of *Hedley Byrne* liability (Category C). Even so, Lord Keith went on to state a *specific* justification for the exclusion of liability in 'defective product' cases, such as this one. Lord Oliver referred to several different categories of economic loss case and explained that the *Hedley Byrne* category was not necessarily the only one in which such losses might be recoverable. Indeed, he pointed out that the only clear exclusionary rule related to 'relational economic loss' (which we have already considered), and doubted whether definition of the loss as 'pecuniary' or 'economic' was of particularly great assistance, except in identifying those cases where 'something more' is required, over and above mere foreseeability.

Complex Structures and the Separate Damage Requirement

Their Lordships were united in dismissing the complex structure theory as a means of saving *Anns*. It was not possible in this case to treat the foundations as a separate structure from the house. On the other hand, their Lordships thought that in cases where some entirely independent component went wrong, it might be possible to bring the case within the ambit of *Donoghue v Stevenson*. There were variations in the approach to when this might be the case. Lord Bridge distinguished between foundations (an integral part of the larger structure), and a central heating boiler (a 'distinct item'). Lord Keith argued that components could not realistically be seen as separate property if the entire house was provided by a single contractor. Lord Jauncey (at 497) also clearly stated that certain 'integral' components could be treated as 'separate property' only if they were installed by a separate contractor. He seems to have thought, however, that these 'integral components' could be distinguished from the examples of the central heating boiler or electrical installations, which he described as 'ancillary equipment'. This illustrates that the potential exists for quite complex argument about the application of *Murphy*.[22]

In *Bellefield Computers v Turner* [2000] BLR 97, it proved that the *Murphy* approach was too clear to be evaded despite reservations on the part of the Court of Appeal. A fire broke out in the claimants' premises, damaging the premises themselves and some of their contents. On the assumed facts, the builders had not complied with building regulations in respect of a fire wall which would, if properly constructed, have prevented the fire from spreading. There was no claim for damage to the wall itself. The Court of Appeal concluded reluctantly that any claim for damage to the building itself was ruled out by the decision in *Murphy v Brentwood*, although the court clearly thought it artificial to describe the loss as 'purely economic' where there had in fact been fire damage to the premises. It was concluded that *Murphy* left no room for manoeuvre in a case, such as this, where the 'fire wall' was provided at the same time, and by the same contractors, as the rest of the building. Schiemann LJ described the conclusion as 'odd' and perceived it as arising from a policy decision to impose control devices over the liability to subsequent purchasers of a building.

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Latency of Defect

It is clear from their Lordships' judgments in *Murphy* that even in the case of defects that cause actual damage to a separate structure or indeed to the person, there will be liability only if the damage is caused by a defect that remains 'latent'. Once the defect becomes known, then the defect 'no longer poses a danger'. (Lord Bridge conceded that a danger may remain if the property is close to the boundary of a neighbour's land, and suggested that the occupier may perhaps be able to recover for the costs of avoiding such dangers.) This was sound enough reasoning in respect of defective plaster (*D and F Estates*) but is an over-simplification when applied to more fundamental defects. A defect will 'no longer pose a danger' *only* if the owner or occupier of the premises is reasonably able to do something to prevent the danger. This may depend upon financing costly repairs, or it may mean moving house or premises (itself a costly undertaking). The truth is that knowledge of the defect does not per se remove the danger associated with it. Rather, the law chooses to treat defects that are 'patent' as the responsibility of the occupier, together with associated costs. In *Targett v Torfaen BC* (1992) HLR 164, the Court of Appeal took the view that the bar on recovery where damage is done by a patent defect did not apply where a weekly tenant was injured when a handrail on a staircase gave way. He knew of the defect, but could not reasonably have done anything about it. There has not, however, been a general reopening of this issue subsequent to *Targett*.[23]

The Wider Picture: The Role of Policy

In *Murphy v Brentwood*, their Lordships unanimously rejected the idea that policy and justice required a remedy at common law. Relatively little space was devoted to the policy arguments, and the judgments were chiefly presented as confirming a definitional error into which *Anns* had fallen. Some commentators have thought that this was a misleading presentation of their Lordships' decision in *Murphy*.

Sir Robin Cooke
(1991) 107 LQR 46, at 57

> … the majority speeches in *Donoghue v Stevenson* were patently not meant to close the categories of liability in negligence, so the decision in that great case could certainly not be said to require the decisions now reached in *D and F Estates, Murphy*, and *Thomas Bates*. Analytically it was open to the House of Lords in those recent cases to decline to take further the ideas which won the day in *Donoghue v Stevenson*. But, analytically, it was just as open to the House as constituted in the *Anns* and *Dorset Yacht* cases to take the more expansive approach. (I avoid the word 'liberal' in this context as being emotive.) The choice was a policy one.

p. 253 ↵ In *Invercargill City Council v Hamlin* [1996] AC 624, an appeal from the Court of Appeal of New Zealand,[24] it was found by the Privy Council to be appropriate for New Zealand law to continue to develop in a direction influenced both by *Anns* and by the prior New Zealand decision in *Bowen v Paramount Builders* [1977] 1 NZLR 394, even though this was inconsistent with *Murphy*. The New Zealand approach was partly determined by the New Zealand courts' reading of social conditions in that jurisdiction and therefore involved no error of law.[25]

Invercargill CC v Hamlin
[1996] AC 624

> **Lord Lloyd of Berwick (giving the judgment of the Board), at 642–3**
>
> In truth, the explanation for divergent views in different common law jurisdictions (or within different jurisdictions of the United States of America) is not far to seek. The decision whether to hold a local authority liable for the negligence of a building inspector is bound to be based at least in part on policy considerations. ...
>
> In a succession of cases in New Zealand over the last 20 years it has been decided that community standards and expectations demand the imposition of a duty of care on local authorities and builders alike to ensure compliance with local byelaws. New Zealand judges are in a much better position to decide on such matters than the Board. Whether circumstances are in fact so very different in England and New Zealand may not matter greatly. What matters is the perception. Both Richardson and McKay JJ. [1994] 3 N.Z.L.R. 513, 528, 546 in their judgments in the court below stress that to change New Zealand law so as to make it comply with *Murphy's* case [1991] 1 A.C. 398 would have 'significant community implications' and would require a 'major attitudinal shift.' It would be rash for the Board to ignore those views.

Murphy v Brentwood: Relevant Policy Factors

What were the policy arguments which influenced the House of Lords in *Murphy*? First, their Lordships noted that *Anns* had instigated an entirely novel form of liability. The introduction of novel forms of liability was best left to Parliament.

Second, in respect of local authorities in particular, it was noted that the majority of English cases on defective premises were fought between insurance companies—*Murphy* itself included. It was not obvious that drawing on the insurance policies of local authorities (thereby tending to increase their insurance premiums) was preferable to leaving the job to first party insurance (by which the homeowner takes out insurance to cover defects in their home). This is, in part, an argument that the consumer is already adequately protected by alternative means, which is one of the main policy reasons isolated by Jane Stapleton in her influential article 'Duty of Care and Economic Loss' (1991) 107 LQR 249. It is also similar to the Australian focus on 'vulnerability'. This point can be amplified into an argument that purchasers can in some circumstances seek alternative
p. 254 protection, in which case they are not ↵ to be regarded as vulnerable. The first purchaser of a property, for example, may be able to negotiate contractual terms which could include a 'transmissible' warranty—that is to say, a warranty that may operate for the benefit of subsequent purchasers. The advantage to the first purchaser is that this may increase the market value of their premises, or simply assist future sales. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, the High Court of Australia relied on the possibility of such a 'transmissible warranty' as one reason why a subsequent purchaser of property may *not* be regarded as 'vulnerable' in the relevant sense.[26] An alternative route is for the purchaser to seek independent appraisal of the state of the premises, and it is recognized that a surveyor offering such an

appraisal may owe duties to take care both in contract and, in an appropriate case, in tort (*Smith v Eric Bush*, Section 2.3). It should be noted, however, that some defects may remain genuinely hidden from a competent surveyor.

The third policy reason is that there is a consumer protection statute in this area which was ignored by the House of Lords in *Anns*. The Defective Premises Act (DPA) 1972 would not have provided a remedy to the plaintiffs in *Murphy* or *Anns*, because the local authorities in those cases would not be covered in the wording of section 1: 'a person taking on work for or in connection with the provision of a dwelling'. The point is rather that the common law should not provide *more* extensive liabilities than the legislature had adopted after lengthy consideration by the Law Commission. The DPA 1972 does apply to benefit subsequent purchasers, and its protection cannot be excluded or limited via contract. On the other hand, it only applies to 'dwellings', and (crucially) an action can only be brought within six years of completion of the work (section 1(5)).

In summary, although purchasers of defective premises are not owed a tort duty in respect of mere defects, they are not left without any means of protection. They may be able to avoid or recover their losses in the following ways:

1. Through first party insurance, as in the case of *Murphy v Brentwood* itself.
2. Through obtaining advice at the time of purchase. If the advice should prove to be negligent, there may be an action in contract or in tort: *Smith v Eric Bush* [1990] 1 AC 831. The relationship between this case and *Murphy v Brentwood* is considered below.
3. In the case of dwellings, a builder, architect, or other party involved in the 'provision' of the dwelling may be liable under the DPA 1972. This, however, is subject to a limitation period of six years from the time that the work is completed. By contrast, the six-year limitation period in negligence begins to run at the time that the damage occurs, which may be significantly later. In cases of latent damage, a special three-year time period may begin to run later than this, at the time when the claimant could have discovered the damage (Limitation Act 1980, section 14A). There is an overriding limitation period for such cases of 15 years from the time of the negligence (Limitation Act 1980, section 14B): see further Chapter 8.
4. If the builder of the premises is a member of the National House Building Council (NHBC), purchasers (including subsequent purchasers) of the building will benefit from the terms of the NHBC's 'Buildmark' warranty. This is a voluntary guarantee and insurance scheme operated by the NHBC and which offers significant protection to purchasers of property in respect of which the scheme operates. Further details are available on the NHBC website <*http://www.nhbc.co.uk/*> .

p. 255 ↵ Effectively, both section 1 of the DPA 1972 and the NHBC scheme provide 'transmissible warranties' in respect of properties to which they apply, during the period for which they are effective.

The Surveyor's Liability: Reconcilable Contradiction?

Among the alternative forms of liability just listed, the only one that operates through the common law is the potential liability of valuers and surveyors who negligently advise on the state of premises.

Where a surveyor is instructed directly by the purchaser of premises, it is clear that the surveyor will owe a duty to take reasonable care in the inspection and report, both in contract and in tort. There is no real controversy surrounding this duty even though the most likely form of damage to flow from breach of such a duty is economic. Why, it is sometimes asked, should a surveyor be liable for failing to spot a defect, when a builder is not liable to a subsequent purchaser for the defective act of building in the first place, unless some separate damage is done? The answer lies in the relationship between the parties, whether this is expressed in terms of assumption of responsibility, of direct and specific reliance, or in some other way. The surveyor offers targeted advice to a particular client and in respect of a specific transaction. We continue this discussion in relation to category C.

Summary of Categories A and B

In categories A and B, we have found that English law is at least substantially clear and predictable, even if not generous to claimants. Furthermore, we have found that some reasonably clear policy reasons are available which would explain the existence of rules against recovery for economic losses of these types. In each case, it is not particularly the nature of the loss as 'purely economic', but other identifiable considerations, which explained the rule against recovery. In the case of relational economic loss, the general reason is the 'ripple effect'; but *The Aliakmon* confirms that the no-liability rule will be maintained even where the ripple effect does not exist. Alternative protection could have been obtained by the plaintiff, via contractual negotiation. In the case of economic losses caused by defectiveness in a product or premises, the policy reasons are concerned with the maintenance of contractual rules and avoidance of new legal categories whose recognition may lead to awkward problems of definition. There is, again, an argument that claimants have alternative protection available to them. In neither category A nor category B is the non-availability of recovery for pure economic losses said to follow logically from the nature of the loss.

Generally, our difficulties lie in reconciling these areas of no liability, with the recognized and emerging categories of recoverable economic loss instigated by *Hedley Byrne v Heller* [1964] AC 465.

2.4 Economic Loss Caused by Reliance on Negligent Statements (Category C)

The Decision in *Hedley Byrne* and its Legacy

According to McHugh J of the High Court of Australia, 'Since the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, confusion bordering on chaos has reigned in the law of negligence' (*Woolcock Street Investments v*
p. 256 *CDG Pty Ltd* [2004] HCA 16, para 45). Yet in ↵ *Steel v NRAM* [2018] UKSC 13; [2018] 1 WLR 1190, *Hedley Byrne* was recognized by the UK Supreme Court (by reference to a statement of Lord Mance in *Customs and Excise v Barclays Bank*) as 'the fountain of most modern economic claims' in negligence. *Hedley Byrne* is a difficult case to interpret even in its own terms, but to establish its relationship with other categories of economic loss is an even harder task. This is important because English judges have to a large extent adopted and adapted language employed in *Hedley Byrne* in order to identify cases of recoverable loss—and not just economic loss—in other contexts.

Hedley Byrne v Heller & Partners [1964] AC 465

The appellants were advertising agents, who planned to place orders for a company and who therefore asked their bankers to enquire into the financial stability of the company. Their bankers approached the company's bankers, the respondents, with inquiries. The respondents gave favourable responses to the inquiries, but stipulated that these statements were made 'without responsibility'. No fee was charged. The appellants relied upon the favourable references in placing orders, and suffered a loss. They brought an action against the company's bankers, in respect of alleged negligence.

The majority of the House of Lords concluded that in principle, a negligent (but honest) misrepresentation may give rise to a cause of action even in the absence of a contract or fiduciary relationship. However, since in this case there was an express disclaimer of responsibility, no such duty would be implied. Lords Morris and Hodson doubted whether, in circumstances such as these, there could be any duty to take care, even in the absence of the disclaimer. Arguably, they thought, the only duty would be to give an honest answer.

The majority of the discussion in *Hedley Byrne* related to the special status of statements, as opposed to acts. The fact that the loss was 'purely economic' seems to have been treated as of little importance. Perhaps this is because in this particular context, no form of loss other than economic loss was involved or could have been anticipated. That being so, the *economic* losses are in no sense 'secondary' or 'remote' consequences of any carelessness.

Here we extract three of the judgments. These have continued to influence the law on recovery of economic losses. But the most influential of the three is the judgment of Lord Devlin.

Lord Reid, at 482–4

The appellants' first argument was based on *Donoghue v. Stevenson*. That is a very important decision, but I do not think that it has any direct bearing on this case. That decision may encourage us to develop existing lines of authority, but it cannot entitle us to disregard them. Apart altogether from authority, I would think that the law must treat negligent words differently from negligent acts. The law ought so far as possible to reflect the standards of the reasonable man, and that is what *Donoghue v. Stevenson* sets out to do. The most obvious difference between negligent words and negligent acts is this. Quite careful people often express definite opinions on social or informal occasions even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally or in a business connection. The appellant agrees that there can be no duty of care on such occasions. ... But it is at least unusual casually to put into circulation negligently made articles which are dangerous. A man might give a friend a negligently-prepared bottle of homemade wine and his friend's guests might ↵ drink it with dire results. But it is by no means clear that those guests would have no action against the negligent manufacturer.

p. 257

Another obvious difference is that a negligently made article will only cause one accident, and so it is not very difficult to find the necessary degree of proximity or neighbourhood between the negligent manufacturer and the person injured. But words can be broadcast with or without the consent or the foresight of the speaker or writer. It would be one thing to say that the speaker owes a duty to a limited class, but it would be going very far to say that he owes a duty to every ultimate 'consumer' who acts on those words to his detriment. ...

So it seems to me that there is good sense behind our present law that in general an innocent but negligent misrepresentation gives no cause of action. There must be something more than the mere misstatement. I therefore turn to the authorities to see what more is required. The most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility, and that appears to me not to conflict with any authority which is binding on this House. Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty. The refusal of English law to recognise any jus quaesitum tertii causes some difficulties, but they are not relevant, here. Then there are cases where a person does not merely make a statement but performs a gratuitous service. I do not intend to examine the cases about that, but at least they show that in some cases that person owes a duty of care apart from any contract, and to that extent they pave the way to holding that there can be a duty of care in making a statement of fact or opinion which is independent of contract.

At 485–6

... A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the

last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

At 493

I am … of opinion that it is clear that the respondents never undertook any duty to exercise care in giving their replies. The appellants cannot succeed unless there was such a duty and therefore this appeal must fail.

Lord Morris of Borth-y-Gest, at 502–3

My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person ↵ takes it upon 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 upon it, then a duty of care will arise.

p. 258

Lord Devlin, at 524–5

What Lord Atkin called [in *Donoghue v Stevenson*] a 'general conception of relations giving rise to a duty of care' is now often referred to as the principle of proximity. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question.

… In my opinion, the appellants in their argument tried to press *Donoghue v. Stevenson* too hard. They asked whether the principle of proximity should not apply as well to words as to deeds. I think it should, but as it is only a general conception it does not get them very far. …

At 529–31

I have had the advantage of reading all the opinions prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that

of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction. In the present case the appellants were not, as in *Woods v. Martins Bank Ltd* ([1959] 1 Q.B. 55) the customers or potential customers of the bank. Responsibility can attach only to the single act, that is, the giving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility. This is a point of great importance because it is, as I understand it, the foundation for the ground on which in the end the House dismisses the appeal. I do not think it possible to formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking any more than it is possible to formulate those in which the law will imply a contract. But in so far as your Lordships describe the circumstances in which an implication will ordinarily be drawn, I am prepared to adopt any one of your Lordships' statements as showing the general rule: and I pay the same respect to the statement by Denning L.J. in his dissenting judgment in *Candler v. Crane, Christmas & Co* about the circumstances in which he says a duty to use care in making a statement exists.

I do not go further than this for two reasons. The first is that I have found in the speech of Lord Shaw in *Nocton v. Lord Ashburton* and in the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arises in this case. Mr Gardiner does not claim to succeed unless he can establish that the reference was intended by the respondents to be communicated by the National Provincial Bank to some unnamed customer of theirs, whose identity was immaterial to the respondents, for that customer's use. All that was lacking was formal consideration. The case is well within the authorities I have already cited and of which *Wilkinson v. Coverdale* (1 Esp. 75) is the most apposite example.

I shall therefore content myself with the proposition that wherever there is a relationship equivalent
p. 259 to contract, there is a duty of care. Such a relationship may be either general or ↵ particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton v. Lord Ashburton* has long stood as the authority and for the latter there is the decision of Salmon J. in *Woods v. Martins Bank Ltd* ([1959] 1 Q.B. 55) which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.

I regard this proposition as an application of the general conception of proximity. Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed. There may, for example, be cases in which a statement is not supplied for the use of any particular person, any more than in *Donoghue v. Stevenson* the ginger beer was supplied for consumption by any particular person; and it will then be necessary to return to the general conception of proximity and to see whether there can be evolved from it, as was done in *Donoghue v. Stevenson*, a specific proposition to fit the case. When that has to be done, the speeches of your Lordships today as well as the judgment of Denning L.J. to which I have referred—and also, I may add, the proposition in the American Restatement of the Law of Torts, Vol. III, p. 122, para. 552, and the cases which exemplify it—will afford good guidance as to what ought to be said. I prefer to see what shape such cases take before committing myself to any formulation, for I bear in mind Lord

> Atkin's warning, which I have quoted, against placing unnecessary restrictions on the adaptability of English law. I have, I hope, made it clear that I take quite literally the dictum of Lord Macmillan, so often quoted from the same case, that 'the categories of negligence are never closed.' English law is wide enough to embrace any new category or proposition that exemplifies the principle of proximity.

Although there was clearly a difference of view between Lords Reid and Morris on the important question of whether there would, in the absence of the disclaimer, be a duty to take care in this case, the greater difference in method is between these two judgments, and that of Lord Devlin. Lords Reid and Morris attempted to set out in quite general terms the circumstances in which there will be a duty to take care in respect of statements. In the extract above, Lord Reid seeks to identify the components of a 'special relationship' that will be sufficient to establish that the duty of care arises. This he says will be established if it is plain that the recipient of a statement is trusting the defendant to take care; if it is reasonable to trust the statement-maker in this way; and if the information or advice was given where the statement-maker ought to have known that the inquirer was relying on him. Lord Morris on the other hand adds the requirement of 'special skill'. The reason why Lord Morris doubted whether this was a case where a duty of care should arise, even in the absence of the disclaimer, is that there was no reasonable expectation that the defendant would go to any great lengths to ensure that their opinion was soundly based. One could say that this was not a statement on which it was reasonable to rely; alternatively, that there is no greater duty in this case than one of honesty.

Lord Devlin and the 'Voluntary Undertaking of Responsibility'

Lord Devlin, by contrast with Lords Reid and Morris, did not seek to establish *general* rules for application to all future cases of negligent misstatement. In disposing of this particular case, he emphasized the closeness to contract of the relationship between the parties. The only difference between this case and a formal contract,
p. 260 he argued, is that in this case there is ↵ no consideration since no fee was payable for the bankers' statement. In such circumstances, he argued, it is clear that there would have been an 'undertaking of responsibility' on the part of the defendant, if it had not been for the disclaimer of responsibility. He stressed that a *voluntary* undertaking of responsibility in the making of the statement was also required by each of the other judges, despite the broader statements highlighted above; and that this was evidenced by the fact that all of the other judges gave decisive weight to the disclaimer of responsibility, which was thought to exclude the possibility that any duty of care might arise.

Lord Devlin made clear that he thought the 'voluntary undertaking of responsibility' was an application of the broader conception of 'proximity'. In the passages extracted above, he made plain that there is no sense in asking courts simply to 'decide whether there is proximity' in a given case. Proximity is only a *general conception*, whose meaning will vary from one category of case law to another. Lord Devlin proposes that the particular facet of 'proximity' which is decisive in this particular case is 'nearness to contract'. Whilst his thoughts on 'proximity' as an overly general term are consistent with the most recent developments in the law, the 'voluntary assumption of responsibility' has not necessarily been read in precisely this way in the decisions that have followed his lead: see the discussion of *Steel v NRAM*, below. Indeed, it is not entirely clear whether 'assumption of responsibility' is to be seen as a facet of 'proximity'.

Although Lord Devlin argues that nearness to contract is a sufficient idea to dispose of this case, he concedes that there will be future cases in which this idea is not applicable. Unlike Lords Reid and Morris, he prefers not to predict the likely criteria that will need to be met in order to determine whether there is indeed proximity in such a case. Therefore it is a mistake to suggest that Lord Devlin thought that 'nearness to contract' was *essential* for a duty to take care in the giving of statements. He merely said that it sufficed. He suggested that the criteria set out by the other judges in *Hedley Byrne* itself will be helpful in future cases, but he considered it unwise to attempt a broad general statement in advance of seeing the particular circumstances that might arise. Apart from the other judgments in *Hedley Byrne*, he also commended as likely to provide helpful guidance the *dissenting* judgment of Denning LJ in *Candler v Crane Christmas* [1951] 2 KB 164. (The majority decision in that case was overruled by the House of Lords in *Hedley Byrne*.)

Denning LJ would have recognized that a duty was owed by accountants where they were instructed to draw up accounts specifically for the purpose of inducing the plaintiff to invest money in a company. The majority of the Court of Appeal held that there could be no such duty in the absence of a contractual or fiduciary relationship between the parties. The following passage was approved by Lord Devlin in *Hedley Byrne*:

Denning LJ, *Candler v Crane Christmas*, at 181

> … there are some cases—of which the present is one—where the accountants know all the time, even before they present their accounts, that their employer requires the accounts to show to a third person so as to induce him to act on them, and then they themselves, or their employers, present the accounts to him for the purpose. In such cases I am of opinion that the accountants owe a duty of care to the third person.
>
> The test of proximity in these cases is: Did the accountants know that the accounts were required for submission to the plaintiff and use by him?

p. 261 ↵ Lord Devlin's endorsement of the approach of Denning LJ in *Candler* is important, because that approach is consistent with the decision of a later House of Lords in the case of *Caparo v Dickman*. It has often been said that the approach in *Caparo* is in conflict with the approach in *Hedley Byrne*. Indeed this perceived conflict led to some tension, which was apparently resolved in favour of *Hedley Byrne* by the Supreme Court in *Steel v NRAM*. In fact, Lord Devlin's judgment was quoted at length, and with approval, by Lord Oliver in *Caparo*. Lord Devlin's reading of proximity in the passage extracted may have inspired Lord Oliver's idea that proximity is no more than a 'general conception'.

Shortly before *Caparo,* however, doubt was cast on the continued relevance of 'assumption of responsibility' by the next case.

Smith v Eric S Bush; Harris v Wyre Forest District Council [1990] 1 AC 831

This case concerned a purchase of relatively low value domestic property. The claimants had paid for a valuation of the property which was arranged by their mortgage company. They had no direct contractual relationship with the surveyor, and the report stated that only the mortgage company should rely upon the report. It was clear, however, that the report would be supplied to the purchasers. They did not secure a

further survey of the property (having, after all, paid for the one secured by their lender). The House of Lords held that the surveyor owed a duty in tort directly to the purchasers, despite the contractual structure. Here we are most concerned with what this case said about the *approach* to be taken where economic losses have been caused by negligent statements.

Lord Templeman considered that the relationship between the parties fitted Lord Devlin's criterion of being 'akin to contract' (a conclusion expressly doubted by Lord Jauncey):

> **Lord Templeman, at 846**
>
> In the present appeals, the relationship between the valuer and the purchaser is 'akin to contract.' The valuer knows that the consideration which he receives derives from the purchaser and is passed on by the mortgagee, and the valuer also knows that the valuation will determine whether or not the purchaser buys the house.

He also considered that, even though there was a disclaimer in the valuation report, the valuer could still be said to have assumed responsibility to the purchaser.

> **At 847**
>
> ... in my opinion the valuer assumes responsibility to both mortgagee and purchaser by agreeing to carry out a valuation for mortgage purposes knowing that the valuation fee has been paid by the purchaser and knowing that the valuation will probably be relied upon by the purchaser in order to decide whether or not to enter into a contract to purchase the house. The valuer can escape the responsibility to exercise reasonable skill and care by an express exclusion clause, provided the exclusion clause does not fall foul of the Unfair Contract Terms Act 1977.

p. 262 ↵ Since the decision in *Hedley Byrne*, the law on exclusion of liability had been altered by the Unfair Contract Terms Act 1977. An attempted exclusion of liability would be effective only if it was judged to be 'reasonable'. In the case of *Smith v Eric Bush*, the valuation had included a specific disclaimer of responsibility to any party other than the mortgagee building society which had commissioned the valuation (though at the purchaser's expense). Lord Templeman treated the disclaimer as relevant only to the question of whether liability had been validly excluded, *not* to the question of whether responsibility had been 'assumed' in the first place. In his view, the exclusion of liability was not, in these circumstances, reasonable:

> **At 854**
>
> The public are exhorted to purchase their homes and cannot find houses to rent. A typical London suburban house, constructed in the 1930s for less than £1,000 is now bought for more than £150,000 with money largely borrowed at high rates of interest and repayable over a period of a quarter of a century. In these circumstances it is not fair and reasonable for building societies and valuers to agree together to impose on purchasers the risk of loss arising as a result of incompetence or carelessness on the part of valuers … different considerations may apply where homes are not concerned.

Lord Griffiths by contrast cast doubt on the usefulness of the 'voluntary assumption of responsibility' idea. Understandably, he thought that he could not hold that there was a duty of care on the basis of a 'voluntary assumption' when the defendants had done all in their power to *disclaim* responsibility. Unlike Lord Templeman, who approached the disclaimer in terms of an attempted 'exclusion of liability', he treated the disclaimer as important to the very question of whether a duty of care could be said to arise. A judgment in favour of the plaintiff in this case could only be compatible with *Hedley Byrne* if the criterion of 'assumption of responsibility' was very considerably watered down.

Lord Griffiths set out an alternative formulation by which to judge whether a duty of care should be recognized as arising in such a case, avoiding the terminology of 'assumption of responsibility'.

> **At 864–5**
>
> I have already given my view that the voluntary assumption of responsibility is unlikely to be a helpful or realistic test in most cases. I therefore return to the question in what circumstances should the law deem those who give advice to have assumed responsibility to the person who acts upon the advice or, in other words, in what circumstances should a duty of care be owed by the adviser to those who act upon his advice? I would answer—only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability. In the case of a surveyor valuing a small house for a building society or local authority, the application of these three criteria leads to the conclusion that he owes a duty of care to the purchaser. If the valuation is negligent and is relied upon damage in the form of economic loss to the purchaser is obviously foreseeable. The necessary proximity arises from the surveyor's knowledge that the overwhelming probability is that the purchaser will rely upon his valuation, the evidence was that surveyors knew that approximately 90 per cent. of purchasers did so, and the fact that the surveyor only obtains the work because the
>
> p. 263 ↵ purchaser is willing to pay his fee. It is just and reasonable that the duty should be imposed for the advice is given in a professional as opposed to a social context and liability for breach of the duty will be limited both as to its extent and amount. The extent of the liability is limited to the purchaser of the house—I would not extend it to subsequent purchasers. The amount of the liability cannot be very great because it relates to a modest house. There is no question here of creating a liability of indeterminate amount to an indeterminate class. I would certainly wish to stress that in cases where the advice has not been given for the specific purpose of the recipient acting upon it, it should only be in cases when the adviser knows that there is a high degree of probability that some other identifiable person will act upon the advice that a duty of care should be imposed. It would impose an intolerable burden upon those who give advice in a professional or commercial context if they were to owe a duty not only to those to whom they give the advice but to any other person who might choose to act upon it.

As we saw earlier, the search for a 'voluntary assumption of responsibility' was intended by Lord Devlin to be a way to judge whether proximity was present in a case like *Hedley Byrne*. Doubting the relevance of 'voluntary assumption' on the facts of *Smith v Eric Bush*, Lord Griffiths suggests an alternative approach which appears to take us straight back to that general conception—proximity—together with foreseeability and the question of what is 'fair, just and reasonable'. Together, these became the components of the 'three-stage test' in *Caparo v Dickman* (Chapter 4, Section 2.4). However, it should be noted that the reasons why Lord Griffiths ultimately thought that the relationship in this case was 'proximate' are compatible with Lord Devlin's analysis of *Candler v Crane Christmas*. The surveyors knew at all times for whose benefit, and for what purpose, they were producing the valuation. This was perhaps a case in which an alternative approach to justifying the duty of care was simply more appropriate. Lord Griffiths' attempt to make the assumption of responsibility fit the facts amounted to a distortion (see the discussion of category D in Section 2.4).

The decision in *Smith v Bush* is sensitive to its facts. In *Scullion v Bank of Scotland* [2011] EWCA Civ 2011; [2011] 1 WLR 3212, the purchaser of a 'buy to let' property was held *not* to be owed a duty of care by a valuer instructed by his mortgagee company. Many of the considerations which were central to *Smith v Bush* did not apply here. In particular, the Court of Appeal felt the facts were such that it could *not* be said that it would have been plain

to the valuer that the purchaser would rely upon its report. It was significant, for example, that a report produced for a buy to let purchaser would have been different, with a particular emphasis on rental value rather than capital value.

Caparo Industries plc v Dickman plc [1990] 2 AC 605

The facts of this case were outlined in Chapter 4.2, where we also noted the general approach to the duty of care which it set out.

Once again, the idea of 'voluntary assumption of responsibility' was not found helpful by the House of Lords, who concentrated instead on various features of the case which showed that there was, on the facts, insufficient proximity between the parties. In particular, the defendant auditors had produced only general audited accounts, and had not envisaged that they would be relied upon by the claimants in making decisions concerning a takeover of the company. The purpose of the accounts was not to advise in respect of such transactions. Even though the claimants were existing shareholders of the company, they could not
p. 264 reasonably rely on published annual accounts in making such decisions. The Court of Appeal, ↵ whose decision was reversed by the House of Lords, had held that a duty of care was owed *to existing shareholders* (including the plaintiffs) in respect of the accuracy of the accounts. The House of Lords added that this was not specific enough. One must also take into account the *purpose* for which it is reasonable to rely upon the accounts, and the purpose for which the defendants know that the statement will be relied upon. The only duty of accuracy owed to shareholders related to the governance of the company.

In commenting on the cases in which a duty of care is recognized to arise (at least potentially) in respect of statements (*Cann v Wilson, Candler v Crane Christmas, Hedley Byrne v Heller, Smith v Eric Bush*), Lord Bridge said:

> **Lord Bridge, at 620–1**
>
> The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J. to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class:' see *Ultramares Corporation v. Touche* (1931) 174 N.E. 441, 444; it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement. Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the 'limit or control mechanism … imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence' rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the 'proximity' between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, 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 (e.g. in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind.
>
> I find this expectation fully supported by the dissenting judgment of Denning L.J. in *Candler v. Crane, Christmas & Co*. [1951] 2 K.B. 164, 179, 180–181, 182–184 …

According to the logic of Lord Bridge's approach, there will be cases in which auditors do owe a duty of care to particular claimants in the preparation of accounts, provided it is clear at the time of preparing the accounts
p. 265 that they may be relied upon for the particular ↵ purpose and by the claimant. This was accepted in *Morgan Crucible v Hill Samuel Bank Ltd* [1991] 1 All ER 148, where the directors and financial advisers of a company had made representations about that company's accounts after a takeover bid had been made by the plaintiffs. The Court of Appeal thought it arguable that *Caparo* could be distinguished, since the representations were made after the bid emerged, and with the intention that they should be relied upon. Similarly, in *Law Society v KPMG Peat Marwick* [2000] 4 All ER 540, the Court of Appeal held that the criteria set out in *Caparo* were fulfilled. Here the defendants prepared the accounts of a firm of solicitors, which

subsequently proved to have defrauded its clients. This led to claims against the Law Society's compensation fund. The accountants knew that the purpose of the accounts was to enable the Law Society to ensure that there were no irregularities, and that they would be both communicated to the Law Society and relied upon. Therefore, a duty was owed.

Some years before the decision in *Steel v NRAM*, when the status of *Hedley Byrne* as an authority was in doubt, Buxton LJ suggested that despite its debateable origins, *Hedley Byrne* had gradually been brought back into the fold of general negligence law through the decisions in the next section, and particularly *Henderson v Merrett*: R. Buxton, 'How the Common Law gets Made: Hedley Byrne and other Cautionary Tales' (2009) 125 LQR 60–78. It is now still more evident that terms derived from *Hedley Byrne* are used to resolve many of the most difficult duty of care issues today. Their primary use is to identify an *exceptional* case in which generally negative answers to duty of care questions in a variety of areas (such as public authority liability, or omissions liability) will not foreclose a duty. Yet immediately after *Caparo*, 'assumption of responsibility' appeared to have been fatally weakened as a justification for the duty of care in cases of economic loss. The next section will concern the resuscitation of that concept, and its use in cases that do not involve the making of statements. First, however, we should explore the recent decisive return of *Hedley Byrne* in misstatement cases, and retreat from any notion of a 'three-part test', in *Steel v NRAM*.

Steel v NRAM [2018] UKSC 13; [2018] 1 WLR 1190

The case turned on the sending of an inaccurate email by a solicitor. Importantly, the email was not sent to by the solicitor to her client (a borrower), but to the lender—a commercial party dealing at arm's length with her client, which (moreover) had all the relevant facts at its disposal. The lender had extended a loan to the borrower in relation to a purchase of property. The loan was secured on the property purchased, which consisted of several units. The borrower then entered into an agreement to sell one of the units; the borrower and lender agreed that the borrower would repay the debt in relation to that unit on sale, and security on that unit would be released.

For some reason, shortly before the sale of the unit, the borrower's solicitor sent an email—described by the Supreme Court as 'extraordinary'—to the lender, stating that the entire loan was to be paid off, and asking for the 'usual' letter to be sent through, releasing the security on *all* of the units. In fact, the security should have remained in place on two remaining units. Equally surprisingly perhaps, the lender acted on the basis of the email, without checking whether this was in fact the position, and duly released its security. It is odd that a commercial lender should respond in this way to instruction from the solicitor of an *opposing* party, and this factor is central to the decision reached by the Supreme Court. The defendant here had no extra information which was not also known to the lender. The borrower continued to pay interest on its remaining loan, and—in brief—the position became known only when the borrower went into liquidation.

p. 266 ↵ It may seem strange that a case of a commercial claimant who had relied in this inexplicable way should be strong enough to require resolution by the Supreme Court. On the other hand, it could be said that the claimant in *Hedley Byrne* itself had been similarly uncautious in relying on a voluntary statement from a bank before making a significant investment (though there, the claimant at least did not already have the information it was seeking from the defendant). The significant question perhaps was *how* the Supreme Court

would resolve this case. It did so in decisive terms which went wider than was required to deal with the case itself. Here, we deal with the part of the judgment which considers the role of *Hedley Byrne* and assumption of responsibility.

Lord Wilson (giving the judgment of the court), *Steel v NRAM*

> 18. In *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181 <http://uk.westlaw.com/Document/I2E303BE0026F11DBBD1C8F45FD054A0D/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, Lord Mance at para 85 described *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 <http://uk.westlaw.com/Document/IBC23A100E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)> as 'the fountain of most modern economic claims'. In the *Hedley Byrne* case the appellant asked its bankers to inquire into the stability of a company and, in response to the inquiry, the company's bankers, acting (so it was assumed) carelessly, gave false information about the company, which it expressed as 'without responsibility' but on which the appellant relied to its detriment. Because of the disclaimer the appellant's claim against the company's bankers failed. The House of Lords held, however, that in the absence of the disclaimer the bankers would have owed a duty of care to the appellant. At p 529, Lord Devlin held that, in the absence of a contract between a representor and a representee, a duty of care in making the representation arose only if the representor had assumed responsibility for it towards the representee; and he proceeded to interpret all five of the speeches delivered in that case as requiring that the responsibility should have been voluntarily accepted or undertaken. The assumption of responsibility could, he explained at pp 529 and 530, be express or implied from all the circumstances. Lord Pearce added at p 539 that liability in such circumstances could arise only from 'a special relationship'.
>
> 19. What is noteworthy for present purposes is the emphasis given in the decision in the *Hedley Byrne* case to the need for the representee reasonably to have relied on the representation and for the representor reasonably to have foreseen that he would do so. This is expressly stressed in the speech of Lord Hodson at p 514. In fact it lies at the heart of the whole decision: in the light of the disclaimer, how could it have been reasonable for the appellant to rely on the representation? If it is not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it is difficult to imagine that the latter will have assumed responsibility for it. If it is not reasonable for a representee to have relied on a representation, it may often follow that it is not reasonable for the representor to have foreseen that he would do so. But the two inquiries remain distinct.
>
> 20. In the decades which followed the decision in the *Hedley Byrne* case, it became clear that not all claims in tort for losses consequent upon representations carelessly made could satisfactorily be despatched by reference to whether the representor had assumed responsibility for it towards the representee. A case in point is the situation in which the representor is bound by a contract with a third party to make a representation upon which the claimant has relied: an analysis of whether, in making the representation in those circumstances, he has voluntarily assumed responsibility for it towards the claimant would

be artificial. Thus, in *Smith v Eric S Bush* [1990] 1 AC 831 <http://uk.westlaw.com/Document/IAF108091E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)> the claimants, in purchasing their houses, had relied on information about their condition contained in reports given by surveyors pursuant to contracts between them and prospective mortgagees. The House of Lords held that the surveyors owed duties of care to the claimants. Lord Griffiths at p 862 explained that the law did not—in the context before the court—ask whether the surveyors had voluntarily assumed responsibility towards the claimants in giving the information. But he did so in terms which were arrestingly wide. He said that the test of an assumption of responsibility was neither helpful nor realistic (or, he added at p 864, at any rate not so in most cases) and that it had meaning only if it referred to the circumstances in which the law deemed responsibility to have been assumed. In effect Lord Griffiths was suggesting that the test identified only a conclusion rather than a criterion.

p. 267

21. Lord Griffiths, with whom three other members of the committee agreed, proceeded at p 865 to propound a threefold test by reference to which the surveyors owed a duty of care to the claimants. The test required first that it was foreseeable that, were the information given negligently, the claimants would be likely to suffer damage; second that there was a sufficiently proximate relationship between the parties; and third that it was just and reasonable to impose the liability.

22. Months later the threefold test propounded by Lord Griffiths was addressed by the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605 <http://uk.westlaw.com/Document/I821B84F0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>. The claimants had taken over a company in reliance on its accounts and alleged that the defendants had negligently discharged their statutory functions in the course of their audit of them. For years afterwards the speeches in the House were taken to have endorsed the threefold test. In fact, however, Lord Bridge of Harwich, with whom three other members of the committee agreed, observed at p 618 that the concepts of proximity and fairness were so imprecise as to deprive them of utility as practical tests; and Lord Oliver of Aylmerton suggested at p 633 that the three suggested ingredients of the so-called test were usually facets of the same thing and that to search for a single formula was to pursue a will-o'-the-wisp. That the House in the *Caparo Industries* case did not endorse the threefold test was explained by Lord Toulson JSC in *Michael v Chief Constable of South Wales Police (Refuge intervening)* [2015] AC 1732 <http://uk.westlaw.com/Document/I8376AC00A71211E48D9BFE15FEBA9566/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, para 106; and it has recently been underlined by Lord Reed JSC in *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR

595 <http://uk.westlaw.com/Document/I597834D00CC911E886A2D99321F34449/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, paras 21–29. In the Caparo Industries case [1990] 2 AC 605 <http://uk.westlaw.com/Document/I821B84F0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)> both Lord Bridge at p 618 and Lord Oliver at p 633 quoted with approval the remarks of Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 <http://uk.westlaw.com/Document/IC6BA16C0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, 43–44 that it was preferable for the law to develop novel categories of negligence incrementally and by analogy with established categories; and, as Lord Reed JSC has explained in the *Robinson* case, it was by declining to accept that the law should develop incrementally to the point for which the claimants contended that the House in the *Caparo Industries* case determined to allow the auditors' appeal.

23. More important for present purposes is the reassertion in the *Caparo Industries* case of the need for a representee to establish that it was reasonable for him to have relied on the representation and that the representor should reasonably have foreseen that he would do so. Thus at pp 620–621 Lord Bridge observed that a salient feature of liability was that the representor knew that it was very likely that the representee would rely on the representation; and at p 638 Lord Oliver observed that a usual condition of liability was that the representor knew that the representee would act on it without independent inquiry. Some months later, in *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113 <http://uk.westlaw.com/Document/ICC539C60E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)> the Court of Appeal, confronted with a similar claim against company accountants, rejected it by reference to the decision in the *Caparo Industries* case. But Neill LJ expanded on the need for foreseeability of reliance. At pp 126–127, he said:

p. 268

> ↵ "One should therefore consider whether and to what extent the advisee was entitled to rely on the statement to take the action that he did take. It is also necessary to consider whether he did in fact rely on the statement, whether he did use or should have used his own judgment and whether he did seek or should have sought independent advice. In business transactions conducted at arms' length it may sometimes be difficult for an advisee to prove that he was entitled to act on a statement without taking any independent advice or to prove that the adviser knew, actually or inferentially, that he would act without taking such advice."

24. In July 1994, in *Spring v Guardian Assurance plc* [1995] 2 AC 296 <http://uk.westlaw.com/Document/IB7D9CCE1E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, the House held that, in writing a reference for the claimant who had worked for them and who was now seeking work elsewhere, the defendants owed a duty of care to him. Lord Goff of Chieveley explained at p 316 that the basis of his conclusion was that the defendants had assumed responsibility to the claimant in respect of the reference within the meaning of the *Hedley Byrne case* [1964] AC 465 <http://uk.westlaw.com/Document/IBC23A100E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>. Weeks later, in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 <http://uk.westlaw.com/Document/IBC69D1C0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, the House held that underwriting agents at Lloyd's owed a duty of care to a member in their conduct of his underwriting affairs even in the absence of any contract between them. In a speech with which the other members of the House agreed, Lord Goff held at p 181 that the case should be decided by reference to the concept of an assumption of responsibility. In *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 <http://uk.westlaw.com/Document/I012401E0E42911DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>. Lord Steyn remarked at p 837 that there was no better rationalization for liability in tort for negligent misrepresentation than the concept of an assumption of responsibility. It has therefore become clear that, although it may require cautious incremental development in order to fit cases to which it does not readily apply, this concept remains the foundation of the liability.

25. The legal consequences of Ms Steel's careless misrepresentation are clearly governed by whether, in making it, she assumed responsibility for it towards Northern Rock. The concept fits the present case perfectly and there is no need to consider whether there should be any incremental development of it. Nevertheless the case has an unusual dimension: for the claim is brought by one party to an arm's length transaction against the solicitor who was acting for the other party. A solicitor owes a duty of care to the party for whom he is acting but generally owes no duty to the opposite party: *Ross v Caunters* [1980] Ch 297 <http://uk.westlaw.com/Document/I8FB66110E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, 322. The absence of that duty runs parallel with the absence of any general duty of care on the part of one litigant towards his opponent: *Jain v Trent Strategic Health Authority* [2009] AC 853. ...

As Lord Wilson put it, the existing category of assumption of responsibility 'fits this case perfectly'. As a consequence, this was not the case in which we might find an answer to the problem noted in Chapter 4, namely how 'incremental development' is to work following *Robinson* and *Poole*. No such development was required.

Two things, nevertheless, are notable from the above extract. First, it presents the decision in *Hedley Byrne* as turning essentially on the reasonableness of reliance. If reliance is unreasonable, then it is unlikely that responsibility has been assumed. The extracts from *Hedley Byrne* above show that this was not the key criterion discussed by the most influential judgments in that case, including the judgment of Lord Devlin which launched the career of the 'assumption of responsibility' in this context. Rather, the Supreme Court referred to some remarks of Lord Hodson, which have had much less attention in intervening years. It is unclear whether 'reasonableness of reliance' is being presented as a general approach for interpretation of the
p. 269 assumption of responsibility, or whether it is intended as a simple ↵ 'shortcut' to establishing whether responsibility has been assumed, in cases which closely resemble this one. It is easily understandable why lack of reasonable reliance was thought important in this case, where the reliance by the claimant, in a commercial transaction, is genuinely odd. But it is quite unclear how widely this concept can be used. Equally, the Supreme Court could have followed Lord Devlin's approach in *Hedley Byrne* and emphasized that the relationship here is very much not 'close to contract'. In turning to reliance, the Supreme Court seems determined to deny any relationship between the *Hedley Byrne* notion of 'assumption of responsibility', and the *Caparo* notion of 'proximity', and that is not helpful to an overall understanding of the area.

This brings us to the second point, which is the treatment both of Lord Griffiths' judgment in *Smith v Bush*, and of *Caparo*. There is no suggestion in this case that either decision was wrong, despite not depending on the notion of assumption of responsibility. Indeed, it seems to be accepted that the facts of *Smith v Bush* could not be said to fit with an 'assumption of responsibility' on the part of the surveyor. The criticism made of Lord Griffiths' judgment is, by implication, that it was 'arrestingly wide' in its dismissal of the assumption of responsibility as identifying 'a conclusion rather than a criterion'. We will look more closely at the assumption of responsibility in the next section.

Consistently with its earlier decision in *Robinson*, the Supreme Court went to great lengths to reject the notion of a 'three stage test' in *Caparo*. Rather, it stated that the assumption of responsibility 'remains the foundation of liability' (para [24]). What is most extraordinary perhaps is Lord Wilson's remark, in this paragraph, that this idea 'may require cautious incremental development in order to fit cases to which it does not readily apply'. This is a strange statement. It suggests that the Supreme Court plans to use 'assumption of responsibility' to determine economic loss cases, even though it does not readily fit all of them. The *concept*—not just the law—is going to need 'incremental development'. It is difficult not to think that this gives some credence to Lord Griffiths remarks, since it tends to suggest that the key concept is expected to be so malleable that it can be developed to fit cases to which it does not comfortably apply.

The remaining question is how should the law develop, incrementally, in this area? Prior to *Steel v NRAM*, the House of Lords' decision in *Barclays Bank* (explored below) gave a somewhat untidy answer, but it did propose a frame for deciding cases of widely differing types. The answer is going to be much harder to determine to the extent that the reasons *actually presented in previous decisions* are to some extent to be disregarded, since the law has (as we saw) to be reinterpreted to reflect the non-existence of such a thing as a *Caparo* 'test'.

2.5 ‘Extended’ *Hedley Byrne* Liability (Category D)

The cases in this section made possible the current position in *Steel v NRAM* (Category C), and perhaps even in *Robinson* and *Poole* (Chapter 4). Through these decisions, *Hedley Byrne* principles were rescued, and no longer restricted to cases of negligent statement. In three House of Lords decisions delivered between July 1994 and February 1995, Lord Goff almost single-handedly propelled the concept of ‘assumption of responsibility’ back to a prominent place. The second of the cases in this sequence of three, *Henderson v Merrett* [1995] 2 AC 145, was described by Lord Mustill in his dissenting opinion in *White v Jones* [1995] 2 AC 207 as having ‘brought back to prominence’ both *Hedley Byrne* itself and *Nocton v Lord Ashburton*, and as the case that ‘gave them new life as a growing point for the tort of negligence’. It will be seen that Lord Mustill, in this comment,
p. 270 emphasizes the importance of *Hedley Byrne* ↵ in very general terms. He does not describe it as important only in respect of the recovery of economic losses, nor solely in respect of statements. This has proved to be prophetic.[27] These cases also ‘extended’ the liability in *Hedley Byrne* to circumstances outside the reliance by one party (the claimant) on a statement given directly to him or her by the defendant. Understanding these decisions is, therefore, of continued importance.

Spring v Guardian Assurance [1995] 2 AC 296

The plaintiff had been a company representative for the first defendants. He later sought a position with a different company. Under the rules of the relevant regulatory body (‘Lautro’), the prospective employer was under a duty to obtain a reference, and the first defendants were under a duty to supply a reference. The reference was unfavourable, and the plaintiff was not appointed. At first instance, the judge held that the reference was negligently prepared, and that this amounted to a breach of a duty of care owed by the first defendant to the plaintiff.

Part of the special controversy of this case lies in the fact that the same facts might give rise to an action in defamation, since it is natural to define the harm caused by a negligent reference in terms of damage to reputation (Chapter 14). If approached as a defamation case, it is clear that the reference would be protected by the defence of ‘qualified privilege’. This defence exists in order to protect free expression on a privileged occasion (*Horrocks v Lowe* [1975] AC 135). Assuming the statement to be made on a privileged occasion, a defendant will lose the protection of qualified privilege only if the statement is made with ‘malice’. Although malice is not always easy to define, it is clear that mere lack of care is insufficient. To recognize a duty of care in negligence would appear to circumvent this important public policy defence.

The judgments in the House of Lords varied in approach. Lord Keith, who dissented, thought it significant that the plaintiff had not relied upon the statement. In his view, this took the case outside the ambit of *Hedley Byrne*. He was also concerned not to circumvent the existing limitations on the action in defamation through recognizing a duty of care. For the majority, Lord Woolf approached the question of whether a duty of care was owed through a direct application of the three *Caparo* criteria of **foreseeability**; **proximity**; and what was **‘fair, just and reasonable’**. He conceded that this was not determinative since *Caparo* also required that a court consider whether the case was sufficiently analogous to existing categories where a duty is owed. Since *Hedley Byrne* concerned an allegedly negligent *positive* reference, Lord Woolf reasoned that it was not too large a step to recognize a duty in respect of a negligent *negative* reference. Of course, one significant difference not noted by Lord Woolf is that the person who suffers loss as a result of the *negative* reference is not the person to

whom the statement was directed, nor the person who relied upon it. As we have already noted, Lord Keith thought that this took the case outside the ambit of *Hedley Byrne* liability. But Lord Woolf applied looser criteria, drawn directly from *Caparo*.

Applying the *Caparo* criteria, Lord Woolf concluded that loss to the plaintiff was clearly a foreseeable result of an adverse reference. Lord Woolf dealt very briefly with the 'proximity' criterion, saying (at 342) that '[t] he relationship between the plaintiff and the defendants could hardly have been closer'. This tends to prove Lord
p. 271 Devlin's point when he said, in ↵ *Hedley Byrne*, that 'proximity' is not the sort of criterion that judges can sensibly be invited to apply directly. The public policy considerations that surrounded the qualified privilege defence were dealt with by Lord Woolf under the third of the *Caparo* criteria. He weighed up the public interest (protected by qualified privilege) in 'full and frank' expression in this context, with the competing public interest (as he saw it) that references should not be based upon negligent investigation. He concluded that public policy did not preclude the recognition of a duty to take care in the giving of references.

Alone among the majority, Lord Goff reached his decision through a specific application of principles drawn from *Hedley Byrne v Heller*, rather than through interpretation of the *Caparo* 'three-stage test' (which has since been rejected). As he made clear, counsel had not considered this line to be worth arguing. He proposed that the basis of *Hedley Byrne* liability was indeed an assumption of responsibility, coupled with reliance on that assumption. In this case, he thought that there was reliance in the general sense that the 'employee' (whose exact employment status was not relevant) relied upon an 'employer' to take due care in the protection of his interests. This amounts to general reliance on the defendant 'to take due care', but *not* reliance upon the truth of the statement.

Arguably, Lord Goff thereby misapplied the idea of reliance to be found in *Hedley Byrne*, which clearly did concern reliance upon the truth of a statement. But alternatively, he might be said to have merely resurrected the broader basis of *Hedley Byrne* liability in relationships of responsibility and reliance, such as professional services between a solicitor and a client, rather than in the giving of statements more narrowly. Although the careless act in *Spring* is the making of a statement, Lord Goff's judgment opened the door for *Hedley Byrne* to be released from its perceived restriction to statements. For example, discussing a relationship in which a *Hedley Byrne* 'assumption of responsibility' is recognized to apply—the relationship between solicitor and client—Lord Goff explained:

> **Lord Goff, at 319**
>
> I can see no reason why a solicitor should not be under a duty to his client to exercise due care and skill when making statements to third parties, so that if he fails in that duty and his client suffers damage in consequence, he may be liable to his client in damages.

In general terms, Lord Goff approached *Hedley Byrne* in the following way:

> **Lord Goff, at 318**
>
> … All the members of the appellate Committee in [*Hedley Byrne*] spoke in terms of the principle resting upon an assumption of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill … Accordingly, where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct.

The main mystery here is in the meaning that Lord Goff attached to the key criterion of 'assumption of responsibility'. Since Lord Goff has dropped the word 'voluntary', and since he speaks of the defendant as
p. 272 being '*held* to have assumed responsibility to the plaintiff', ↵ we can take it that his test is objective, and does not reflect an intention on the part of the defendant to assume potential liability. If so, then arguably this formulation has lost its foundation as expressed by Lord Devlin. The latter, it will be recalled, suggested that the relevant duty is not 'imposed by law', but is voluntarily undertaken by the defendant. Instead, there is a reference to the plaintiff 'entrusting the defendant with his affairs'. But the criterion is not wholly empty. In this particular case, Lord Goff's formulation appears to place emphasis on relationships of trust and reliance, an element which was expressly developed by Lord Browne-Wilkinson in the subsequent cases of *Henderson v Merrett*, and *White v Jones*.

An important subsidiary mystery lies in the relationship between the duty under *Hedley Byrne*, and the policy issue in respect of qualified privilege which was outlined above. Lord Goff stated that the policy issues were irrelevant where there was a sufficient relationship under *Hedley Byrne*, but he did not explain why this was so:

> **At 324**
>
> Since, for the reasons I have given, it is my opinion that in cases such as the present the duty of care arises by reason of an assumption of responsibility by the employer to the employee in respect of the relevant reference, I can see no good reason why the duty to exercise due skill and care which rests upon the employer should be negatived because, if the plaintiff were instead to bring an action for damage to his reputation, he would be met by the defence of qualified privilege which could only be defeated by proof of malice. It is not to be forgotten that the *Hedley Byrne* duty arises where there is a relationship which is, broadly speaking, either contractual or equivalent to contract. In these circumstances, I cannot see that principles of the law of defamation are of any relevance.

In the next case extracted, Lord Goff clearly proposed that the presence of an 'assumption of responsibility' made it unnecessary to consider policy factors in accordance with the third stage of the *Caparo* test. Since the Supreme Court's most recent decisions, there is no 'third stage', since there is no *Caparo* test, and policy factors—as explained in Chapter 4—have less immediate application. But the same point could be put a different way: the 'assumption of responsibility' has become the most common explanation for the presence of a duty of care in circumstances where on ordinary principles, no such duty would exist.

Henderson v Merrett [1995] 2 AC 145

The facts of *Henderson* were complex, but the solution favoured by the House of Lords was reasonably simple. The case arose out of losses suffered by investors (referred to as 'Names') in the Lloyds Insurance market in London during the 1980s. The plaintiffs brought these actions against underwriting and managing agents for negligent conduct of their affairs which, they argued, exposed them to unreasonable risk of losses. The role of the various agents is explained in the following extract from the judgment of Lord Goff:

> Every person who wishes to become a Name at Lloyd's and who is not himself or herself an underwriting agent must appoint an underwriting agent to act on his or her behalf, pursuant to an underwriting agency agreement. Underwriting agents may act in one of three different capacities. (1) They may be members' agents, who (broadly speaking) advise Names on ↵ their choice of syndicates, place Names on the syndicates chosen by them, and give general advice to them. (2) They may be managing agents, who underwrite contracts of insurance at Lloyd's on behalf of the Names who are members of the syndicates under their management, and who reinsure contracts of insurance and pay claims. (3) They may be combined agents, who perform both the role of members' agents, and the role of managing agents in respect of the syndicates under their management.
>
> The agency agreements were contractual. In some cases, there was a direct contract between the Names and the managing agents. In these cases, the plaintiffs were referred to as 'direct Names'. In other cases, the Names entered into a contract with the underwriting agent, who entered into a 'sub-Agency' agreement with the managing agent. In these cases, the plaintiffs were referred to as 'indirect Names'. The plaintiffs argued that the defendant managing agents were liable in tort to both the 'direct' and 'indirect' Names. The reason for pursuing actions in tort as well as in contract is partly that in some instances as we have seen there was no contract between the Name and the managing agent; and partly because in the case of the direct Names the plaintiffs could claim the benefit of a more generous 'limitation period' in tort. As we noted in respect of defective premises, the limitation period in negligence begins to run only when some damage has been caused, since this is when the 'cause of action' accrues. In contract, the relevant period runs from the breach.

p. 273

Giving the leading judgment in a unanimous House of Lords, Lord Goff decided that the *direct Names* could choose to sue the managing agents either in contract, or in tort. Furthermore, the *indirect Names* could sue the managing agents in tort despite the existence of a contractual chain. Building on his own judgment in *Spring v Guardian Assurance*, Lord Goff again emphasized the concept of assumption of responsibility drawn from *Hedley Byrne*; noted that *Hedley Byrne* was founded on earlier case law in which there was concurrent liability in contract and in tort which was not solely for negligent statements but extended to professional services more generally; and defended the idea that there was a role for tort law even in circumstances where the parties had entered into contractual arrangements. Such arrangements did not exclude the possibility of a tort action. However, he also emphasized that the action in tort would be subject to limitations derived from the terms of the relevant contracts.

> **Lord Goff, at 180–1**
>
> We can see that [the decision in *Hedley Byrne*] rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other … though *Hedley Byrne* was concerned with the provision of information and advice, the example given by Lord Devlin of the relationship between solicitor and client, and his and Lord Morris's statements of principle, show that the principle extends beyond the provision of information and advice to include the performance of other services. It follows, of course, that although, in the case of the provision of information and advice, reliance upon it by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect), nevertheless there may be other circumstances in which there will be the necessary reliance to give rise to the application ↵ of the principle. In particular, as cases concerned with solicitor and client demonstrate, where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, he may be held to have relied on the defendant to exercise due skill and care in such conduct.
>
> p. 274
>
> In subsequent cases concerned with liability under the *Hedley Byrne* principle in respect of negligent misstatements, the question has frequently arisen whether the plaintiff falls within the category of persons to whom the maker of the statement owes a duty of care. In seeking to contain that category of persons within reasonable bounds, there has been some tendency on the part of the courts to criticise the concept of 'assumption of responsibility' as being 'unlikely to be a helpful or realistic test in most cases' (see *Smith v. Eric S. Bush* [1990] 1 A.C. 831, 864–865, *per* Lord Griffiths; and see also *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 628, *per* Lord Roskill). However, at least in cases such as the present, in which the same problem does not arise, there seems to be no reason why recourse should not be had to the concept, which appears after all to have been adopted, in one form or another, by all of their Lordships in *Hedley Byrne* [1964] A.C. 465 (see, e.g., Lord Reid, at pp. 483, 486 and 487; Lord Morris (with whom Lord Hodson agreed), at p. 494; Lord Devlin, at pp. 529 and 531; and Lord Pearce at p. 538). Furthermore, especially in a context concerned with a liability which may arise under a contract or in a situation 'equivalent to contract,' it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff: see *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 637, *per* Lord Oliver of Aylmerton. In addition, the concept provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further enquiry whether it is 'fair, just and reasonable' to impose liability for economic loss—a point which is, I consider, of some importance in the present case.

In respect of the question of 'concurrency' (liability in both contract and tort on the same facts), Lord Goff examined the case of *Hedley Byrne* and considered whether the principle of 'assumption of responsibility' should be thought to apply only in the *absence* of a contract. Like Oliver J in the earlier case of *Midland Bank*

Trust Co v Hett, Stubbs and Kemp [1979] Ch 384, Lord Goff considered that the *Hedley Byrne* principle of 'assumption of responsibility' could give rise to a claim in tort in contractual situations. He also considered that, if his reading of *Hedley Byrne* was incorrect in this respect, it was time to develop tort liability based on assumptions of responsibility to cases where there is indeed a contractual relationship between the parties (at 192). The practical result of this was that a plaintiff who had available remedies in both contract and tort could 'choose that remedy which appears to him to be the most advantageous' (at 194).

White v Jones [1995] 2 AC 207

In terms of its treatment of the legal principles, *White v Jones* is perhaps the most controversial of this sequence of three cases. The solution adopted was intended to be confined to the facts of this and other cases relating to negligence in respect of wills; but we have seen that much more recently, it has inspired an
p. 275 exception to the exclusion of 'relational' losses, on behalf of beneficial owners.[28] The decision was also applied in the different but analogous situation of advice in respect of pension rights, where the defendant adviser is aware that the client intends to make provision for his or her dependents: *Gorham v British Telecommunications plc* [2000] 1 WLR 2129, Court of Appeal.

In *White v Jones*, a testator executed a new will after a family quarrel, disinheriting his two daughters, the plaintiffs. After a reconciliation, he contacted his solicitors with instructions to draw up a new will, restoring the legacies to the plaintiffs. Little progress was made, and the testator died before the new will was completed. In the earlier case of *Ross v Caunters* [1980] Ch 297, a solicitor was held to owe a duty of care to intended beneficiaries in respect of the proper execution of a will. In that earlier case, it was held that a duty was owed through application of the principle in *Donoghue v Stevenson*. In *White v Jones*, the House of Lords accepted that the simple approach in *Ross v Caunters* could not be maintained in view of the many conceptual problems involved in the case. However, it was also noted that no significant dissatisfaction had ever been expressed with the practical impact of that decision.

Lord Goff frankly acknowledged that there was no true assumption of responsibility on the part of the defendant, towards the plaintiffs. In his judgment, this case concerned a wrong which required a remedy, and the best way of providing this remedy was to 'deem' that the assumption of responsibility which existed between the defendant solicitor and his client also *extended to* the intended beneficiaries who were the plaintiffs in the case. Although this was not truly a case of 'transferred loss' (see our discussion of *The Aliakmon*, Section 2.1), it was analogous to such a case. The reasons why it was not such a case are set out in the extract below. Part of the controversy was whether this case would have been more appropriately resolved through a contractual remedy.

Lord Goff, at 265–9

... Here there is a lacuna in the law, in the sense that practical justice requires that the disappointed beneficiary should have a remedy against the testator's solicitor in circumstances in which neither the testator nor his estate has in law suffered a loss. Professor Lorenz (*Essays in Memory of Professor F. H. Lawson*, p. 90) has said that 'this is a situation which comes very close to the cases of "transferred loss," the only difference being that the damage due to the solicitor's negligence could never have been caused to the testator or to his executor.' In the case of the testator, he suffers no loss because (in contrast to a gift by an inter vivos settlor) a gift under a will cannot take effect until after the testator's death, and it follows that there can be no depletion of the testator's assets in his lifetime if the relevant asset is, through the solicitors' negligence, directed to a person other than the intended beneficiary. The situation is therefore not one in which events have subsequently occurred which have resulted in the loss falling on another. It is one in which the relevant loss could never fall on the testator to whom the solicitor owed a duty, but only on another; and the loss which is suffered by that other, i.e. an expectation loss, is of a character which in any event could never have been suffered by the testator. Strictly speaking, therefore, this is not a case of transferred loss.

Even so, the analogy is very close. In practical terms, part or all of the testator's estate has been lost because it has been dispatched to a destination unintended by the testator. Moreover, had a gift been similarly misdirected during the testator's lifetime, he would either have been able to recover it from the recipient or, if not, he could have recovered the full amount from the negligent solicitor as
p. 276 damages. In a case such as the present, no such ↵ remedies are available to the testator or his estate. The will cannot normally be rectified: the testator has of course no remedy: and his estate has suffered no loss, because it has been distributed under the terms of a valid will. In these circumstances, there can be no injustice if the intended beneficiary has a remedy against the solicitor for the full amount which he should have received under the will, this being no greater than the damage for which the solicitor could have been liable to the donor if the loss had occurred in his lifetime.

A Contractual Approach

It may be suggested that, in cases such as the present, the simplest course would be to solve the problem by making available to the disappointed beneficiary, by some means or another, the benefit of the contractual rights (such as they are) of the testator or his estate against the negligent solicitor, as is, for example, done under the German principle of Vertrag mit Schutzwirkung fur Dritte. Indeed that course has been urged upon us by Professor Markesinis, 103 L.Q.R. 354, 396–397, echoing a view expressed by Professor Fleming in (1986) 4 O.J.L.S. 235, 241. Attractive though this solution is, there is unfortunately a serious difficulty in its way. The doctrine of consideration still forms part of our law of contract, as does the doctrine of privity of contract which is considered to exclude the recognition of a jus quaesitum tertio. To proceed as Professor Markesinis has suggested may be acceptable in German law, but in this country could be open to criticism as an illegitimate circumvention of these long established doctrines; and this criticism could be reinforced by reference to the fact that, in the case of carriage of goods by sea, a contractual solution to a particular problem of transferred loss, and

> to other cognate problems, was provided only by recourse to Parliament. Furthermore, I myself do not consider that the present case provides a suitable occasion for reconsideration of doctrines so fundamental as these.

Lord Goff considered potential contractual routes to a remedy in this case, none of which would suffice to fill the ‘lacuna’:

The tortious solution

I therefore return to the law of tort for a solution to the problem. For the reasons I have already given, an ordinary action in tortious negligence on the lines proposed by Sir Robert Megarry V.-C.in *Ross v. Caunters* [1980] Ch. 297 must, with the greatest respect, be regarded as inappropriate, because it does not meet any of the conceptual problems which have been raised. Furthermore, for the reasons I have previously given, the *Hedley Byrne* [1964] A.C. 465 principle cannot, in the absence of special circumstances, give rise on ordinary principles to an assumption of responsibility by the testator's solicitor towards an intended beneficiary. Even so it seems to me that it is open to your Lordships' House, as in the *Lenesta Sludge* case [1994] 1 A.C. 85, to fashion a remedy to fill a lacuna in the law and so prevent the injustice which would otherwise occur on the facts of cases such as the present. In the *Lenesta Sludge* case [1994] 1 A.C. 85, as I have said, the House made available a remedy as a matter of law to solve the problem of transferred loss in the case before them. The present case is, if anything, a fortiori, since the nature of the transaction was such that, if the solicitors were negligent and their negligence did not come to light until after the death of the testator, there would be no remedy for the ensuing loss unless the intended beneficiary could claim. In my opinion, therefore, your
p. 277 Lordships' House should in cases such as these ↵ extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. Such liability will not of course arise in cases in which the defect in the will comes to light before the death of the testator, and the testator either leaves the will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant benefit. I only wish to add that, with the benefit of experience during the 15 years in which *Ross v. Caunters* has been regularly applied, we can say with some confidence that a direct remedy by the intended beneficiary against the solicitor appears to create no problems in practice. That is therefore the solution which I would recommend to your Lordships.

As I see it, not only does this conclusion produce practical justice as far as all parties are concerned, but it also has the following beneficial consequences.

1. There is no unacceptable circumvention of established principles of the law of contract.
2. No problem arises by reason of the loss being of a purely economic character.
3. Such assumption of responsibility will of course be subject to any term of the contract between the solicitor and the testator which may exclude or restrict the solicitor's liability to the testator under the principle in *Hedley Byrne*. It is true that such a term would be most unlikely to exist in practice; but as a matter of principle it is right that this largely theoretical question should be addressed.
4. Since the *Hedley Byrne* principle is founded upon an assumption of responsibility, the solicitor may be liable for negligent omissions as well as negligent acts of commission: see the *Midland Bank Trust Co*. case [1979] Ch. 384, 416, *per* Oliver J. and *Henderson v. Merrett Syndicates Ltd*

> [1995] 2 A.C. 145, 182, *per* Lord Goff of Chieveley. This conclusion provides justification for the decision of the Court of Appeal to reverse the decision of Turner J. in the present case, although this point was not in fact raised below or before your Lordships.
>
> 5. I do not consider that damages for loss of an expectation are excluded in cases of negligence arising under the principle in the *Hedley Byrne* case [1964] A.C. 465, simply because the cause of action is classified as tortious. Such damages may in principle be recoverable in cases of contractual negligence; and I cannot see that, for present purposes, any relevant distinction can be drawn between the two forms of action. In particular, an expectation loss may well occur in cases where a professional man, such as a solicitor, has assumed responsibility for the affairs of another; and I for my part can see no reason in principle why the professional man should not, in an appropriate case, be liable for such loss under the *Hedley Byrne* principle.
>
> In the result, all the conceptual problems, including those which so troubled Lush and Murphy JJ. in *Seale v. Perry* [1982] V.R. 193, can be seen to fade innocuously away. Let me emphasise that I can see no injustice in imposing liability upon a negligent solicitor in a case such as the present where, in the absence of a remedy in this form, neither the testator's estate nor the disappointed beneficiary will have a claim for the loss caused by his negligence. This is the injustice which, in my opinion, the judges of this country should address by recognising that cases such as these call for an appropriate remedy, and that the common law is not so sterile as to be incapable of supplying that remedy when it is required.

p. 278 ↵ Lord Goff pointed out that the route to a contractual remedy is blocked by the doctrine of privity. English law did not recognize a right on behalf a stranger to a contract to sue on the terms of the contract. He considered some important cases which qualified the doctrine of privity, including *The Albazero* [1977] AC 774 and *Linden Gardens v Lenesta Sludge* [1994] 1 AC 85. However, these cases were inapplicable for two reasons. First, the cases did not give a remedy directly to the third party, but only allowed a *contracting* party to sue for damages that they had suffered.[29] The cases did not allow the third party (who had suffered the loss) to *compel* the contracting party to sue. Here, the executors, as representatives of the contracting party (the testator), may have been unwilling to commit resources to bringing an action on behalf of the disappointed beneficiaries, to the possible detriment of the estate. Second, the previous case law only allowed actions in contract on behalf of third parties where the loss suffered by the third parties was *the same loss* that the contracting party would have suffered, had that loss not been 'transferred' in one way or another. In *Linden Gardens*, for example, there had been an assignment of contractual rights. In *White v Jones*, as Lord Goff pointed out, the loss of expectation on the part of the beneficiaries was not the sort of loss that the testator could ever have suffered.

Subsequently, there has been significant legislative qualification of the doctrine of privity of contract. The Contracts (Rights of Third Parties) Act 1999 provides that:

> 1.—(1) … a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if—
>
> (a) the contract expressly provides that he may, or
>
> (b) … the term purports to confer a benefit on him

The Law Commission, in its Report *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996), stressed that this reform was intended to be 'a relatively conservative and moderate measure' (para 5.10), which should not prevent the courts from instigating more radical change if they thought it appropriate. The Law Commission (referring to Kit Barker's analysis in 'Are We Up To Expectations? Solicitors, Beneficiaries and the Tort/Contract Divide' (1994) 14 OJLS 137, 142) explained that:

> 7.25 It is our view ... that the negligent will-drafting situation ought to lie, and does lie, just outside our proposed reform. It is an example of the rare case where the third party, albeit expressly designated 'as a beneficiary' in the contract, has no presumed right of enforcement. Indeed it is arguable that, by merely adjusting the wording of the second limb to include promises that are 'of benefit to' expressly designated third parties, rather than those that 'confer benefits on' third parties, we would have brought the negligent will-drafting situation within our reform. But we believe that these words draw the crucial distinction between the situation where it is natural to presume that the contracting parties intended to confer legal rights on the third party and the situation where that presumption is forced and artificial.

p. 279 ↵ As we have seen, Lord Goff's solution was intended to be contained in its scope. It was an attempt to resolve what he considered to be an obvious injustice, and the extension of the assumption of responsibility was overtly fictional. Lord Browne-Wilkinson, on the other hand, decided the case not on the basis of a fiction, but by an extended understanding of the concept of 'voluntary assumption of responsibility' itself. Again, he argued that the duty of care in *Hedley Byrne* cases is but one example of a fiduciary duty. In the case of fiduciary duties, he argued, it was not necessary to show that the plaintiff had consciously relied upon the defendant. In fact, it was not necessary to show that the plaintiff had any knowledge of the defendant's role in respect of his or her interests at all. Rather, it is sufficient for the fiduciary to know that the 'economic welfare' of the plaintiff depends upon his exercise of due care. The difference between Lord Goff's understanding of 'assumption of responsibility' (rooted in 'closeness to contract'), and Lord Browne-Wilkinson's understanding (based in 'fiduciary relationships') becomes clear. On the latter interpretation, the plaintiffs here are owed a fiduciary duty, since this can arise without any knowledge on their part. There is a true 'assumption of responsibility'. On Lord Goff's analysis, the assumption was merely 'deemed' to extend to the plaintiffs, in order to deal with a particular, perceived injustice.

The three cases extracted above sought to articulate principles which cross the boundaries between acts and statements, acts and omissions, and contract and tort. Importantly, one of the boundaries that is broken down is the boundary between economic and other forms of loss. The nature of the loss as purely 'economic' received little emphasis in these cases. Whether or not there is a 'statement' is barely mentioned. Subsequently, the idea of 'assumption of responsibility' has been increasingly used in a wide range of different situations, including cases of psychiatric harm and educational failure, until it has become perhaps the central idea in explaining the pattern of negligence liability. It is certainly not confined to economic loss. On the other hand, and at the same time, the meaning of that term remains.

2.6 Developments in Categories C and D: The Role of 'Voluntary Assumption of Responsibility' Considered

After *White v Jones*, the House of Lords had two major opportunities to reconsider the proper approach to cases of economic loss outside categories A and B.[30] It appeared that the House of Lords in *CEC v Barclays Bank* offered some clarification; but that approach has been severely dented by more recent decisions of the Supreme Court.

Williams v Natural Life Health Foods [1998] 1 WLR 830

The second defendant M, an individual, formed a limited company (the first defendant). He was the managing director and principal shareholder in the company. The plaintiffs negotiated a franchise with the company, dealing directly with M. The franchise was much less successful than expected, and the plaintiffs traded at a loss before eventually going out of business. They argued that they had been negligently advised. When the company was wound up, the plaintiffs joined M as a party to the action. Ordinarily, the director of a limited company has no personal liability in respect of the company's debts. The plaintiffs ↵ argued that M had *assumed personal responsibility* to them, so that he owed a duty in tort. The judgment should be understood as directed to this rather special argument. As Lord Steyn put it:

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> **Lord Steyn, at 835**
>
> What matters is not that the liability of the shareholders is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director.

Giving the sole judgment in the case, Lord Steyn made clear that the guiding principles to be applied were to be drawn from the judgments of Lord Goff (rather than of Lord Browne-Wilkinson) in the cases of *Henderson v Merrett* and *White v Jones*. Not only must there be an assumption of responsibility on the part of the defendant (in the case of M, an assumption of 'personal' responsibility), but the plaintiffs must have *reasonably relied upon* that assumption. *White v Jones* itself did not fit this description particularly well since there was no reliance, and *Smith v Eric Bush* also did not fit it well for the reasons we explored earlier. Lord Steyn explained both cases on the basis that, '[c] oherence must sometimes yield to practical justice' (at 837). Academic criticisms of the principle of assumption of responsibility, he argued, were overstated so far as they were based on these two exceptional cases. In this particular case:

> **Lord Steyn, at 835**
>
> … it is important to make clear that a director of a contracting company may only be made liable where it is established by evidence that he assumed personal liability and that there was the necessary reliance. There is nothing fictional about this species of liability in tort.

This being the case, it was necessary to show evidence of specific words or conduct which crossed an important line.

> **Lord Steyn, at 838**
>
> In the present case there were no personal dealings between Mr Mistlin and the plaintiffs. There were no exchanges or conduct which crossed the line which could have conveyed to the plaintiffs that Mr Mistlin was willing to assume personal responsibility to the plaintiffs … I am also satisfied that there was not even evidence that the plaintiffs believed that Mr Mistlin was undertaking personal responsibility to them. Certainly, there was nothing in the circumstances to show that the plaintiffs could reasonably have looked to Mr Mistlin for indemnification of any loss.

If this seems a very strong test for assumption of responsibility, this can be explained by the particular need to show an assumption of *personal* responsibility sufficient to bypass the corporate structure within which the parties were working. This in turn illustrates that the concept is adjusted to its circumstances.

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Customs and Excise Commissioners v Barclays Bank [2004] 1 WLR 2027 (Colman J); [2005] 1 WLR 2082 (CA); [2006] 3 WLR 1 (HL)

The decision of the House of Lords in this case seemed to shed significant light on the role of voluntary assumption of responsibility, and its relationship to the concept of 'proximity' referred to in *Caparo v Dickman*. There was only a passing reference to the decision in *Steel v NRAM*, but the Supreme Court's determination that there is no 'three stage test' derived from *Caparo v Dickman* now makes it very difficult for lower courts to seek any guidance from the decision, in cases where there is no assumption of responsibility. The decision may, however, offer some guidance on the interpretation of 'assumption of responsibility' itself, and indicates the kinds of issues that will arise in cases where this concept does not apply.

The Customs and Excise Commissioners obtained 'freezing orders', and served them on the defendant bank. The purpose of these orders was to prevent two companies from removing funds from their bank accounts, so that the claimants could recover outstanding VAT from those accounts. The defendant bank, which held the relevant accounts, failed to take action to prevent funds from being moved out of the accounts. It was alleged that this failure was negligent. The Customs and Excise Commissioners could not recover the full sums owing. They sought to recover the shortfall (amounting to several million pounds) from the defendant bank on the basis that it had breached a duty of care owed to them, to abide by the orders. On a preliminary issue, Colman J held that no duty of care was owed by the bank ([2004] 1 WLR 2027). His decision was reversed by the Court of Appeal.

The first instance judgment of Colman J was particularly cogent. Colman J accepted that the assumption of responsibility was based on an 'objective' test, not on voluntary acceptance of legal responsibility in the fullest sense. But he was clear that the 'assumption of responsibility' is not an entirely empty phrase. Equally, on his analysis the three stage test was devised precisely in order to deal with novel cases which were not easily

susceptible to analysis in terms of 'assumption of responsibility'. The two, therefore, are not really alternatives: the three-stage test became useful where the assumption of responsibility had not resolved the case.

> **Colman J [2004] EWHC 122 (Comm)**
>
> 51 In my judgment, [the] authorities do not support the proposition that in every case where there has been negligent provision of a service which is said to have caused the claimant pure economic loss there has to be a relationship akin to contract before a duty of care can be imposed. If, objectively analysed, the relationship is too oblique or indirect to bear that analogy there can be an assumption of responsibility only in the artificial sense that a responsibility is imposed as a matter of law. However, when one comes to the void at which Lord Oliver arrived in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 637G, the methodology appropriate to a relationship akin to contract has to be replaced and in those circumstances it is the threefold test which provides a broad analytical guideline towards the existence of a duty of care. However, there may be novel factual situations where it is appropriate to supplement application of the threefold test by reference to other comparable situations in which the courts have imposed or, as the case may be, declined to impose a duty of care. This supplementation has been explained by Phillips LJ in *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648, 677:
>
> > "When confronted with a novel situation the court does not … consider these matters
> p. 282 [foreseeability, proximity, and fairness] in isolation. It does so by comparison
> ↵ with established categories of negligence to see whether the facts amount to no more than a small extension of a situation already covered by authority, or whether a finding of the existence of a duty of care would effect a significant extension to the law of negligence. Only in exceptional cases will the court accept that the interests of justice justify such an extension of the law."

Colman J argued that if there is a relationship 'akin to contract' in the sense explained in *Henderson v Merrett*, there is no reason to consider the three-stage test under *Caparo v Dickman*. If, however, there is no relationship akin to contract (if the relationship is 'too oblique'), then in terms of *Hedley Byrne* we arrive at a 'void'. This is the void that the *Caparo* three-stage test was designed to fill. The three-stage test cannot, however, be applied without reference to analogous cases, otherwise proximity in particular has no clear meaning. This approach is partially compatible with the Supreme Court's new direction, since it emphasises the significance of decided cases. However, its reference to the 'three part test' as a means of framing the enquiry is inconsistent with the Supreme Court's denial that such a test exists. Unless the factors referred to in *Caparo* can be rebranded in some way, it remains unclear how the 'void' is going to be filled.

In this case, there was no relationship akin to contract. Colman J saw this as a case where the relationship between the parties was akin to that between adversaries in civil litigation.[31] The bank had not *chosen* to enter any relationship at all with the claimants, but had been served with an order, carrying potential legal implications should they fail to act. In *Connolly-Martin v Davis* [1999] PNLR 826; *Welsh v CC of Merseyside Police*

[1993] 1 All ER 692; and *Elguzouli-Daf v Commissioner of Police for the Metropolis* [1995] QB 335, it had been said that parties to litigation could only owe one another duties to take care if there was some special feature of conduct to suggest an assumption of responsibility. Colman J regarded this as requiring an assumption of responsibility in the strong sense exemplified by *Williams* (above). Without this, there could not be said to be 'proximity'; and Colman J also doubted whether the imposition of the duty could be 'fair, just and reasonable'.

It is suggested that this element of Colman J's reasoning is particularly useful. It amounts to an argument that an assumption of responsibility *either* may be deduced from the general nature of the relationship (as in *Henderson v Merrett*), *or*—if the general nature of the relationship is not compatible with such a deduction—may be deduced from specific words, conduct, or circumstances which (applying *Williams*) override the general features of the relationship. This is consistent with the subsequent decision of the House of Lords. As an analysis of the role of assumption of responsibility—and the presence of both general and specific variations of such as assumption—it is also compatible with the later decision of the Supreme Court in *Poole BC v GN*, explored in the next section.

The general nature of the relationship between the parties was not one which suggested an assumption of responsibility on the part of the defendants. The only *special* element of the defendants' conduct which could be said to show that they had assumed responsibility was the writing of a letter, acknowledging the freezing
p. 283 order. This, however, was received ↵ by the claimants only after the funds had been released. So even if this letter could amount to conduct which established that responsibility was assumed, it was too late. The House of Lords for its part declined to attach any importance at all to the letter:

> **Lord Bingham (HL)**
>
> 3 … Had the letters reached the Commissioners before release of the funds, the judge would have attached significance to them. … But in my respectful opinion they were of no significance. The Bank was bound to comply with the order of the court irrespective of any confirmation on its part. The letters did not affect the factual or the legal position. Their purpose was to pave the way to reimbursement of the costs of compliance incurred by the Bank.

In support of Colman J's conclusion that no duty is owed, there were strongly involuntary elements in the relationship between the parties. The defendants had done nothing other than accept deposits from clients that might, in the future, attract freezing orders. It is a very long stretch to fit this relationship into any meaningful interpretation of *Hedley Byrne*.

CEC v Barclays Bank [2006] UKHL 28; [2006] 3 WLR 1 (HL)

The House of Lords restored Colman J's decision that no duty of care was owed.

There were five separate and subtly different judgments in the *Barclays Bank* case (though no dissents). In terms of method for deciding economic loss cases, the key conclusions can be summarized as follows:

1. The first stage in deciding a novel case of economic loss is to ask whether there is a voluntary assumption of responsibility.

2. If an assumption of responsibility is established, this may be sufficient.

This much is consistent with recent decisions of the Supreme Court, but is expressed slightly differently. The difficulties surround the position when no assumption of responsibility is found. Is this the end of the exploration? If so, then Lord Bingham is wrong to say—in the extract below—that the assumption of responsibility though sufficient is not necessary. But it is by no means clear whether this is the case: it is not a question addressed by *Steel v NRAM*.

> **Lord Bingham**
>
> 4 … there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration. *Hedley Byrne* would, but for the express disclaimer, have been such a case. *White v Jones* and *Henderson v Merrett Syndicates Ltd*, although the relationship was more remote, can be seen as analogous. Thus, like Colman J (whose methodology was commended by Paul Mitchell and Charles Mitchell, 'Negligence Liability for Pure Economic Loss' (2005) 121 LQR 194, 199), 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 inquiry. If answered negatively, further consideration is called for.

p. 284 3. At least two of the judges seem to have treated assumption of responsibility as an aspect of proximity.

Lord Hoffmann was particularly clear on this point.

> **Lord Hoffmann**
>
> 35 … In … cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for one purpose (rather than another). 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, as Lord Goff of Chieveley pointed out in *Henderson v Merrett Syndicates Ltd* at 181, 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.

It is suggested that Lord Walker also treated assumption of responsibility as an aspect of proximity, although his reasoning was less explicit (at [74]).

It is unlikely that the Supreme Court would now take this approach. If 'assumption of responsibility' is an aspect of proximity, then it could be concluded that it forms part of the three-stage test—and the Supreme Court has been clear that no such test exists. It has, rather, been keen to separate *Hedley Byrne* from the *Caparo* decision. However, the proposed 'sufficiency' of assumption of responsibility is important (negating the need to look to policy considerations), particularly given its use far beyond the area of economic loss.

4. No assumption of responsibility could be established.

In this case, there was an *adverse* relationship between the parties. A degree of voluntariness is essential to any 'assumption of responsibility', according to the House of Lords, even if the test for its existence is objective. Here, the defendants did not choose their relationship with the claimant. On the contrary they were exposed, through the freezing order, to the risk of proceedings for contempt of court. On any established test, there was no assumption of responsibility.

This conclusion shows that the House of Lords regards the assumption of responsibility as having *some* meaning. No matter how elastic, it could not stretch to cover this case. In the very different context of provision of equipment or other benefits which are required in accordance with statutory duties, the same sort of thinking has also been adopted: if provision is required by statute, the duty to provide cannot be assumed voluntarily—it is simply imposed: *Rowley v Secretary for Work and Pensions* [2007] EWCA Civ 598; [2007] 1 WLR 2861 (Child Support payments); *Sandford v London Borough of Waltham Forest* [2008] EWHC 1106 (QB) (equipment assessed under statute as being required).

Here, we need to enter a major qualification, derived from the decision in *Poole v GN*. In this decision, the
p. 285 outcomes in cases such as *Rowley* were said not to be in doubt; but it was ↵ said that some of their reasoning in relation to the assumption of responsibility was incorrect. Indeed, relying on the judgment of Lord Hoffmann in *CEC*, Lord Reed in *Poole* proposed that there is a *general* sense in which assumption of responsibility may be established by the nature of the task being undertaken by the defendant, in relation to the claimant. This clearly suggests that the 'assumption of responsibility' need not be specific, and—most importantly—it suggests that it need not be as voluntary as had previously been thought. The significance of the assumption of responsibility may be harder to explain, should there no longer be any emphasis on voluntariness.

5. If there is no assumption of responsibility (as here), this was not the end of the matter.

According to the House of Lords, the three-stage test from *Caparo* may still lead to the conclusion that a duty is owed. In *Barclays Bank*, this meant that the three-stage test is still to be applied. In such a case, proximity must be present but (in the absence of an assumption of responsibility) will not be sufficient. *Policy* factors would be the determinant of liability:

> **Lord Bingham**
>
> 15 It is common ground that the foreseeability element of the threefold test is satisfied here. The bank obviously appreciated that, since risk of dissipation has to be shown to obtain a freezing injunction, the commissioners were liable to suffer loss if the injunction were not given effect. It was not contended otherwise. The concept of proximity in the context of pure economic loss is notoriously elusive. But it seems to me that the parties were proximate only in the sense that one served a court order on the other and that other appreciated the risk of loss to the first party if it was not obeyed. I think it is the third, policy, ingredient of the threefold test which must be determinative.

Lord Bingham says there is 'proximity' here, but only in a form that does not provide a particularly compelling reason for finding that the defendants owed a duty of care. This is why the policy ingredient would be decisive.

This approach (accepting that the three-stage test may be satisfied where there is *no* assumption of responsibility) allowed *Smith v Eric Bush* to be reconciled with the other case law under *Hedley Byrne*. It is simply a case where there was no assumption of responsibility; but the three requirements of foreseeability, proximity, and 'policy' were satisfied in the claimants' favour. This precise solution, however, is not available following the decisions in *Robinson*, *Steel v NRAM*, and *Poole*, since the Supreme Court has now stated that there is no three stage *Caparo* test. While these decisions may have simplified decision-making in some contexts, 'filling the void' in novel cases will now be much more difficult. In *Robinson*, however, Lord Reed did refer to the general need for novel duties to be shown to be 'fair, just and reasonable'. Outside the reach of the assumption of responsibility, it is not clear how this will now be assessed.

6. Policy issues were decisive against a duty of care in this case.

A common theme of the judgments in the House of Lords was that in the absence of an assumption of responsibility, and given that there was foreseeability and arguable proximity, policy issues would be key to the outcome. On analysis of the policy issues, it was not 'fair, just and reasonable' to recognize a duty of care on the present facts.

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Summary: CEC v Barclays Bank

Their Lordships were unanimous that there was no voluntary assumption of responsibility where the defendant was served with an order compelling it to safeguard certain funds. That being so, all agreed that 'voluntary assumption of responsibility' has some meaning. Some referred to the assumption of responsibility as a particularly important form of proximity. But all were agreed that absence of such an assumption was not the end of the matter. The three-stage test was still to be applied, and policy would be determinative in this case. Lord Hoffmann found a short cut on the policy issues, reasoning that an order of this sort cannot be the basis for a duty to take care in negligence.

Now that the Supreme Court has rejected the very existence of a '*Caparo* test', the route to clarification offered by the House of Lords in *Barclays Bank* is closed off. At the same time, no question has been raised about the correctness of its outcome. It seems from the brief comments of Lord Wilson in *Steel v NRAM* that the

Supreme Court hopes to be able to extend the notion of *assumption of responsibility* incrementally and by analogy, even in circumstances where it does not comfortably apply. The question remains how this can be done; and whether it is supposed that this strategy will be enough to deal with all economic loss claims.

Tension between Categories

The fact remains that the ideas used by Lord Goff to revive the idea of 'assumption of responsibility' could also have been invoked when deciding cases of relational damage and defective property. Now that the 'assumption of responsibility' is advancing into other areas of negligence, it is plainly more difficult to maintain a bright line against their use in categories A and B. *White v Jones* was built upon Lord Goff's preferred response to *The Aliakmon*, which was rejected by the House of Lords in that case, yet was used as inspiration in a recent case which could have undermined *The Aliakmon* itself. What of the interface between liability based on assumption of responsibility, and category B cases, under *Murphy*? Now that it is plain that 'assumption of responsibility' is not solely applicable to statements, and that it may operate even in the presence of a contract, are builders excluded from its reach; or is it necessary to ask in each case of defective workmanship *what the nature of the parties' relationship was*?

In *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, the Court of Appeal preferred to rely upon *Murphy v Brentwood.* The claimant was not a subsequent purchaser of property, but had directly contracted with the builder while the property was under construction. Some 12 years after completion, a surveyor advised that the flues had not been properly constructed. Like *D & F Estates*, this was not a case where any personal injury was threatened. On the other hand, the relationship between the parties was plainly not only direct, but also contractual. Why should it not be considered as akin to *Henderson v Merrett*? It is the contractual relationship itself which explains the decision of the Court of Appeal, that no duty of care in tort was owed in relation to the economic losses suffered as a result of the defect. Clauses 8 and 10 of the building conditions *excluded* concurrent liability in tort; but Jackson LJ (with whom the other judges agreed) would have come to the same conclusion in any event given the nature of the contract.

p. 287 **Jackson LJ, *Robinson v PE Jones (Contractors) Ltd***
[2011] EWCA Civ 9; [2012] QB 44

> 83 In the present case I see nothing to suggest that the defendant 'assumed responsibility' to the claimant in the Hedley Byrne sense. The parties entered into a normal contract whereby the defendant would complete the construction of a house for the claimant to an agreed specification and the claimant would pay the purchase price. The defendant's warranties of quality were set out and the claimant's remedies in the event of breach of warranty were also set out. The parties were not in a professional relationship whereby, for example, the claimant was paying the defendant to give advice or to prepare reports or plans upon which the claimant would act.
>
> ...
>
> 87 Let me now draw the threads together. The rights and remedies of the parties to this case were set out in a written contract, the terms of which are clear and simple. That contract provided the claimant with extensive (but not total) protection against defects. The contract represents a perfectly sensible allocation of risk between the parties. At the time of contracting, both parties were represented by solicitors and they must have known where they stood.
>
> 88 It is a matter of great misfortune that a latent defect in the claimant's house emerged 12 and a half years after completion and that this defect was outside the scope of the NHBC agreement. That, however, is a consequence of the contractual allocation of risk between the parties. In my judgment it is not possible for the claimant to invoke the law of tort in order to impose liabilities upon the defendant which are inconsistent with the contract.

General Conclusions on Economic Loss

The restrictions on recovery for economic losses are not arbitrary in the sense we identified in the last section. In categories A and B, the reasons for restricting liability are based in legal policy. In the case of the remaining categories, there has been an attempt to articulate guiding 'principles'. Here, however, it has been found that the possible range of cases is too diverse to state applicable principles in any simple way. Outside categories A and B, English law has committed itself to a certain amount of uncertainty associated with open categories and variable concepts. The end result could certainly be described as unpredictable and hard to interpret. One commentator has suggested that the guiding principles are mere 'veils' for hidden or partly revealed policy concerns (Kit Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 LQR 461). In *Barclays Bank*, the policy concerns became more express. But in its search for guiding principles across the field of negligence liability, the new direction of the Supreme Court turns its face against this solution—without specific criticism of *Barclays Bank* itself. It remains to be seen how well the issues can be resolved through extension of the core notion of assumption of responsibility; and how far that concept can be stretched without losing its value. There is, in any event, apparently a new 'coyness' about open reference to policy considerations in disposing of novel cases.

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3 Public Authorities

3.1 The General Issues

In principle, the nature of the potential defendant—whether that defendant is a public authority or private party, corporation, or individual—makes no difference to the availability of an action in the tort of negligence. Historically, however, the Crown (though not other public authorities) was accorded a general immunity against liability at common law. This immunity was removed by the Crown Proceedings Act 1947, although the statute preserved an immunity in respect of the armed forces.[32] Far from being generally protected from actions in tort, public authorities and their individual officers are particularly vulnerable to certain tort actions,[33] and are especially exposed to an award of exemplary damages,[34] as well as the usual actions in negligence, nuisance, trespass, and so on.[35] Outside tort law, damages may also be sought against a public authority under the Human Rights Act 1998 (HRA).[36] The availability of this action inevitably casts new light on how courts have chosen to set limits to negligence liability in this context. According to its recently published Consultation on the Human Rights Act (2021), the UK Government considers the expansion of rights in this area, both in tort and under the HRA, to be unfortunate, and a target for reform. The Consultation is extracted in Chapter 1.4.

In this part of the chapter, there are three key themes. First is the application of the tort of negligence in the presence of various statutory powers and duties. It is this which has given the area much of its technical complexity. The distinction between powers and duties is also related to the second theme, namely the distinction between acts and omissions or, more appropriately following *Poole*, between causing harm and failing to benefit. This is—deliberately—a reversion to earlier case law some of which is extracted below. But how well does the reasoning in *Poole* match this case law? Third is the inevitable comparison with the action for damages under the HRA, and the influence of this parallel source of remedy.

3.2 The Variety of Powers and Duties

In approaching this area of law, it is important to keep in mind that the following powers and duties are distinct. The coexistence of these powers and duties gives the area much of its complexity. An attempt has been made by the Supreme Court in both *Poole* and *Robinson* to simplify the law in this field, by making the
p. 289 distinction between acts and omissions the ↵ central concept. The distinction is related to the difference between powers and duties, but that relationship is not entirely straightforward.

1. **The duty of care at common law.** The duty of care arises at common law. Any party, including a public authority, may owe such a duty to another if the applicable criteria are fulfilled. This seems a simple or even obvious statement in isolation, but it becomes hard to remember in the hurly-burly of the case law (below). Remembering that common law duties arise at common law and nowhere else,[37] no matter what other powers and duties are in issue, is the key to understanding the case law in this field.
2. **Statutory duties.** Legislation often imposes duties. From the point of view of the law of tort, statutory duties can be divided into two types:

i. Duties which are clear, precise, designed to benefit a particular group including the claimant, and intended to be actionable at common law. Such duties are actionable through the distinct tort of breach of statutory duty (Chapter 18). A leading example is the duty in *Groves v Wimborne* [1898] 2 QB 402: factory legislation required that certain machinery be fenced. This was for the benefit of workers. When a worker lost his forearm because machinery was unfenced, he was able to claim in tort. Recent legislative change in the law means that in future, this sort of claim will no longer be actionable unless there is proof of negligence—a major change to a long-standing principle.[38]

ii. The more usual type of statutory duty is one which is *not* actionable at common law. A very *general* statutory duty, or one not designed to benefit a particular group of people including the claimant, or one that Parliament did not intend to be actionable, will not be enforceable through the action for breach of statutory duty. Many duties where there is a criminal or other sanction set out in the statute will fall into this category, though this is not conclusive.[39] An example of a duty not actionable at common law arises in *O'Rourke v Camden* [1998] AC 188. The duty to offer accommodation to those who are homeless was not narrow and defined and was not for the benefit of a prescribed class of people. It was a social welfare duty. A person who was not housed when he presented himself as homeless could not seek damages in tort, and must instead seek judicial review.

3. **Statutory powers.** Unlike a duty, a power confers permission: it specifies that the recipient of the power *may* do something, not that they *must*. Formally, statutory powers allow the recipient to decide what to do, and whether to do it. They generally confer discretion. Public law provides remedies if discretion is *improperly exercised*, or if there is *an improper failure to exercise a power*. Generally speaking, *damages* are not readily available in an action at public law.

4. **Duties to respect Convention rights.** Under the HRA, section 6, all 'public authorities' are under a duty to act compatibly with Convention rights (those rights of the European Convention on Human Rights (ECHR) which are listed in the Appendix to the HRA: see Chapter 1). An action against a public authority
p. 290 for failure to do so is created by the HRA, sections 7–8. These duties are separate from common law duties, though they may arise on similar facts and be argued alongside a claim in tort. Common law duties are unlikely to be adapted to resemble the duties to protect Convention rights, or to fill gaps where the Act does not apply: *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50; [2009] 1 AC 225; *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] 2 WLR 481. The starting point is that common law and the HRA, sections 7–8 provide two different routes to two different remedies.[40] But the European Court of Human Rights has interpreted positive duties to protect the Convention rights in such a way as to create a 'tort-like' form of liability against States which is, through the HRA, also available against public authorities in domestic courts.

The Role of These Powers and Duties in a Negligence Action

1. **Duties of care at common law.** A claim in the tort of negligence cannot succeed unless a duty of care at common law is owed to the claimant. A public body, like anyone else, will be liable in negligence only if a duty of care is held to exist.

2. **Statutory duties.** We noted above that the action for breach of statutory duty will be available only if the duty in question is a type (a) statutory duty. The majority of statutory duties are not actionable in this way.[41]

   Supposing there is a statutory duty which is *not* actionable at common law, does the existence of the statutory duty in any sense *exclude* the existence of a duty to take care at common law? It does not; but the common law duty must at least be compatible with the statute and not, for example, 'cut across' the legislative scheme.

3. **Statutory powers.** Some of the most difficult issues in all of negligence law have surrounded statutory powers. Can there be a duty of care at common law in respect of a *negligent exercise*, or *negligent failure to exercise*, a statutory power?

   It is now apparent that the answer to this question is much simpler than first appeared. The key is to remember that statutory power, and common law duty, are separate and distinct. If a common law duty is to arise, it will arise through application of the principles developed in cases such as *Donoghue, Hedley Byrne*, *Caparo*, and *Poole v GN*, and nothing more complicated than that really needs to be said.[42]

4. **Duties to respect Convention rights.** Increasingly, as we have already said, duties to respect Convention rights (including positive duties to act) are also seen to be separate from common law duties. Some such positive duties are imposed upon public authorities such as the police and health authorities. These are a significant source of remedies in their own right. Their existence does not necessarily imply that common law ought to change to achieve the same outcome; but it has led to more questions about the soundness of the arguments through which restrictive tort rules are justified, and through this has led to—or at least, helped to justify—change in the law.

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3.3 Leading Cases from *Geddis* to *X V Bedfordshire*

Geddis v Proprietor of the Bann Reservoir (1878) 3 App Cas 430 (HL) (on appeal from the Exchequer Chamber in Ireland)

The defendants were incorporated by Act of Parliament for the purpose of securing a regular supply of water to mills on the banks of the River Bann. The relevant statute conferred power to collect several small streams into a reservoir, and to send down waters through a smaller stream, the Muddock. The defendants did not properly regulate the flow of water or scour the stream; and they were liable for the flooding of the plaintiffs' land which resulted.

Geddis shows that activities undertaken in the exercise of a statutory power are not beyond the reach of private law, *if* those powers are carelessly exercised. The most influential judicial statement in *Geddis* is the remark of Lord Blackburn which is italicized below. It is important to read this highlighted passage within its context.

Lord Blackburn, *Geddis v Proprietors of the Bann Reservoir*, at 455–6

> It is agreed on all sides that the Act requires the promoters, the Defendants, to pour into the channel of the River *Muddock* as much water as, on the average, used formerly to go. … And they have a permissive power, for the benefit of the millowners on the *Bann*, to send down more water, both greater in quantity and in a different way from what would have gone in the ordinary natural state of things down the *Muddock* if the Act had not been passed. Now, certainly the result has been that the channel of the *Muddock* as it exists at present is not able to carry off the water they have put into it, and if they have no power to cleanse the channel of the *Muddock*, or to alter it, which was the view taken by the majority of the learned Judges of the Court of Exchequer Chamber below, then they are not liable to damages for doing that which the Act of Parliament authorizes, namely, pouring part of the water of the reservoir into the *Muddock* that it may go to the Bann. *For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers*. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law.
>
> Now, upon that view of the law, if in this case the learned Judges in the Exchequer Chamber are right in holding that the Defendants have no power to interfere with the channel of the *Muddock* at all, of course no action will lie against them. But if on the other hand Baron *Fitzgerald* and Chief Baron *Palles* are right in the view which they took, that they have power to do so, I think that the conclusion becomes irresistible that they ought to adopt a reasonable exercise of that power by cleansing, scouring, widening, and deepening, the natural channel of the *Muddock*, so as to make it capable of receiving the waters which they pour down it, and that not to do so before they poured down the water, was a neglect to make a reasonable use of the powers given to them by the statute.
>
> [Emphasis added]

p. 292 ↵ Lord Blackburn's reference to 'negligence' is not a reference to the *tort* of negligence. Rather, it is a reference to the limited scope of 'statutory authority' as a defence. This defence does not assist a defendant who has acted *without due care*. (Statutory authority is analysed as a defence to private nuisance, in Chapter 10, and to the action in *Rylands v Fletcher*, in Chapter 11.)

The last paragraph extracted seems to suggests that there is greater scope for liability where there is a power to do something, than where there is not. This may seem puzzling. A power after all confers a choice over what to do. How can the existence of a *choice* be the basis for liability? The point being made by Lord Blackburn here is that the defendants could not be made liable for *failing* to do something (adjust the nature of the River Muddock) if they were not *entitled* to do it. In this context then, the crucial question was whether the defendants even had power to do that which they failed to do. It is important to note that this is not a case of a

pure omission (like *Gorringe v Calderdale*, Section 3.5). It is a case where the *activities* of the defendants caused the flooding, because they failed to take steps, which they were authorized to take, to ameliorate the effects of their own actions.

East Suffolk Rivers Catchment Board v Kent [1941] 1 AC 74

Owing to a very high tide, a sea wall was breached, and the respondent's farmland was flooded. The appellants, in the exercise of their statutory powers under the Land Drainage Act 1930, entered the respondents' land and began repair work. They carried out the work so inefficiently that the respondents' land remained flooded for 178 days. It appears that the work could have been done, if it had been done with reasonable skill, within 14 days. The respondents claimed damages for the excess time during which their land remained flooded.

A majority of the House of Lords held that the appellants were not liable. They were under no obligation to repair the wall, nor to complete the work after they had begun it. Further, their lack of reasonable skill *had not caused the damage suffered*, which was the result of natural forces. This conclusion was disapproved in *Anns v Merton*, but has returned to the law, particularly in respect of duties owed by 'emergency services' (below). *East Suffolk* was treated as a case of the first importance in *Poole v GN*, which is considered in this connection below.

This case was decided a few years *after* the decision in *Donoghue v Stevenson*, which first recognized a unified tort of negligence. So its legal context is very different from the context of *Geddis*. Lord Atkin, the key figure in the recognition of the unified tort of negligence in *Donoghue*, dissented in *East Suffolk*. Only Lord Atkin adequately recognized the independence of the duty of care in negligence from the statutory powers and duties; and indeed only Lord Atkin mentioned *Donoghue v Stevenson* at all in explaining the potential source of a duty to take care in this case. Viscount Simon, in the majority, did refer to the tort of negligence as connoting 'the complex notion of duty, breach and damage'. However, he mentioned this only to argue that no damage had been caused by the defendant's lack of skill.

Of the majority judgments, Lord Romer's is the most often cited. He distinguished *Geddis*—and particularly the words of Lord Blackburn quoted earlier—on the basis that *Geddis* was a case where the damage was *caused by* the acts of the defendants. In this case, the defendants had merely permitted the damage to continue.

p. 293

Lord Romer, at 102

[*Geddis* and *Shepphard v Glossop Corporation* [1921] 3 KB 132[43]] seem to lay down a principle which in my opinion is a thoroughly sound one. It is this: Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If in the exercise of their discretion they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages that he would have suffered had they done nothing. So long as they exercise their discretion honestly, it is for them to determine the method by which and the time within which and the time during which the power shall be exercised; and they cannot be made liable, except to the extent that I have just mentioned, for any damage that would have been avoided had they exercised their discretion in a more reasonable way.

Lord Atkin (dissenting) approached the matter in a very different way. He began by stating the sources of duty in such cases. The following passages from Lord Atkin's judgment stand out for their clarity of approach:

Lord Atkin, at 88–9 (dissenting)

My Lords, two material points emerged on the argument of this appeal: (1) Was there a duty owed to the plaintiffs and, if so, what was its nature? (2) If there was a duty owed to the plaintiffs to conduct the work with reasonable dispatch, was there any damage caused to the plaintiffs by the breach of the duty? On the first point I cannot help thinking that the argument did not sufficiently distinguish between two kinds of duties: (1) A statutory duty to do or abstain from doing something. (2) A common law duty to conduct yourself with reasonable care so as not to injure persons liable to be affected by your conduct.

(1) The duty imposed by statute is primarily a duty owed to the State. Occasionally penalties are imposed by the statute for breach; and, speaking generally, in the absence of special sanctions imposed by the statute the breach of duty amounts to a common law misdemeanour. The duty is not necessarily a duty owed to a private citizen. The duty may, however, be imposed for the protection of particular citizens or class of citizens, in which case a person of the protected class can sue for injury to him due to the breach. The cases as to breach of the Factory or Coal Mines Act are instances. As a rule the statutory duty involves the notion of taking care not to injure and in such cases actions for breach of statutory duty come within the category of negligence: see *Lochgelly Iron and Coal Co. v. M'Mullan*.

(2) But apart from the existence of a public duty to the public, every person whether discharging a public duty or not is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. This duty exists whether a person is performing a public duty, or merely exercising a power which he possesses either under statutory authority or in pursuance of his ordinary rights as a citizen. To whom the obligation is owed is, as I see it, the principal question in the present case.

p. 294 ↵ The second kind of duty referred to by Lord Atkin in the passage above is, of course, the duty of care in negligence.

> **At 90–1**
>
> I treat it … as established that a public authority whether doing an act which it is its duty to do, or doing an act which it is merely empowered to do, must in doing the act do it without negligence, or as it is put in some of the cases must not do it carelessly or improperly. …
>
> I thus come to the crucial point in this case to whom is such a duty owed, or who can complain of the failure to use reasonable dispatch. Now it must be conceded that instances will occur of the performance of powers where it might be difficult for a member of the public generally to complain of unreasonable delay. For instance delay in the work of relaying the surface of a highway may not be actionable at the suit of members of the public who are put to expense and inconvenience by having to make a detour. Even in this case I think something might be said for a householder or shopkeeper on the route under repair who is for an unreasonably long time deprived of access to his premises for himself and his customers. *But we have to deal here with relations between the plaintiffs and the Board which I suggest are much closer than the general relations of members of the public to a public authority. The Board were engaging themselves in repairing the plaintiffs' wall with the object of preventing the further flooding of the land of the plaintiffs and, I think, also one other occupier, and they were operating upon the plaintiffs' land*. Subject to what I have to say upon the causation of damage which I wish for the present purpose to assume, they would know that the longer the work was delayed the longer would the waters ebb and flow over the land with the possibility of damage therefrom. I consider that these relations give rise to a duty owed to the plaintiffs to use reasonable care, including dispatch in doing the work.
>
> [Emphasis added]

The italicized passage in this extract approaches the matter through the concept of *proximity*, which was an aspect of 'neighbourhood' as it was explained in *Donoghue v Stevenson*. It was irrelevant that the statute conferred a mere power. The approach to establishing a duty of care has changed over time, but it remains the case that a duty at common law is separate from a statutory power or duty. A public authority will owe such a duty on the same basis as anybody else, dependent on their acts and omissions. However, in referring with approval to the majority's decision in *East Suffolk Rivers Catchment v Kent*, the Supreme Court in recent decisions has set considerable store by the distinction between causing harm, and failing to confer benefits. Against that backdrop, how would the present Supreme Court approach the issues mentioned by Lord Atkin? This is not something that it has addressed directly. However, it seems highly likely that it would address these issues in terms of whether there was a duty to confer a benefit on the claimants; and that they would try to answer this question in terms of whether the actions of the Board amounted to an 'assumption of responsibility'. The latter terminology was not used in *Donoghue v Stevenson*, nor in *East Suffolk* itself. The question which arose in the last section, on economic losses, also arises here: is this terminology being pressed to do too much work? If so, why might this be?

p. 295

Anns v Merton [1977] 2 WLR 1024

This is our third visit to this case. We have already seen that *Anns* has been departed from as to its *ratio*, because it incorrectly stated the form of damage suffered by the plaintiff;[44] and that the expansive two-stage test for a duty of care adopted in *Anns* has been superseded, initially by the more cautious (but equally open-textured) *Caparo* test, and then by the incremental approach in *Robinson*. Here we consider a different aspect of Lord Wilberforce's judgment, concerning the statutory context of the defendant's act (or failure to act). This aspect of his judgment fared rather better than the rest, but this final element of *Anns* has now been demolished by *Gorringe v Calderdale* [2004] 1 WLR 1057. We must still consider *Anns*, because it provides a vital link between *East Suffolk* and *Geddis*, and the law as it stands now.

Anns: The Issues

We outlined the facts of *Anns* in Chapter 3.

Even leaving aside the 'type of damage', one would have thought the obstacles to the claim were formidable. In particular:

(a) The statute conferred a power not a duty.

(b) On one hypothesis, the local authority had merely failed to inspect.

(c) Applying the majority approach in *East Suffolk*, this is a case of mere failure to avoid harm. The harm was not caused by natural forces, but it was caused by a builder, and the local authority had merely failed to notice and prevent the defect.

Despite these features, the House of Lords held that a claim in negligence was arguable, *whether there had been an inspection or not*.

Lord Wilberforce, *Anns v Merton*,
at 1035–6

> … It is said that there is an absolute distinction in the law between statutory duty and statutory power—the former giving rise to possible liability, the latter not, or at least not doing so unless the exercise of the power involves some positive act creating some fresh or additional damage.
>
> My Lords, I do not believe that any such absolute rule exists: or perhaps, more accurately, that such rules as exist in relation to powers and duties existing under particular statutes, provide sufficient definition of the rights of individuals affected by their exercise, or indeed their non-exercise, unless they take account of the possibility that, parallel with public law duties there may coexist those duties which persons—private or public—are under at common law to avoid causing damage to others in sufficient proximity to them. This is, I think, the key to understanding of the main authority relied upon by the appellants—*East Suffolk Rivers Catchment Board v. Kent* [1941] AC 74.

p. 296

At 1037–8

> … the law, as stated in some of the speeches in *East Suffolk Rivers Catchment Board v. Kent* [1941] AC 74, but not in those of Lord Atkin or Lord Thankerton, requires at the present time to be understood and applied with the recognition that, quite apart from such consequences as may flow from an examination of the duties laid down by the particular statute, there may be room, once one is outside the area of legitimate discretion or policy, for a duty of care at common law. It is irrelevant to the existence of this duty of care whether what is created by the statute is a duty or a power: the duty of care may exist in either case. The difference between the two lies in this, that, in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of the power. In *Dorset Yacht Co. Ltd v. Home Office* [1970] AC 1004 the officers may (on the assumed facts) have acted outside any discretion delegated to them and having disregarded their instructions as to the precautions which they should take to prevent the trainees from escaping: (see *per* Lord Diplock, at p. 1069). So in the present case, the allegations made are consistent with the council or its inspector having acted outside any delegated discretion either as to the making of an inspection, or as to the manner in which an inspection was made. Whether they did so must be determined at the trial. In the event of a positive determination, and only so, can a duty of care arise. …

Apart from anything else, Lord Wilberforce's approach is difficult to apply in practice. The first step, where there is a statutory power, is to show that the act or omission complained of 'lay outside the ambit of the power'. If it is within the ambit of the power, there is no room for the negligence action. The difficulty is that whether the act or omission is within the ambit of a power is a question of public law. Under the *Anns* approach, we therefore have to deal with public law concepts, in a private law action.

Lord Wilberforce seems to have used these public law concepts in order to explain how a *duty* can be derived from a *power* (see the extract above, from p. 1035). But this is not true to the dissenting judgment of Lord Atkin in *East Suffolk* (which Lord Wilberforce was trying to apply). There, Lord Atkin emphasized the *independence* of

the duty of care in negligence, from statutory powers and duties. He determined whether a duty of care arose at common law by applying the neighbourhood test. The duty of care, if it arises at all, arises in its own right: in short, it arises out of the neighbour principle (now qualified by *Caparo* and *Robinson* and *Poole*).

This question about statutory powers has returned to exercise the House of Lords on a number of occasions. In the next case extracted, the House of Lords made a serious attempt to resolve the issue. In *some* respects, the solution proved short-lived. Indeed the authority of *X v Bedfordshire* has been gradually chipped away, though it has not suffered the same fate as *Anns*. Parts of its reasoning continue to frame the law—for example, the notion that some claims are simply not 'justiciable', and that this is a threshold test. However limited its authority in some respects today, much of the current law on child abuse and education claims in negligence was decided under the influence of this decision, and the significance of *Poole* cannot be grasped without some understanding of this case. According to the Supreme Court in *Poole*, decisions following *X v Bedfordshire* have been essentially correct in their outcomes, but require reinterpretation in terms of the applicable principles that they represent. This is because their reasoning is misleading, because of the
p. 297 influence of *Anns v Merton*, and the mistaken view that *Caparo* set out a 'three stage test'. This makes
↵ understanding of the cases following *X v Bedfordshire* rather difficult. It may help to be aware that the Supreme Court has set about reinterpreting the key authorities, and setting them on a basis which was not adopted by the courts that decided them.

X v Bedfordshire County Council; M v Newham LBC & Others [1995] 2 AC 633

The House of Lords dealt with five appeals, all involving claims in negligence and some involving claims for breach of statutory duty. The first two appeals concerned (respectively) an allegation that a local authority had failed to take children into care despite evidence of neglect and abuse by their parents (*X v Bedfordshire* itself), and that a local authority had carelessly taken a child away from her mother on a mistaken suspicion that the mother's partner was abusing the child (*M v Newham*). These are referred to as the 'child abuse cases'. Not surprisingly perhaps, the House of Lords approached these in terms of the same principles; but the Supreme Court in *Poole* has now suggested that there ought to have been a sharp distinction between the two scenarios. One involves failing to benefit the children; the other involves wrongly causing them harm. Yet the processes involved and relationship between the parties will have been precisely the same. This indicates the major reworking of the law represented by *Poole*, and underlines the great significance being attached to non-contextual factors in the form of 'established legal principles'.

In the remaining three appeals (*E v Dorset; Christmas v Hampshire*; and *Keating v Bromley*), local authorities had failed to diagnose learning difficulties on the part of the claimants, or failed to make adequate provision for schooling. These are referred to as the 'education cases'.

General: Three Types of Claim

Lord Browne-Wilkinson broke down the claims in the five cases into three types. Not all types of claim were present in every case; but in most cases, they were.

1. Claims for breach of statutory duty. The relevant statutes in the abuse cases were the Children and Young Persons Act 1969; the Child Care Act 1980; and the Children Act 1989 (*Bedfordshire* only). In the education cases, the relevant statutes were the Education Acts 1944 and 1981. In no case was a claim for breach of statutory duty successful. The statutory duties were not of the appropriate sort. They were social welfare duties for the benefit of the public as a whole, and they were not actionable by individuals at common law. This aspect of the decision has stood the test of time.
2. Claims for negligent breach of a direct duty of care on the part of the defendant local authority, in the exercise of their statutory functions. With one exception, these claims failed too, and were struck out. In general, the duties argued for would be inconsistent with the purposes of the statutes.
3. Claims that the local authority was vicariously liable for the breach of a duty of care by an individual employee. Here there was a difference in fortunes between the two types of case.
   (a) Applying the criteria in *Caparo v Dickman*, the abuse cases were struck out. It would not be fair, just, and reasonable to impose a duty of care on the professional social workers and psychologists who made judgments as to the child's welfare. This conclusion would now be different following
p. 298 *D v East Berkshire,* which was endorsed by the Supreme Court in *Poole*. The guiding principles are causation of harm; and assumption of responsibility, rather than what is 'fair, just and reasonable'. Policy issues are less openly acknowledged.
   (b) Applying the same criteria, the education cases had a chance of success, and would not be struck out. This is because the relationship between professional and child in these cases was arguably similar to a 'normal professional relationship' carrying no potential conflict of interest. In the case of a headmaster, there was also a voluntary assumption of responsibility towards a pupil at the school (applying *Henderson v Merrett*, Section 6.2). Later education cases have succeeded on their merits. This reasoning is consistent with the developments in *Poole*.

Lord Browne-Wilkinson rightly rejected a fourth argument, that there could be an action for 'negligent breach of a statutory duty', distinct from the claim in the tort of negligence *and* from the action at private law for breach of statutory duty. No such action exists (at 732). This is consistent with our analysis so far, and with Lord Atkin's judgment in *East Suffolk*. It is not contradicted by Lord Blackburn's remarks in *Geddis*, provided these are read in context, as we read them above, and is consistent with *Poole*.

The Abuse Cases

The following reasoning explains the rejection of the **direct duty of care** in the abuse cases.

Lord Browne-Wilkinson, at 749

I turn then to consider whether, in accordance with the ordinary principles laid down in the *Caparo* case [1990] 2 A.C. 605, the local authority in the *Bedfordshire* case owed a direct duty of care to the plaintiffs. The local authority accepts that they could foresee damage to the plaintiffs if they carried out their statutory duties negligently and that the relationship between the authority and the plaintiffs is sufficiently proximate. The third requirement laid down in *Caparo* is that it must be just and reasonable to impose a common law duty of care in all the circumstances. ... Is it, then, just and reasonable to superimpose a common law duty of care on the local authority in relation to the performance of its statutory duties to protect children? In my judgment it is not. Sir Thomas Bingham M.R. took the view, with which I agree, that the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter considerations are required to override that policy ante, p. 663C–D. However, in my judgment there are such considerations in this case.

First, in my judgment a common law duty of care would cut across the whole statutory system set up for the protection of children at risk. As a result of the ministerial directions contained in 'Working Together' the protection of such children is not the exclusive territory of the local authority's social services. The system is inter-disciplinary, involving the participation of the police, educational bodies, doctors and others. At all stages the system involves joint discussions, joint recommendations and joint decisions. The key organisation is the Child Protection Conference, a multi-disciplinary body which decides whether to place the child on the Child Protection Register. ... To impose such liability on all the participant bodies would lead to almost impossible problems of disentangling as between the respective bodies the liability, both primary and by way of contribution, of each for reaching a decision found to be negligent.

p. 299 ↵ Second, the task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. Legislation requires the local authority to have regard not only to the physical wellbeing of the child but also to the advantages of not disrupting the child's family environment: see, for example, section 17 of the Act of 1989. In one of the child abuse cases, the local authority is blamed for removing the child precipitately: in the other, for failing to remove the children from their mother. As the Report of the Inquiry into Child Abuse in Cleveland 1987 (Cm. 412) said, at p. 244:

> "It is a delicate and difficult line to tread between taking action too soon and not taking it soon enough. Social services whilst putting the needs of the child first must respect the rights of the parents; they also must work if possible with the parents for the benefit of the children. These parents themselves are often in need of help. Inevitably a degree of conflict develops between those objectives."

Next, if a liability in damages were to be imposed, it might well be that local authorities would adopt a more cautious and defensive approach to their duties. For example, as the Cleveland Report makes clear, on occasions the speedy decision to remove the child is sometimes vital. If the authority is to be made liable in damages for a negligent decision to remove a child (such negligence lying in the

> failure properly first to investigate the allegations) there would be a substantial temptation to postpone making such a decision until further inquiries have been made in the hope of getting more concrete facts. Not only would the child in fact being abused be prejudiced by such delay: the increased workload inherent in making such investigations would reduce the time available to deal with other cases and other children.
>
> The relationship between the social worker and the child's parents is frequently one of conflict, the parent wishing to retain care of the child, the social worker having to consider whether to remove it. This is fertile ground in which to breed ill feeling and litigation, often hopeless, the cost of which both in terms of money and human resources will be diverted from the performance of the social service for which they were provided. The spectre of vexatious and costly litigation is often urged as a reason for not imposing a legal duty. But the circumstances surrounding cases of child abuse make the risk a very high one which cannot be ignored.
>
> If there were no other remedy for maladministration of the statutory system for the protection of children, it would provide substantial argument for imposing a duty of care. But the statutory complaints procedures contained in section 76 of the Act of 1980 and the much fuller procedures now available under the Act of 1989 provide a means to have grievances investigated, though not to recover compensation. Further, it was submitted (and not controverted) that the local authorities Ombudsman would have power to investigate cases such as these.
>
> Finally, your Lordships' decision in the *Caparo* case [1990] 2 A.C. 605 lays down that, in deciding whether to develop novel categories of negligence the court should proceed incrementally and by analogy with decided categories. We were not referred to any category of case in which a duty of care has been held to exist which is in any way analogous to the present cases. Here, for the first time, the plaintiffs are seeking to erect a common law duty of care in relation to the administration of a statutory social welfare scheme. Such a scheme is designed to protect weaker members of society (children) from harm done to them by others. The scheme involves the administrators in exercising discretions and powers which could not exist in the private sector and which in many cases bring them into conflict with those who, under the general law, are responsible for the child's welfare. To
>
> p. 300 my mind, the ↵ nearest analogies are the cases where a common law duty of care has been sought to be imposed upon the police (in seeking to protect vulnerable members of society from wrongs done to them by others) or statutory regulators of financial dealings who are seeking to protect investors from dishonesty. In neither of those cases has it been thought appropriate to superimpose on the statutory regime a common law duty of care giving rise to a claim in damages for failure to protect the weak against the wrongdoer: see *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53 and *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175.

The European Court of Human Rights in *Z v UK* (Section 3.6) clearly disagreed with the argument in this extract, that alternative remedies were adequate.

Lord Browne-Wilkinson also rejected claims that the local authority should be *vicariously* liable. The following remarks relate to the rejection of the vicarious liability claims in the abuse cases. Vicarious liability is explored in Chapter 10.

> **At 752–3**
>
> … The social workers and the psychiatrists were retained by the local authority to advise the local authority, not the plaintiffs. The subject matter of the advice and activities of the professionals is the child. Moreover the tendering of any advice will in many cases involve interviewing and, in the case of doctors, examining the child. But the fact that the carrying out of the retainer involves contact with and relationship with the child cannot alter the extent of the duty owed by the professionals under the retainer from the local authority. The Court of Appeal drew a correct analogy with the doctor instructed by an insurance company to examine an applicant for life insurance. The doctor does not, by examining the applicant, come under any general duty of medical care to the applicant. He is under a duty not to damage the applicant in the course of the examination: but beyond that his duties are owed to the insurance company and not to the applicant.
>
> …
>
> In my judgment in the present cases, the social workers and the psychiatrist did not, by accepting the instructions of the local authority, assume any general professional duty of care to the plaintiff children. The professionals were employed or retained to advise the local authority in relation to the well being of the plaintiffs but not to advise or treat the plaintiffs.

The child is merely the 'subject of the report' prepared. The only *duty* is owed to the local authority, as employer. This part of the reasoning has not survived (see our discussion of *D v East Berkshire* and *Poole v GN*, later). However, the policy reasons listed remained influential in denying that a duty is owed to *parents* who are wrongly suspected of child abuse; and to others in rather different contexts where conflicts of interest may arise (*Jain v Trent Strategic Health Authority* [2009] UKHL 4; [2009] 2 WLR 248).

Under the approach in *Poole*, making decisions by reference to policy arguments such as this is not the preferred approach. While 'incrementalism' is defined as the key to *Caparo*, the Supreme Court has suggested that the House of Lords here went wrong, because in the case of a child taken into care wrongly, there is an established duty situation, which does ↵ not require discussion in these terms. Referring to the final part of the extract from *X v Befordshire* above, Lord Reed commented as follows:

p. 301

Lord Reed, *GN v Poole* [2019] UKSC 25

> 43. The fundamental problem with this reasoning, so far as relating to an assumption of responsibility, is that … the liability of the social worker and the psychiatrist in the *Newham* case did not depend on whether they had assumed a responsibility towards the child.

This suggests the House of Lords had made a category error. But as we noted in Chapter 4, all depends on how the categories are defined; and the Supreme Court in *Poole* and other cases seems to be drawing its categories extremely widely, by reference to 'established principle', rather than policy concerns. We have also seen, in our examination of *Geddis* and *East Suffolk*, that even these older authorities need reinterpreting to fit *Poole*'s 'established' or traditional categories.

The approach in *Poole* suggests that in the case of a child not taken into care and thereby denied protection from abuse, there is no duty, unless the case falls into an established exception. In this instance, the possible exception is that there has been an 'assumption of responsibility'. But that criterion does not apply to a child who *has* been taken into care. It would seem this case is considered straightforward.

Lord Reed, *GN v Poole*

> 74. In the light of the cases which I have discussed, the decision in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 <https://uk.westlaw.com/Document/I0A765450E42911DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)> can no longer be regarded as good law in so far as it ruled out on grounds of public policy the possibility that a duty of care might be owed by local authorities or their staff towards children with whom they came into contact in the performance of their functions under the 1989 Act, or in so far as liability for inflicting harm on a child was considered, in the *Newham* case, to depend upon an assumption of responsibility. Whether a local authority or its employees owe a duty of care to a child in particular circumstances depends on the application in that setting of the general principles most recently clarified in the case of *Robinson [2018] AC 736* <https://uk.westlaw.com/Document/I597834D00CC911E886A2D99321F34449/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>. Following that approach, it is helpful to consider in the first place whether the case is one in which the defendant is alleged to have harmed the claimant, or one in which the defendant is alleged to have failed to provide a benefit to the claimant, for example, by protecting him from harm.

The approach to vicarious liability in the welfare cases is therefore no longer to be followed. But it has been influential in a number of subsequent cases. We explore this, and the present position, below.

The Education Cases

Although the claims for direct duties were also found untenable in the education cases generally, in the *Dorset* case there was thought to be one potential route to establishing such a duty. The duty might arise by analogy
p. 302 with *Hedley Byrne v Heller* and *Henderson v Merrett*, ↵ irrespective of the kind of damage (economic loss or not) that followed (at 762–3).[45] Here, there is direct reference to the 'assumption of responsibility', derived from cases explored in the previous section, relating to pure economic losses.

The other critical difference between the abuse cases, and the education cases, was that the **vicarious liability** claims in respect of education were not doomed to fail. The following extract relates specifically to the *Dorset* case, but it is indicative of the general approach.

Lord Browne-Wilkinson, at 763

> ### Common Law Duty of Care—Vicarious
>
> The claim is that the educational psychologists and other members of the staff of the defendant authority owed a duty to use reasonable professional skill and care in the assessment and determination of the plaintiff's educational needs. It is further alleged that the plaintiff's parents relied on the advice of such professionals. The defendant authority is vicariously liable for any breach of such duties by their employees.
>
> Again, I can see no ground for striking out this claim at least in relation to the educational psychologists. Psychologists hold themselves out as having special skills and they are, in my judgment, like any other professional bound both to possess such skills and to exercise them carefully. Of course, the test in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582 will apply to them, i.e. they are only bound to exercise the ordinary skill of a competent psychologist and if they can show that they acted in accordance with the accepted views of some reputable psychologist at the relevant time they will have discharged the duty of care, even if other psychologists would have adopted a different view. In the context of advice on the treatment of dyslexia, a subject on which views have changed over the years, this may be an important factor. But that said, I can see no ground on which, at this stage, the existence of a professional duty of care can be ruled out. The position of other members of the defendant's staff is not as clear, but I would not at this stage strike out the claims relating to them.
>
> The position of the psychologists in the education cases is quite different from that of the doctor and social worker in the child abuse cases. There is no potential conflict of duty between the professional's duties to the plaintiff and his duty to the educational authority. Nor is there any obvious conflict between the professional being under a duty of care to the plaintiff and the discharge by the authority of its statutory duties. If, at trial, it emerges that there are such conflicts, then the trial judge may have to limit or exclude any duty of care owed by the professional to the plaintiff. But at this stage no obvious conflict has been demonstrated. …

The newer approach in *Poole* would, presumably, differ slightly from the above passage. The presence of an assumption of responsibility would be considered sufficient, removing the need to discuss conflicting duties and other policy concerns.

The House of Lords therefore permitted the education cases to proceed to trial on the basis that not only a local education authority *but also its individual teachers* potentially owe a duty of care to their pupils.

p. 303

3.4 After *X V Bedfordshire*

Welfare Cases

Barrett v Enfield [2001] 2 AC 550

Barrett v Enfield was not a case of suspected child abuse, nor did it concern a decision about whether to take a child into care. Rather, the claimant brought an action in negligence in respect of the conduct of his care. The claim was for personal injuries. The House of Lords declined to strike out the claim, concluding that the case should be heard on its merits.

There are three important points to make about *Barrett*.

1. Less Enthusiasm for Striking Out

Lord Browne-Wilkinson, in this case, was critical of the decision in *Osman v UK* [2000] EHRR 245. Here, the European Court of Human Rights had concluded that English law conferred an 'immunity' on the police in respect of certain actions in negligence. This immunity was contrary to Article 6 of the ECHR, which states that everyone is entitled to a hearing by a tribunal in respect of their civil rights. This aspect of *Osman v UK* has since been recognized as mistaken by the European Court of Human Rights itself, in *Z v UK* (2002) 34 EHRR 3, but before that, it had an impact on English law. Despite his criticisms, Lord Browne-Wilkinson thought that if this case was struck out, a claim would be initiated before the European Court of Human Rights for a violation of Article 6.

> **Lord Browne-Wilkinson, at 560**
>
> In view of the decision in the *Osman* case it is now difficult to foretell what would be the result in the present case if we were to uphold the striking out order. It seems to me that it is at least probable that the matter would then be taken to Strasbourg. That court, applying its decision in the *Osman* case if it considers it to be correct, would say that we had deprived the plaintiff of his right to have the balance struck between the hardship suffered by him and the damage to be done to the public interest in the present case if an order were to be made against the defendant council. In the present very unsatisfactory state of affairs, and bearing in mind that under the Human Rights Act 1998 article 6 will shortly become part of English law, in such cases as these it is difficult to say that it is a clear and obvious case calling for striking out; see also *Markesinis & Deakin, Tort Law*, 4th ed (1999), pp 145 et seq.

On the other hand, elsewhere in his judgment Lord Browne-Wilkinson called for caution in striking out on entirely different grounds, namely that it is difficult to judge the policy issues unless one has a full grasp of the facts (at 557–8). The other judges in *Barrett* also called for caution in striking out, without relying on *Osman v UK*.

2. Less Broad Brush Policy Reasoning and More Confidence in the Negligence Action

This second point is related to the first. The policy arguments which proved fatal to the child abuse claims in *X v Bedfordshire* were not thought to apply with the same force to the claims in this case. The potential conflicts identified in *X v Bedfordshire* would not necessarily apply here, and there was much less confidence in the availability of other suitable remedies. Lord Slynn referred to the dissenting judgment of Lord Bingham MR in *X v Bedfordshire* (in the Court of Appeal), suggesting greater confidence that tort law may have a positive role in responding to malpractice in the social welfare sphere, as elsewhere.

p. 304

3. A Simpler Approach to 'Justiciability'

As we have seen, the approach adopted in *Anns v Merton* threatened to make negligence cases turn on an interpretation of public law concepts. In *X v Bedfordshire*, Lord Browne-Wilkinson expressed the view that it was best to keep public law concepts away from the negligence enquiry, but he nevertheless appeared to say that both policy and discretion were protected spheres. In *Barrett*, Lord Slynn and Lord Hutton advocated a more straightforward approach which would keep questions of public law out of negligence cases. At the same time, their approach would permit broader enquiry into local authority decision-making.

> **Lord Slynn, at 571**
>
> Where a statutory power is given to a local authority and damage is caused by what it does pursuant to that power, the ultimate question is whether the particular issue is justiciable or whether the court should accept that it has no role to play. … The greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought. … A claim of negligence in the taking of a decision to exercise a statutory discretion is likely to be barred, unless it is wholly unreasonable so as not to be a real exercise of the discretion, or if it involves the making of a policy decision involving the balancing of different public interests; acts done pursuant to the lawful exercise of the discretion can, however, in my view be subject to a duty of care, even if some element of discretion is involved. Thus, accepting that a decision to take a child into care pursuant to a statutory power is not justiciable, it does not in my view follow that, having taken a child into care, an authority cannot be liable for what it or its employees do in relation to the child without it being shown that they have acted in excess of power. It may amount to an excess of power, but that is not in my opinion the test to be adopted: the test is whether the conditions in the *Caparo* case [1990] 2 AC 605 have been satisfied.

Z v UK and After

The plaintiffs in *X v Bedfordshire* (their claims in negligence having been struck out) brought an action before the European Court of Human Rights, alleging violations of Article 6 (right of access to a court), Article 3 (freedom from inhuman and degrading treatment), Article 8 (respect for private and family life), and Article 13 (right to compensation in the event of a violation of one of the substantive rights). The Court admitted that its interpretation in *Osman v UK* had been in error. There had been no violation of Article 6. However, there *had*

been violations of Article 3 and Article 13 in this case. The absence of protection for the interests of the children in this case, *and also* the lack of a remedy in the form of compensation, had violated their Convention rights.

Given the finding that Article 6 had not been violated, there was no necessity that the law of tort should provide a remedy in such a case. The HRA as we have seen provides a remedy against public authorities who do not act consistently with Convention rights, under section 8. This is an alternative to the law of tort. But, in the formative years of litigation over child welfare and education after *X v Bedfordshire*, the courts thought they should adjust *the law of tort* to provide remedies, rather than leaving claimants to an action under section 7. Courts are themselves public authorities under section 6, and by section 2(1) they must have regard to the 'Strasbourg jurisprudence' when interpreting the applicable law. In *D v East Berkshire* (below), it was further
p. 305 pointed out that an action against the local authority ↵ for damages under section 8 would not be available where the actions in question occurred before October 2000, when the HRA came into force; and that in cases of child abuse it was quite typical for actions to be brought many years after the event.[46] The only route to a remedy was through adaptation of common law. This controversial decision has now been approved as consistent with 'established principle', by the Supreme Court in *Poole*.

D v East Berkshire Community Health NHS Trust and Another [2004] 2 WLR 58 (CA)

Actions were brought by parents and in one case a child for psychiatric injury suffered as a result of mistaken, and allegedly negligent allegations of child abuse by the parents against the children. The parents' claims were dismissed; but the child's appeal was allowed.

The House of Lords heard an appeal from this decision; but that appeal related only to the unsuccessful claims brought by parents, and the appeal failed. The historic decision of the Court of Appeal in this case *not to follow the decision of the House of Lords* in *X v Bedfordshire* was not criticized by the House of Lords, but later developments in interpretation of the HRA suggested that this sort of move was unlikely to be made again. In *Poole BC v GN*, the defendant argued that the Court of Appeal's decision in *D v East Berkshire* should no longer be followed, and that later decisions such as *Mitchell v Glasgow* [2009] UKHL 11 and *Michael v Chief Constable of South Wales* [2015] UKSC 2 impliedly overruled the decision. The Supreme Court vindicated the decision, but on particular grounds, which we visit below.

D v East Berkshire Health Authority [2005] UKHL 23; [2005] 2 AC 373

The question on appeal before the House of Lords concerned the rejected claims on behalf of the parents. The decision of the Court of Appeal to depart from *X v Bedfordshire* was not criticized by their Lordships. Lord Bingham (dissenting) would have gone further than the Court of Appeal, allowing the claims of the parents to proceed to trial. But the majority held that no duty was owed to the parents, and the actions must be struck out.

Lords Nicholls, Brown, and Rodger delivered judgments explaining why the claims by the parents should be struck out. Lord Steyn agreed with all three of these.

> **Lord Nicholls of Birkenhead**
>
> [85] In my view the Court of Appeal reached the right conclusion on the issue arising in the present cases. Ultimately the factor which persuades me that, at common law, 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'. A doctor is obliged to act in the best interests of his patient. In these cases the child is his patient. The doctor is charged with the protection of the child, not with the protection of the parent. The best interests of a child and his parent normally march hand-in-hand. But when considering whether something does not feel 'quite right', a doctor must be able to act single-mindedly in the interests of the child. He ought not to have at the back of his mind an awareness that if his doubts about intentional injury or sexual abuse prove unfounded he may be exposed to claims by a distressed parent.

p. 306 ↵ The approach of the majority uses generic policy arguments to block claims by parents even in the case of the most outrageous accusations, in order to protect those who make genuinely difficult decisions.

Poole v GN [2019] UKSC 25

The leading decision in relation to child welfare, and to public authority liability as a whole, is now *Poole v GN*. The facts were outlined in Chapter 4.

The Supreme Court rescued the decision of the Court of Appeal in *D v East Berkshire*, but not on the basis that there would otherwise be a violation of Article 6 ECHR: common law did not need to adapt to match the Convention for this reason or any other. Rather, *D v East Berkshire* was consistent with established principle, in the particular sense set out in the earlier case of *Robinson*. The influence of the HRA was simply that its enactment discredited the policy arguments which had been influential in *X v Bedfordshire* in denying a duty, in the face of established principle. It could no longer be said that such an action must be avoided because of its adverse impact, when a parallel action was already available and could proceed; therefore, the policy arguments lost their force, and common law principles could be applied.

Lord Reed

75. Understandably, the reasoning of Irwin LJ in the Court of Appeal in the present case did not follow the approach set out in *Robinson*, which was decided after the Court of Appeal had given its decision. The first consideration on which Irwin LJ placed particular emphasis, namely the concern expressed in *X (Minors) v Bedfordshire* and *Hill v Chief Constable of West Yorkshire* that liability in negligence would complicate decision-making in a difficult and sensitive field, and potentially divert the social worker or police officer into defensive decision-making, has not been treated as sufficient reason for denying liability in subsequent cases such as *Barrett v Enfield*, *Phelps v Hillingdon* and *D v East Berkshire*. His view that the decision of the Court of Appeal in *D v East Berkshire* had been implicitly overruled by *Michael* was mistaken: the decision in *D v East Berkshire* has not been overruled by any subsequent decision. In *Michael*, as explained earlier, this court rejected an argument which was said to be supported by *D v East Berkshire*, but it did not disapprove of the true ratio of that decision. More fundamentally, in cases such as *Gorringe*, *Michael* and *Robinson* both the House of Lords and this court adopted a different approach (or rather, reverted to an earlier approach) to the question whether a public authority is under a duty of care. That approach is based on the premise that public authorities are prima facie subject to the same general principles of the common law of negligence as private individuals and organisations, and may therefore be liable for negligently causing individuals to suffer actionable harm but not, in the absence of some particular reason justifying such liability, for negligently failing to protect individuals from harm caused by others. Rather than justifying decisions that public authorities owe no duty of care by relying on public policy, it has been held that even if a duty of care would ordinarily arise on the application of common law principles, it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating. In that way, the courts can continue to take into account, for example, the difficult choices which may be involved in the exercise of discretionary powers.

p. 307 In this way, some of the 'policy' arguments canvassed in cases such as *X v Bedfordshire* are rebranded. They are now treated as potential reasons for restriction on public authority ↵ liability, where such liability would arise for 'ordinary' defendants. Those reasons are presented as being about inconsistency with statute, not about 'policy' in a general and untested sense. Generally, the Court restated the new guiding principle, about the distinction between causing harm and failing to benefit, which was described in Chapter 4. This now will be the most significant faultline in the law relating to public authority liability; and 'assumption of responsibility' is to be the key concept in deciding whether there is (exceptionally) liability for failure to benefit.

Lord Reed

79. Irwin LJ rejected the contention that there was an assumption of responsibility by the council on the ground that there was an insufficient basis to satisfy the approach of the Court of Appeal in *X v Hounslow London Borough Council* and *Darby v Richmond upon Thames London Borough Council* [2017] EWCA Civ 252 <https://uk.westlaw.com/Document/I30DA35901EAA11E7B5C9A50D0D015B7A/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>. I have also come to the conclusion that the particulars of claim do not provide a basis on which an assumption of responsibility might be established, for the following reasons.

80. As Lord Browne-Wilkinson explained in relation to the educational cases in *X (Minors) v Bedfordshire* (particularly the *Dorset* case), a public body which offers a service to the public often assumes a responsibility to those using the service. The assumption of responsibility is an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care. Thus, whether operated privately or under statutory powers, a hospital undertakes to exercise reasonable care in the medical treatment of its patients. The same is true, mutatis mutandis, of an education authority accepting pupils into its schools.

81. In the present case, on the other hand, the council's investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours, in particular by rehousing them, but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare. The position is not, therefore, the same as in *Barrett v Enfield*. In short, the nature of the statutory functions relied on in the particulars of claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care.

82. It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike-out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred. Reference is made to an e-mail written in June 2009 in which the council's anti-social behaviour co-ordinator wrote to Amy that 'we do as much as it is in our power to fulfil

p. 308

> our duty of care towards you and your family, and yet we can't seem to get it right as far as you are concerned', but the e-mail does not appear to have been concerned with the council's functions under the 1989 Act, and in any event a duty of care cannot be brought into being solely by a statement that it exists: *O'Rourke v Camden London Borough Council* [1998] AC 188 <https://uk.westlaw.com/Document/I11E201E0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>, 196.
>
> 83. I would therefore conclude, like the Court of Appeal but for different reasons, that the particulars of claim do not set out an arguable claim that the council owed the claimants a duty of care. Although *X (Minors) v Bedfordshire* cannot now be understood as laying down a rule that local authorities do not under any circumstances owe a duty of care to children in relation to the performance of their social services functions, as the Court of Appeal rightly held in *D v East Berkshire*, the particulars of claim in this case do not lay a foundation for establishing circumstances in which such a duty might exist.

Lord Reed went on to explore an alternative argument, that the Council was *vicariously* liable, for the negligence of its employees. We saw the distinction between direct and vicarious liability at work in *X v Bedfordshire* above. Here too, the proposed liability would be dependent on showing an assumption of responsibility, this time on the part of the employees. Lord Reed first explained that this was not a case, like the education cases in *X v Bedfordshire*, in which educational psychologists could be taken to be 'providing a service', and where liability potentially arose on the basis of *Hedley Byrne* principles. Indicating the significance of the 'assumption of responsibility' in the present law, Lord Reed continued:

> **Lord Reed**
>
> 88. As has been explained, however, the concept of an assumption of responsibility is not confined to the provision of information or advice. It can also apply where, as Lord Goff put it in *Spring v Guardian Assurance plc*, the claimant entrusts the defendant with the conduct of his affairs, in general or in particular. Such situations can arise where the defendant undertakes the performance of some task or the provision of some service for the claimant with an undertaking that reasonable care will be taken. Such an undertaking may be express, but is more commonly implied, usually by reason of the foreseeability of reliance by the claimant on the exercise of such care. In the present case, however, there is nothing in the particulars of claim to suggest that a situation of that kind came into being.
>
> 89. The existence of an assumption of responsibility can be highly dependent on the facts of a particular case, and where there appears to be a real possibility that such a case might be made out, a court will not decide otherwise on a strike-out application. In the circumstances which I have described, however, the particulars of claim do not in my opinion set out any basis on which an assumption of responsibility might be established at trial.

In the absence of any offered basis on which an assumption of responsibility in the *particular* circumstances could be established, the claim was struck out. On the way to this conclusion, however, the Supreme Court had continued its reorientation in the approach to duty of care.

1. Wide-ranging policy considerations were no longer playing the central role, though issues concerning potential conflict with statutory schemes retain their significance;
2. The distinction between 'acts and omissions' was the starting point;
p. 309 3. An 'assumption of responsibility' is the key way in which 'omissions' liability may be justified in this area;
4. An assumption of responsibility may be general, associated with the statutory role being played by the authority;
5. Or, it may be specific, in which case there needs to be sufficient factual basis for it to be argued in a particular case.

We have already visited most of these elements, but it should be noted that proposition 4 (general assumption of responsibility) is itself quite controversial, because it is hard to treat such an assumption of responsibility as 'voluntary'. This issue will be returned to in relation to 'Omissions', below.

Education Cases

In *X v Bedfordshire*, Lord Browne-Wilkinson did not strike out all of the 'education claims'. He said that the individual professionals involved may owe duties of care to the children and, if these were breached, the local authorities could be vicariously liable. Equally, there was one claim based on breach of a direct duty of care which was not struck out. This was a claim based on the proposition that the local authority was offering a 'psychology service' to the public, and that it therefore owed duties of care to members of the public who made use of the service, along the lines of the duty of care for professional services recognized in *Henderson v Merrett*.

In *Barrett v Enfield* (at 557–8), Lord Browne-Wilkinson suggested (rather unusually) that he had been wrong not to strike out the single surviving 'direct duty' claim in *X v Bedfordshire*. This, he thought, had exposed local education authorities to a proliferation of claims. It also illustrated the dangers of striking out, because it showed that appeal courts who are asked to determine questions on a striking out action are in danger of making too many assumptions about the nature of the facts. His mistake was, he now thought, to assume that the 'psychology service' was offered to the public in the same way as any other professional service. In fact, he now understood that the point of the psychology service was not to inform the individuals who were referred to it, but to advise schools and education authorities on the appropriate provision for those individuals. This, he argued, was quite different, and he now thought that recognition of a duty of care would be inappropriate in such circumstances. This point fell to be decided by the House of Lords in the next case, not on assumed facts but in an action on its merits.[47] Despite Lord Browne-Wilkinson's change of heart, the claimant succeeded not just in taking her claim to trial, but also in winning damages.

Phelps v Hillingdon [2001] 2 AC 619

In the first of four appeals heard together by the House of Lords, the claimant was referred by her school, at the age of 12, to the defendant local education authority's school psychology service. An educational psychologist employed by the authority reported no specific weaknesses on the part of the claimant. Shortly

before leaving school, the claimant was diagnosed as dyslexic. She brought an action against the local authority, and was awarded damages.

p. 310 ↵ The House of Lords agreed that the individual educational psychologist owed a duty to the claimant, which had been breached, causing recoverable damage. The local authority was vicariously liable.

Lord Slynn repeated the simpler approach to policy and discretion that was adopted in *Barrett v Enfield*: so long as the issue is suitable for adjudication (it is 'justiciable'), the court will apply the *Caparo* test. The statutory context will of course be *relevant* to an application of this test. But the existence of statutory powers (or of statutory duties which are themselves unenforceable at private law) is in no sense a 'defence' to a negligence action; nor does it justify immunity from the duty of care. He also—consistently with the approach in *Poole*—preferred to approach the liability of the public authority in essentially the same way as the liability of any other party carrying out similar activities or functions, subject to conflict with the statutory background of powers and duties.

What is the Damage?

It is not entirely clear whether Lord Slynn regarded the claim as principally for personal injury in the form of psychological harm, or for economic losses flowing from the failure to diagnose. Indeed he does not seem to have differentiated particularly between these forms of damage. One reason why he did not do so is that he thought the *Caparo* criteria would apply in the same way in either event. But the relevant damage may be important for certain purposes, not least for determining the relevant *limitation period*. The identification of 'damage' was raised in one of the other appeals decided together with *Phelps* by the House of Lords: *Anderton v Clwyd*. It had been argued by the Court of Appeal in this case that even if dyslexia could be treated as 'impairment of a person's physical and mental condition' (the definition of 'personal injuries' adopted in section 35(5) of the Supreme Court Act 1981),[48] that impairment had not been *caused by* the defendants. The defendants had not caused the dyslexia, but had failed to benefit the claimant by offering the best educational options. This argument was rejected by the House of Lords:

> **Lord Slynn, at 664**
>
> … Having regard to the purpose of the provision it would in any event, in my view, be wrong to adopt an overly legalistic view of what are 'personal injuries to a person'. For the reasons given in my decision in the *Phelps* case, psychological damage and a failure to diagnose a congenital condition and to take appropriate action as a result of which a child's level of achievement is reduced (which leads to loss of employment and wages) may constitute damage for the purpose of a claim. … Garland J was right … that a failure to mitigate the adverse consequences of a congenital defect is capable of being 'personal injuries to a person' within the meaning of the rules.

Although the reasoning on this point is less than clear, it was adopted by a later House of Lords in *Adams v Bracknell Forest BC* [2005] 1 AC 76. In this case, which was concerned with the important practical question of *when the limitation period begins to run* in a case of failure to diagnose dyslexia, the House of Lords concluded that it was sensible to treat the damage in a case of this sort *as* personal injury. However, this was not an

appropriate case in which to exercise the discretion which is available to a court in certain personal injury
p. 311 cases ↵ to, in effect, override the applicable time limit. This serves as a reminder that the test for duty of care is not the only mechanism for controlling claims.

Limitation periods in general, and *Adams v Bracknell* in particular, are further discussed in Chapter 8.

3.5 The Significance of Omissions/Failures to Benefit

Omissions and Powers

Shortly after the decision in *X v Bedfordshire*, the House of Lords decided the case of *Stovin v Wise* [1996] AC 923. This decision initially seemed puzzling and hard to place. The subsequent decision in *Gorringe v Calderdale* [2004] UKHL 15 helped to explain the ambit of *Stovin.* But in *Poole v GN*, the Supreme Court attributed much greater significance to *Stovin v Wise* than might have been expected. It was, quite simply, the case which spelled the end of the significance of *Anns v Merton* in the field of public authority liability.

This was not immediately obvious, and even in retrospect, seems a somewhat surprising claim. *Stovin v Wise* and *Gorringe v Calderdale* were cases of 'pure' omission, or of *doing nothing at all*, where the grounds for suggesting that a duty exists is the existence of a statutory power. These cases state that the existence of a statutory power, or of a very general and unenforceable statutory duty, cannot be the sole basis for holding that there is a duty to take positive action. There needs to be some independent reason for holding that there is a positive duty to act *at common law*. The outcome is (simply) that existence of a power or a purely 'public law' style duty does not provide a short cut to finding a duty at common law. The usual principles on positive duties at common law will apply. The Supreme Court seems to have read them more broadly than this:

Lord Reed, *Poole v GN*

> 31. Although the decision in *Anns* was departed from in *Murphy v Brentwood District Council* [1991] 1 AC 398 <https://uk.westlaw.com/Document/I09805101E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>, its reasoning in relation to the liabilities of public authorities remained influential until *Stovin v Wise* [1996] AC 923 <https://uk.westlaw.com/Document/IBFDB8370E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>, where a majority of the House of Lords reasserted the importance of the distinction in the law of negligence between harming the claimant and failing to confer a benefit on him or her, typically by protecting him or her from harm. The distinction between policy and operations was also rejected. The resultant position, as explained by Lord Hoffmann in a speech with which the other members of the majority agreed, was that 'In the case of positive acts, therefore, the liability of a public authority in tort is in principle the same as that of a private person but may be *restricted* by its statutory powers and duties' (p 947: emphasis in original).

Lord Reed went on to add, in a later paragraph ([34]), that '[i]t took time for the significance of *Stovin v Wise* and *Gorringe* to be fully appreciated'.

Stovin v Wise [1996] AC 923

The plaintiff was riding his motorcycle, when the defendant pulled out at a junction and collided with him. The plaintiff was seriously injured. When the plaintiff commenced an action against the defendant, the
p. 312 defendant (or rather, the defendant's insurer) joined the local ↵ authority as co-defendant, arguing that the junction was known to be dangerous because visibility was impaired by the existence of a bank on adjoining land. Accidents had occurred there on at least three previous occasions. The council had looked into the matter, and agreed a surveyor's recommendation that the bank be removed if the landowner agreed. A letter was written to the landowner, but there was no reply and no action was taken to follow it up. The trial judge held that the council, as highway authority, had not breached any statutory duties, but it was in breach of a common law duty of care. He judged the council to be 30 per cent to blame for the damage. The Court of Appeal dismissed an appeal by the council.

The House of Lords held that the local authority owed no duty (either in public law or in negligence) to take positive steps to remove the bank. On the way to this conclusion, their reasoning was complex and in many respects confusing. The issues have subsequently been better explained in *Gorringe v Calderdale* (later in this section).

Lord Hoffmann delivered the leading judgment for the majority. He pointed out (at 943) that this was a case of an *omission to act*. Equally, in this case the *only* reason why the local authority might be thought to be under a duty to act at all was that it had certain powers and duties conferred or imposed upon it by statute. Indeed, the dissenting judgment of Lord Nicholls (with whom, notably, Lord Slynn agreed)[49] argued that a duty to act was *justified by* the existence of a power.

Lord Nicholls, at 931 (dissenting)

> **Omissions and proximity**
>
> The council was more than a bystander. The council had a statutory power to remove this source of danger, although it was not under a statutory duty to do so. Before 1978 the accepted law was that the council could be under no common law liability for failing to act. A simple failure to exercise a statutory power did not give rise to a common law claim for damages: see *East Suffolk Rivers Catchment Board v. Kent*. The decision in *Anns v. Merton London Borough Council* ... liberated the law from this unacceptable yoke. This was the great contribution the Anns case made to the development of the common law.

The true *ratio* of *Stovin* is its rejection of the proposition above. *The existence of a statutory power does not itself give rise to a common law duty to act*. The last remaining 'great contribution of *Anns*' is therefore rejected by the majority in *Stovin* and, subsequently, by *Gorringe.* But this, in itself, is a much narrower proposition than the

suggestion that duties to benefit can only be established within a narrow range of exceptions to a general principle against such liability.

However, there were some more general statements within the judgments. Lord Hoffmann in particular clearly considered that the local authority while not a 'mere bystander' was nevertheless a 'peripheral party'—a party who has failed to benefit others. He emphasized that *positive reasons*, beyond foreseeability of harm, must be shown to justify the imposition of a duty of care. This applies to both acts and omissions.

p. 313

> **Lord Hoffmann, at 949**
>
> … The trend of authorities has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from a person (preferably insured or a public authority) whose act or omission can be said to have caused it. The default position is that he is not.

Despite the conclusion in *Stovin* that the existence of a statutory power does not *in itself* give rise to a duty to act, the possibility was conceded that in some circumstances—primarily in cases of general or specific *reliance*—a positive duty to act may exist.[50] This is very important. The duty in such cases does not arise from the statutory power. It is not clear that *Stovin* really provides authority for the broad propositions contained in the judgment in *Poole*.

Certain other features of Lord Hoffmann's majority judgment in *Stovin* sowed some confusion, but were clarified in the subsequent case of *Gorringe* (below).

> **Lord Hoffmann, at 952–3**
>
> In the case of a mere statutory power, … the legislature has chosen to confer a discretion rather than create a duty. Of course there may be cases in which Parliament has chosen to confer a power because the subject matter did not permit a duty to be stated with sufficient precision. It may nevertheless have contemplated that in circumstances in which it would be irrational not to exercise the power, a person who suffered loss because it had not been exercised, or not properly exercised, would be entitled to compensation. I therefore do not say that a statutory 'may' can never give rise to a common law duty of care. I prefer to leave open the question of whether the *Anns* case was wrong to create any exception to Lord Romer's statement of principle in the *East Suffolk* case and I shall go on to consider the circumstances (such as 'general reliance') in which it has been suggested that such a duty might arise. But the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation. The need to have regard to the policy of the statute therefore means that exceptions will be rare.
>
> In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.

The difficulties are that Lord Hoffmann appears to accept Lord Romer's general statement in *East Suffolk v Kent* (disapproved in *Anns*, but also not easily consistent with later cases such as *Barrett* and *Phelps*); and that he appears to argue that any common law duty in this context would grow out of the statutory powers, whereas we have said that they are independent of such powers.

p. 314

Gorringe v Calderdale [2004] UKHL 15; [2004] 1 WLR 1057

The claimant was driving too fast towards the brow of a hill. Having got to the top, she caught sight of a bus coming up the other side. It was not in her lane but she panicked, crashed, and was injured. She brought an action against the local authority on the basis that it should have repainted the word 'slow' on the road towards the top of the hill.

Here, the local authority was under a relevant statutory *duty*, but this was expressed in such broad and general terms that it could not form the basis of an action at private law. This duty was therefore treated in the same way as the statutory *power* in *Stovin v Wise*. Lord Hoffmann explained:

(a) that the approach in *Stovin v Wise* was limited to cases of pure omission ('doing nothing at all') in which the *only* basis for suggesting there is a duty to act is the existence of a statutory power (or, now, broad public law duty); and

(b) that there probably would be no exceptional cases meeting his criteria of actionability after all. This being the case, there was no need to discuss the concept of 'irrationality' at public law in *Stovin v Wise*. It was probably a mistake to have made any remarks on this subject.

> **Lord Hoffmann**
>
> 31 … The majority [in *Stovin*] rejected the argument that the existence of the statutory power to make improvements to the highway could in itself give rise to a common law duty to take reasonable care to exercise the power or even not to be irrational in failing to do so. It went no further than to leave open the possibility that there might somewhere be a statutory power or public duty which generated a common law duty and indulged in some speculation (which may have been ill-advised) about what that duty might be.
>
> 32 Speaking for myself, I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide. For example, the majority reasoning in *Stovin v Wise* was applied in *Capital & Counties plc v Hampshire County Council* [1997] QB 1004 to fire authorities, which have a general public law duty to make provision for efficient fire-fighting services: see section 1 of the Fire Services Act 1947. The Court of Appeal held, in my view correctly, that this did not create a common law duty.

Emphasizing that the outcomes in these cases do not conflict directly with other developments (in cases such as *Barrett* and *Phelps*), he added:

> 38 My Lords, I must make it clear that this appeal is concerned only with an attempt to impose upon a local authority a common law duty to act based solely on the existence of a broad public law duty. We are not concerned with cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care. In such cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty. A hospital trust provides medical treatment pursuant to the public law duty in the 1977 Act, but the existence of its common law duty is based simply upon its acceptance of a professional
> p. 315 relationship with the patient no different from that which would be accepted by a doctor in private practice. The duty rests upon a solid, orthodox common law foundation and the question is not whether it is created by the statute but whether the terms of the statute (for example, in requiring a particular thing to be done or conferring a discretion) are sufficient to exclude it. The law in this respect has been well established since *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430.

It seems difficult to argue, in the face of these clear statements, that the House of Lords in *Stovin* and *Gorringe* intended to reorient the law in any other case than where the sole argument for a duty of care is based on a statutory power. Yet much more has been built upon these cases in recent decisions of the Supreme Court, as we have just seen. The following comments of Lord Steyn make very clear the limited ambit of *Stovin* and *Gorringe*.

Lord Steyn, *Gorringe v Calderdale*
[2004] 1 WLR 1057

2 There are … a few remarks that I would wish to make about negligence and statutory duties and powers. This is a subject of great complexity and very much an evolving area of the law. No single decision is capable of providing a comprehensive analysis. It is a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary. On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice or what has been called 'the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied': *M (A Minor) v Newham London Borough Council* and *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 663, per Sir Thomas Bingham MR. Sometimes cases may not obviously fall in one category or the other. Truly difficult cases arise.

3 In recent years four House of Lords decisions have been milestones in the evolution of this branch of the law and have helped to clarify the correct approach, without answering all the questions: *X (Minors) v Bedfordshire County Council, Stovin v Wise, Barrett v Enfield London Borough Council* and *Phelps v Hillingdon London Borough Council*. There are two comments on these decisions which I would make. First, except on a very careful study of these decisions, there is a principled distinction which is not always in the forefront of discussions. It is this: in a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered *to create* a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute *excludes* a private law remedy? An assimilation of the two inquiries will sometimes produce wrong results.

4 The second point relates to observations of Lord Hoffmann in his landmark majority judgment in *Stovin v Wise*, to which Lord Hoffmann has made reference in his opinion. …

> "In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are
> ↵ exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised."

p. 316

Since *Stovin v Wise* these observations have been qualified in *Barrett's* and *Phelps's* cases. I say that not because of the context of the actual decisions in those cases—in *Barrett's* case a council's duty to a child in care and in *Phelps's* case a duty of care in the educational field. Rather it is demonstrated by the legal analysis which prevailed in those decisions.

> 5 These qualifications of *Stovin v Wise* have been widely welcomed by academic lawyers. A notably careful and balanced analysis is that of Professor Paul Craig, *Administrative Law*, 5th ed (2003), pp 888–904. He stated, at p 898:
>
> > "There are many instances where a public body exercises discretion, but where the choices thus made are suited to judicial resolution. The mere presence of some species of discretion does not entail the conclusion that the matter is thereby non-justiciable. In the United States, it was once argued that the very existence of discretion rendered the decision immune from negligence. As one court scathingly said of such an argument, there can be discretion even in the hammering of a nail. Discretionary judgments made by public bodies, which the courts feel able to assess, should not therefore preclude the existence of negligence liability. This does not mean that the presence of such discretion will be irrelevant to the determination of liability. It will be of relevance in deciding whether there has been a breach of the duty of care. It is for this reason that the decisions in *Barrett* and *Phelps* are to be welcomed. Their Lordships recognised that justiciable discretionary choices would be taken into account in deciding whether the defendant had acted in breach of the duty of care. There may also be cases where some allegations of negligence are thought to be non-justiciable, while others may be felt suited to judicial resolution in accordance with the normal rules on breach."

Overall, the House of Lords in *Gorringe* clarified the narrow ambit of *Stovin v Wise*. Besides the specific conclusion that the local authority owed no duty to take positive steps to remove the hazard in *Stovin*, or to provide a warning in *Gorringe*, the cases hold that existence of a power or public law duty does not give rise to a duty to act at private law; and that there was no reason (for example, of general or specific reliance) to recognize a duty in such cases.

This means the cases should have no application in circumstances where positive steps are taken, such as *East Suffolk* itself. But it should also mean that it has no application in a case such as *X v Bedfordshire*, where children had been interviewed and decisions made about whether or not to take into care. In other words, *Stovin* and *Gorringe* are not broad enough to form the basis of the Supreme Court's current interpretation of the welfare cases in *X v Bedfordshire*, and that interpretation should be seen as novel.

It is also worth mentioning the continued application of *East Suffolk* in certain 'emergency cases', one of which was referred to by Lord Hoffmann with approval in *Gorringe* (above). In this case, *Capital and Counties plc v Hampshire County Council* [1997] 1 QB 1004, the Court of Appeal held that a fire service attending a fire was not in a sufficient relationship of proximity with the owner of the premises to come under a duty of care. Their duties were owed to the public at large, even if they were in attendance. This conclusion was supported by the authority of *Alexandrou v Oxford* [1993] 4 All ER 328, in which it was held that no duty was owed by police
p. 317 officers to the owner or occupier of premises which they attended ↵ in response to a burglar alarm, on the basis of lack of proximity. Yet there *was* liability in a case where the fire brigade had not only attended and fought the fire, but also turned off the sprinkler system which was the plaintiffs' own defence against the spread of fire. The Court of Appeal clearly reasoned in terms of *East Suffolk*.

Subsequently in *Kent v Griffiths* [2000] 2 WLR 1158, a different Court of Appeal thought there could be liability where an ambulance had failed to attend quickly, and no convincing reason or explanation was ever given. The consequence was the claimant suffered very severe injury, which could have been avoided.[51] The court tried to distinguish between the ambulance service, as an element of a health service, and a fire service, but this distinction is not particularly convincing. *Kent v Griffiths* may illustrate the impact that a finding of fact can have upon a court: the action had proceeded to trial, and the judge had found that the ambulance crew had even attempted to falsify the records. Lord Woolf echoed the idea in *Barrett* that striking out should be exercised with restraint, and that the test for breach of duty will itself restrict the number of successful claims. This approach, as we have seen, has not generally found favour in recent years; although the decision of the Supreme Court in *Smith v Ministry of Defence*, explored below, suggests some continued scope.

Protection from Others: Assumption of Responsibility

The new emphasis in cases such as *Robinson* and *Poole* on the distinction between causing harm, and failing to benefit, also depends on a good understanding of the law relating to public authorities who fail to *protect claimants from others*. That, in fact, was the basis of the claim in *Poole*, where it was argued that a vulnerable family should have been housed elsewhere, and thereby protected from harassment on the part of their neighbours, who were known to be problem tenants. Clearly, this was not a case of 'doing nothing' in the sense of *Stovin v Wise*. The Supreme Court turned to the following decision to help guide its thinking. We have already encountered the decision in Chapter 4, in relation to acts and omissions.

In *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] 1 AC 874, Lords Hope and Brown set out a range of cases where a defendant (in this instance a public authority) may owe a duty of care to an individual, to protect them from harm done by a third party. These are situations where:

(i) the defendant created the risk or danger that the third party may cause harm;[52]

(ii) the third party is under the control or supervision of the defendant, as in *Dorset Yacht v Home Office* ([1970] AC 1004); or

(iii) the defendant assumed responsibility towards the claimant.

We saw in relation to pure economic losses, in the previous section, that an assumption of responsibility is sometimes treated as justifying a duty of care where none would otherwise exist. We also explained that the notion of duty arising from an 'assumption of responsibility' has come to be deployed outside the field of economic losses; and that it has been narrowly or broadly defined in different circumstances.

p. 318 ↵ In the particular context of statutory powers and duties, it had been made clear, in decisions such as *Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598, that the exercise of a statutory power or duty in relation to the claimant cannot itself amount to an 'assumption of responsibility'. To be effective, an assumption of responsibility had to be both *specific*, and to some degree *voluntary*.

Mitchell v Glasgow illustrates the approach. The deceased was a tenant of the defendant council, and had been attacked by a fellow tenant and neighbour. The attacker had attended a meeting with the council where he had been told that he risked eviction following earlier threats to the deceased. He had previously attacked the home of the deceased with an iron bar, albeit some years previously, and had been threatening and abusive.

The deceased had been given no warning of the meeting. The House of Lords held that no relevant duty of care had been owed to the deceased. There would generally be no duty to warn. Policy issues—particularly a desire not to prevent the authority from pursuing its essential social welfare functions—were to the fore, and such a duty was considered likely to be onerous. It was surmised that it would add complexity to an already sensitive process.[53] It was recognized that the usual approach may be overridden in the circumstances set out above. However, they were not present in this case. As Lord Rodger put it (at [63]), 'The pursuers point to no undertaking or other circumstance which would show that, exceptionally, the Council had made themselves responsible for protecting Mr Mitchell'.

This restrictive approach to finding an assumption of responsibility was followed by the Court of Appeal in *X & Y v Hounslow LBC* [2009] EWCA Civ 286. Here, the claimants were vulnerable adults and were subjected to abuse in their own flat by young people who were known to be entering their home. The Court of Appeal emphasized that a specific assumption of responsibility, by words or deeds, would need to be shown, if a duty to protect from others was to be established. Indeed, the court went so far as to suggest that a specific individual would need to have both assumed responsibility, and breached the duty, for the claim to be actionable. It is suggested that this is, to say the least, an unusual requirement where the defendant is an organization.

The Supreme Court in *Poole*, however, appears to have relaxed this requirement quite considerably, whilst not suggesting that any of the above decisions were incorrect. An assumption of responsibility may be inherent in the role carried out by a defendant authority, even if this role is performed in pursuit of a statutory duty. For this reason, it would appear to follow that not all assumptions of responsibility are *voluntary*. And indeed, because this general form of assumption of responsibility can exist, it need not be *specific*. There were two potential routes to an assumption of responsibility in *Poole*, and both needed to be considered: was the authority in such a position in relation to the claimant that its conduct in pursuit of its statutory powers and duties amounted to an assumption of responsibility? This may be the case, for example, if providing a 'service' or something analogous to it, whatever the statutory background. Alternatively, was there a *specific* assumption of responsibility, arising from the particular facts in this case? This 'dual route' to showing an assumption of responsibility is highly significant. This approach can arguably be seen at work in previous authorities such as *X v Bedfordshire*, but it was not obvious that it existed. The *test* for whether such an assumption existed would be derived from cases encountered in relation to economic losses—*Hedley Byrne*, and *Spring v Guardian Assurance*.

p. 319 **Lord Reed, *Poole v GN***

> 73. There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is *Phelps v Hillingdon*, where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owed to their employers. Another example is *Barrett v Enfield*, where the assumption of responsibility arose out of the local authority's performance of its functions under child care legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne* and *Spring v Guardian Assurance plc*.

We saw in the previous section that in *Steel v NRAM*, the assumption of responsibility was addressed chiefly in terms of the reasonableness of reliance, which might indicate a change in direction in the law, even if principally applicable to cases of negligent misstatement; and that the notion might have to be developed to fit cases to which it did not naturally apply. In *Poole*, the Supreme Court has stated that the assumption of responsibility need not necessarily be voluntary, or specific, as had been stated in some leading authorities. As the assumption of responsibility is given increasing emphasis, it is worth noting that its *content* is also shifting. The general purpose of the assumption of responsibility appears to be to mark out exceptional cases in which liability will be established, in areas where the general rule is that there is no duty. It is currently thought a more appropriate basis for these cases. Policy reasons on the other hand are generally seen as negative reasons for rejecting a duty, and they are disapplied when the assumption of responsibility is present. As we have seen in Chapter 4, they are also disapplied when the case falls within an 'established category' of claim. At the same time that there is an increased emphasis on assumption of responsibility, the actual content of the assumption is undergoing change.

3.6 Police Liability and the Development of Convention Rights

Even before the advent of the HRA, the UK's obligations under the ECHR had made themselves felt in respect of liability in the tort of negligence, against State defendants, and most particularly the police. At that stage, when the Convention rights were not directly part of English law, it was largely Article 6 which was in issue, as it was argued (initially successfully) that the courts' invocation of policy reasons for restricting liability offended claimants' right to have their civil claim heard. That argument has now been defeated. More recently, with direct liability on the part of public authorities under the HRA for failure to act compatibly with the rights (and sometimes, for failure to secure the rights), attention has moved to other Articles of the Convention. Claims under the HRA now often run parallel to negligence claims. Other issues relating to Convention rights have already been raised in this chapter (see the discussion of *D v East Berkshire*, above), and more are to be found in Chapters 2 (especially in respect of Article 5, Liberty); 11 (Article 1, First Protocol—
p. 320 property); and ↵ Chapters 14 and 15 (Articles 8 and 10, Privacy and expression). The approach to assessment of damages for breach of Convention rights under the HRA is explored in Chapter 9.

We begin by exploring the influence of Article 6, which has led the courts to avoid 'immunities' and, for a time, caused caution in striking out on policy grounds. We have already seen that such caution is no longer evident, but the history of Article 6 has nevertheless affected the current pattern of liabilities imposed upon public authorities. At present, different Convention rights have come to the fore, and most particularly Article 2 (Right to Life). The existence of positive duties to protect such rights arguably creates new pressures on the law of tort, as remedies for breach of the positive duty become more familiar in domestic courts. We have already seen that this has made it harder to maintain policy arguments against private law duties in the same circumstances. Against this background, there has been a shift to other reasons for maintaining restrictive rules, principally the act-omission distinction, as explained above; and the need to avoid conflicting duties, in a subsidiary and as yet unclear role. Cases involving the police have played a particularly significant part in this transition, partly because of the very protective approach adopted by the courts during the *Anns* era, which was continued in slightly different terms in the era of *Caparo*. Here, the reorientation in recent law is especially significant.

European Convention on Human Rights

> #### Article 6 Right to a fair trial
>
> 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …

Hill v Chief Constable of South Yorkshire Police [1989] 1 AC 53

The plaintiff's daughter was the final victim of a serial killer, Peter Sutcliffe, who had been preying on young single women in the area. The plaintiff argued that the police owed a duty to her daughter to conduct their investigation into the murders with reasonable care, that they had breached this duty, and that this had led to the death of her daughter. The House of Lords agreed with the first instance judge and with the Court of Appeal that no duty of care was owed, and the action was struck out.

After reviewing the applicable authorities including *Anns v Merton* and *Dorset Yacht v Home Office*, Lord Keith outlined two separate reasons why no duty of care could be established in this case. Either reason would be sufficient in its own right.

The first reason relates to lack of proximity between the parties. The second reason relates to *policy concerns. Hill* was decided by applying the two-stage test for the existence of a duty of care, under *Anns v Merton*. These reasons correspond with the two stages of *Anns*.

Lord Keith, at 62–3

In the instant case the identity of the wanted criminal was at the material time unknown and it is not averred that any full or clear description of him was ever available. The alleged negligence of the police consists in a failure to discover his identity. But if there is no general duty of care owed to
p. 321 individual members of the public by the responsible authorities to prevent ↵ the escape of a known criminal or to recapture him, there cannot reasonably be imposed upon any police force a duty of care similarly owed to identify and apprehend an unknown one. Miss Hill cannot for this purpose be regarded as a person at special risk simply because she was young and female. Where the class of potential victims of a particular habitual criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of an habitual burglar, and all females those of an habitual rapist. The conclusion must be that although there existed reasonable foreseeability of likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the Home Office in the *Dorset Yacht* case. Nor is there present any additional characteristic such as might make up the deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire Police.

That is sufficient for the disposal of the appeal. But in my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. In *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 193, I expressed the view that the category of cases where the second stage of Lord Wilberforce's two stage test in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751–752 might fall to be applied was a limited one, one example of that category being *Rondel v. Worsley* [1969] 1 A.C. 191. Application of that second stage is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure—for example, that a police officer negligently tripped and fell while pursuing a burglar—others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example, as to which particular line of inquiry is most advantageously to be pursued

> and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been
> p. 322 competently conducted. I therefore consider that Glidewell L.J., in his ↵ judgment in the Court of Appeal [1988] Q.B. 60, 76 in the present case, was right to take the view that the police were immune from an action of this kind on grounds similar to those which in *Rondel v. Worsley* [1969] 1 A.C. 191 were held to render a barrister immune from actions for negligence in his conduct of proceedings in court.

At the end of this catalogue of policy reasons, Lord Keith refers to the police as 'immune' from such an action. This was perhaps not the best terminology to use to summarize the preceding discussion. But the effect was reinforced by comparison with the barristers' immunity recognized in *Rondel v Worsley* [1969] 1 AC 191. That immunity was abolished in *Arthur JS Hall v Simons* [2002] 1 AC 615. The policy considerations had changed, as had the tort of negligence and the organization of the legal profession.[54] Having decided that policy arguments now weighed *against* the immunity, the House of Lords did not consider whether the immunity would be in violation of Article 6 of the ECHR. But it is probable that the barristers' immunity was considered to be under threat, given the European Court of Human Rights' decision in *Osman v UK*. In order to understand *Osman v UK*, it is necessary to examine the way that *Hill* was interpreted by the Court of Appeal in *Osman v Ferguson*, which led to the action against the UK.

Osman v Ferguson [1993] 4 All ER 344 (CA)

A school teacher (P) became obsessed with a 15-year-old pupil (O). Because of his conduct (including criminal damage, painting graffiti about O, and changing his name to Osman), he was dismissed from his job. He continued to harass O and his family. The police were aware of these events, and P had told police that he might 'do something criminally insane'. After further acts of aggression, of which the police were aware, P eventually followed O home, and shot him (causing serious injury) and his father (who was killed). P was convicted of manslaughter. O and his mother (for her husband's estate) brought an action in negligence against the police, for failing to arrest and charge P on the basis of what was known, therefore failing to prevent the shooting. This, like *Hill*, was a case of *failure to prevent*.

The Court of Appeal accepted that this case was different from *Hill*, in that it was arguable that there was *proximity* and indeed *a special relationship* between the parties.

> **McCowan J**
>
> Returning to the facts of the present case and again on the assumption that they are proved, it seems to me that it can well be said on behalf of the plaintiffs that the second plaintiff and his family were exposed to a risk from Paget-Lewis over and above that of the public at large. In my judgment the plaintiffs have therefore an arguable case that as between the second plaintiff and his family, on the one hand, and the investigating officers, on the other, there existed a very close degree of proximity amounting to a special relationship. …

The claim was struck out, however, because the policy arguments set out in *Hill* were thought to determine this case. The difficulty is that the judgments in *Hill* seem to have been interpreted as though they laid down a
p. 323 binding rule, that no action against the police could succeed ↵ in respect of 'investigation and suppression of crime'. The *Caparo* criteria (then generally thought to set out the basis of liability in negligence claims) were not considered afresh in relation to the facts of the case in hand. Rather, the conclusion in one case was seen as binding in another.

> … Mr Hendy submitted that the present was a case depending on the decision of one or more difficult points of law and that we should therefore refuse to entertain the claim to strike out. I cannot agree. I consider this a plain and obvious case falling squarely within a House of Lords decision. I would therefore allow the appeal.

It is understandable that the European Court of Human Rights interpreted this *particular* case as disclosing an 'immunity'—not least because that word was used in *Hill* itself, and a parallel was drawn with the true immunity, now discontinued, afforded to barristers in the conduct of a case.

Osman v UK
[1999] 1 FLR 193

> (134) … The applicants maintained that although they had established all the constituent elements of the duty of care, the Court of Appeal was constrained by precedent to apply the doctrine of police immunity developed by the House of Lords in the *Hill* case (see para (90) above) to strike out their statement of claim. In their view the doctrine of police immunity was not one of the essential elements of the duty of care as was claimed by the Government, but a separate and distinct ground for defeating a negligence action in order to ensure, inter alia, that police manpower was not diverted from their ordinary functions or to avoid overly cautious or defensive policing.
>
> (135) The Commission agreed with the applicants that Art 6(1) was applicable. It considered that the applicants' claim against the police was arguably based on an existing right in domestic law, namely the general tort of negligence. The House of Lords in the *Hill* case modified that right for reasons of public policy in order to provide an immunity for the police from civil suit for their acts and omissions in the context of the investigation and suppression of crime. In the instant case, that immunity acted as a bar to the applicants' civil action by preventing them from having an adjudication by a court on the merits of their case against the police.
>
> …
>
> (139) … the Court considers that the applicants must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in the *Hill* case. In the view of the Court the assertion of that right by the applicants is in itself sufficient to ensure the applicability of Art 6(1) of the Convention.
>
> (140) For the above reasons, the Court concludes that Art 6(1) is applicable. It remains to be determined whether the restriction which was imposed on the exercise of the applicants' right under that provision was lawful.

p. 324 ↵ The denial of the opportunity for adjudication was sufficient to *engage* Article 6(1). It did not mean in itself that Article 6 had been violated. This is because the general policy objective of *Hill* was legitimate. In finding that there was a violation of Article 6, the court had regard to the *proportionality* of the protection accorded to this policy objective, bearing in mind the gravity of the harm foreseeably suffered by the plaintiff,[55] *and* the way in which the immunity was interpreted in *Osman v Ferguson* itself:

Osman v UK
[1999] 1 FLR 193

> (149) The reasons which led the House of Lords in the *Hill* case to lay down an exclusionary rule to protect the police from negligence actions in the context at issue are based on the view that the interests of the community as a whole are best served by a police service whose efficiency and effectiveness in the battle against crime are not jeopardised by the constant risk of exposure to tortious liability for policy and operational decisions.
>
> (150) Although the aim of such a rule may be accepted as legitimate in terms of the Convention, as being directed to the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime, the Court must nevertheless, in turning to the issue of proportionality, have particular regard to its scope and especially its application in the case at issue. While the Government have contended that the exclusionary rule of liability is not of an absolute nature (see para (144) above) and that its application may yield to other public policy considerations, it would appear to the Court that in the instant case the Court of Appeal proceeded on the basis that the rule provided a watertight defence to the police and that it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime.
>
> (151) The Court would observe that the application of the rule in this manner without further inquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.

Osman v UK has been criticized for its interpretation of the role of policy in the tort of negligence.[56] It is indeed incorrect to say that under *Caparo* 'policy' was an additional factor. It was always a core part of the *Caparo* criteria. But *Hill* was decided in accordance with *Anns*, and the division of that test into two stages may understandably give the false impression that policy is an additional criterion. Lord Hoffmann, writing extra-judicially, was particularly trenchant about *Osman v UK*. His broader remarks have some continuing force despite the discrediting of *Osman* itself:

p. 325 **Rt Hon Lord Hoffmann, 'Human Rights and the House of Lords'**
(1999) 62 MLR 159, at 164, 165–6

> I am bound to say that this decision [*Osman v UK*] fills me with apprehension. Under the cover of an Article which says that everyone is entitled to have his civil rights and obligations determined by a tribunal, the European Court of Human Rights is taking upon itself to decide what the content of those civil rights should be. In so doing, it is challenging the autonomy of the courts and indeed the Parliament[57] of the United Kingdom to deal with what are essentially social welfare questions involving budgetary limits and efficient public administration. …
>
> Of course it is true that the Strasbourg court acknowledges the fact that often there is no right answer by allowing what it calls a 'margin of appreciation' to the legislature or courts of a member State. Within limits, they are allowed to differ. And, as I have said, I accept that there is an irreducible minimum of human rights which must be universally true. But most of the jurisprudence which comes out of Strasbourg is not about the irreducible minimum. … The *Osman* case, dealing with the substantive civil law right to financial compensation for not receiving the benefit of a social service, is as far as one can imagine from basic human rights. …

Notice that here Lord Hoffmann argues that the right to compensation for not receiving the benefit of a social service (protection from crime) is a matter *not* of human rights, but of 'social welfare', involving budgetary constraints. A similar outlook can be seen throughout the Government's 2021 Consultation on the Human Rights Act, which was extracted in Chapter 1.4. Lord Hoffmann's opinion of the European Court of Human Rights did not appear to mellow once *Z v UK* altered the approach to negligence.[58] In certain more recent decisions—such as *Rabone* and *Smith v Ministry of Defence*, extracted below—the UK Supreme Court has been sufficiently confident to *lead* the development of Convention jurisprudence in relation to tort-like liability. In this sense, time has certainly altered the approach of English courts to the Convention rights in relation to liability of public authorities. But this development appears to be unwelcome from the point of view of the UK Government. In seeking to make the UK Supreme Court the ultimate arbiter of human rights within the jurisdiction, there is nevertheless criticism of this confidence in *leading* the development of human rights. In reality, it is the Government's own view of the rights—avoiding judicial expansion—that the Government wishes to secure.

On the other hand, certain criticisms of *Osman v Ferguson* itself are well made. The Court of Appeal in that decision did indeed seem to interpret the immunity in *Hill* as if it were a general rule to be applied in all cases of 'investigation and suppression of crime', without regard to the precise facts of the case. Subsequent cases such as *Barrett v Enfield* (above) and *Brooks v Commissioner of the Metropolis* (below) adopted a much more nuanced approach to the policy issues and courts became less ready to translate—let alone 'apply'—policy arguments developed in one case, in order to dispose of a quite different case.

p. 326

Z v UK [2001] 2 FLR 612

The losing plantiffs in *X v Bedfordshire*[59] commenced proceedings against the UK, alleging violations of Articles 3, 6, 8, and 13 of the Convention. Importantly, the European Court of Human Rights accepted that it had been mistaken in the earlier case of *Osman v UK* as to the role of policy in the tort of negligence. The Court concluded that no 'immunity' was applied in *X v Bedfordshire* itself. There was therefore no violation of Article 6. This conclusion was assisted by consideration of *Barrett v Enfield* and other later cases. In the rush to note that *Osman* has been discredited on the 'immunity' point, it is easy to overlook that this happened partly because courts became careful not to be seen to apply 'blanket' policy reasoning.

The Court held that there were violations of Articles 3 and 13 in this case. We have already explored the impact of this in domestic law, via the HRA, when we considered *D v East Berkshire* (earlier).

Brooks v Commissioner of Police for the Metropolis [2005] 1 WLR 1495

In this case the House of Lords considered whether *Hill v Chief Constable* could be followed, without falling foul of Article 6. The essential facts and background to the case are encapsulated in the first paragraph of Lord Bingham's judgment.[60] In paragraph two, Lord Bingham also sets out the three specific duties argued for by the claimant.

Lord Bingham, *Brooks v Commissioner of Police for the Metropolis*
[2005] UKHL 24; [2005] 1 WLR 1495

1 My Lords, Duwayne Brooks, the respondent, was present when his friend Stephen Lawrence was abused and murdered in the most notorious racist killing which our country has ever known. He also was abused and attacked. However well this crime had been investigated by the police and however sensitively he had himself been treated by the police, the respondent would inevitably have been deeply traumatised by his experience on the night of the murder and in the days and weeks which followed. But unfortunately, as established by the public inquiry into the killing (The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny (1999)) (Cm 4262-I), the investigation was very badly conducted and the respondent himself was not treated as he should have been. He issued proceedings against the Metropolitan Police Commissioner and a number of other parties, all but one of whom were police officers.

2 ... the only issue before the House is whether, assuming the facts pleaded by the respondent to be true, the Commissioner and the officers for whom he is responsible arguably owed the respondent a common law duty sounding in damages to (1) take reasonable steps to assess whether the respondent was a victim of crime and then to accord him reasonably appropriate protection, support, assistance and treatment if he was so assessed; (2) take reasonable steps to afford the respondent the protection, assistance and support commonly afforded to a key eye-witness to a serious crime of violence; (3) afford reasonable weight to the account that the respondent gave and to act upon it accordingly.

p. 327

Lord Steyn

27 Since the decision in *Hill's* case there have been developments which affect the reasoning of that decision in part. In *Hill's* case the House relied on the barrister's immunity enunciated in *Rondel v Worsley* [1969] 1 AC 191. That immunity no longer exists: *Arthur J S Hall & Co v Simons* [2002] 1 AC 615. More fundamentally since the decision of the European Court of Human Rights in *Z v United Kingdom* (2001) 34 EHRR 97, 138, para 100, it would be best for the principle in *Hill's* case to be reformulated in terms of the absence of a duty of care rather than a blanket immunity.

28 With hindsight not every observation in *Hill's* case [1989] AC 53 can now be supported. Lord Keith of Kinkel observed, at p 63, that

> "From time to time [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it".

Nowadays, a more sceptical approach to the carrying out of all public functions is necessary.

> 29 Counsel for the Commissioner concedes that cases of assumption of responsibility under the extended *Hedley Byrne* doctrine (*Hedley Byrne & Co Ltd v Heller & Partner Ltd* [1964] AC 465) fall outside the principle in *Hill's* case. In such cases there is no need to embark on an inquiry whether it is 'fair, just and reasonable' to impose liability for economic loss: *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830.
>
> 30 But the core principle of *Hill's* case 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's* case, 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: compare the Police (Conduct) Regulations 2004 (SI 2004/645). But to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence: see section 29 of the Police Act 1996, read with Schedule 4 as substituted by section 83 of the Police Reform Act 2002; section 17 of the Police (Scotland) Act 1967; *Halsbury's Laws of England*, 4th ed reissue (1999), vol 36(1), para 524; *The Laws of Scotland, Stair Memorial Encyclopaedia*, vol 16, (1995), para 1784; *Moylan, Scotland Yard and the Metropolitan Police*, (1929), p 34. A retreat from the principle in *Hill's* case would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill's case*, be bound to lead to an unduly defensive approach in combating crime.

On a cynical day, one might say that the only difference between this approach, and *Hill* itself, is the emphasis on the possibility of 'extreme cases' (indicating that this is not a case of 'blanket' policy thinking), and the change in language from 'immunity', to 'no duty'. But Lord Steyn also makes the fundamentally important
p. 328 point that it is not always appropriate ↵ for individuals' claims in tort to succeed, without regard to the impact on broader interests. The HRA, like the European Convention on Human Rights itself, in no way requires that individual interests should always prevail over community interests. This interpretation of the Convention rights is further illustrated in Chapter 14, in respect of defamation and Chapter 2, in connection with false imprisonment.

So far as the law of tort is concerned, the question that arises after *Brooks* is whether there is any scope for a duty on the part of the police to prevent harm being caused to a claimant.

Positive Duties to Protect Convention Rights

Following *Osman v UK*, a positive duty under Article 2 will be owed by states—and, under the HRA, by a relevant public authority—when that public authority knows or ought reasonably to know that there is an imminent threat to the life of the victim. This positive duty to protect life is not expressly set out in Article 2 itself, but has become well established. There is more than one positive duty under Article 2, as Lord Dyson explains in the next extract.

Lord Dyson, *Rabone v Pennine Care NHS Trust*
[2012] UKSC 2

> 12 … I need to set the scene by making a few introductory comments about article 2 of the Convention which provides: 'Everyone's right to life shall be protected by law.' These few words have been interpreted by the European Court of Human Rights ('the ECtHR' or 'Strasbourg') as imposing three distinct duties on the state: (i) a negative duty to refrain from taking life save in the exceptional circumstances described in article 2.2; (ii) a positive duty to conduct a proper and open investigation into deaths for which the state might be responsible; and (iii) a positive duty to protect life in certain circumstances. This latter positive duty contains two distinct elements. The first is a general duty on the state 'to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life': see *Öneryildiz v Turkey* (2004) 41 EHRR 325, para 89 applying, mutatis mutandis, what the court said in *Osman v United Kingdom* (1998) 29 EHRR 245, para 115. The second is what has been called the 'operational duty' which was also articulated by the court in the Osman case. This was a case about the alleged failure of the police to protect the Osman family who had been subjected to threats and harassment from a third party, culminating in the murder of Mr Osman and the wounding of his son. The court said that in 'well-defined circumstances' the state should take 'appropriate steps' to safeguard the lives of those within its jurisdiction including a positive obligation to take 'preventative operational measures' to protect an individual whose life is at risk from the criminal acts of another: para 115. At para 116, the court went on to say that the positive obligation must be interpreted 'in a way which does not impose an impossible or disproportionate burden on the authorities'. In a case such as Osman, therefore, there will be a breach of the positive obligation where:
>
> > "the authorities knew or ought to have known at the time of the existence 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." (See para 116.)

The duty recognized in *Osman v UK* is an *operational* duty: it arises in light of the specific circumstances of the case.

p. 329 ↵ In *Mitchell v Glasgow City Council* [2009] UKHL 11, there was considered to have been no reason for the defendants to apprehend an imminent threat to the life of the claimant, and there was no actionable failure to respect the Article 2 rights of the deceased. A similar result was found in the following case of police liability, decided by the House of Lords shortly before *Mitchell*. But, as we will see, the range of circumstances in which the operational duty to protect life will be recognized both by Strasbourg, and by our domestic courts, has subsequently appeared to expand. The landscape has changed markedly in a short time where positive duties to protect Convention rights are concerned.

Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of the Sussex Police [2008] UKHL 50; [2009] 1 AC 225

In these joined appeals, the House of Lords considered two different sources of duty—common law and the HRA—in connection with failures to prevent attacks on the claimants. The *Van Colle* claim was argued only under the HRA, on the basis of a failure to secure the Article 2 right to life. This claim failed, because there were insufficient grounds to apprehend an imminent threat to the life of the subject. The proposed involvement of the defendants in creating the danger to the deceased, in that he was due to appear as a witness in a criminal trial and was murdered by the accused, did not in any sense lower the threshold for application of the *Osman* test, which was invariable. In *Van Colle v UK* (2013) 56 EHRR 23, the European Court of Human Rights came to the same conclusion: the risk factors were lower than in *Osman* itself.

The *Smith* case by contrast was argued only in negligence at common law. Here, the claimant had been attacked and seriously injured by his former partner. He had clearly apprehended the threat that his former partner posed to him and had disclosed this to police. The claim therefore was that they had ample reason to arrest his attacker, and owed a duty to the claimant to do so. This is a similar case to *Osman v Ferguson*.[61] Its resolution should clearly indicate whether intervening developments have altered the blanket nature of the *Hill* policy concerns.

If the policy arguments set out in *Hill* and more selectively adopted in *Brooks* allowed for any exceptions on the basis of proximity or clear identification of the likelihood of attack by an identified assailant,[62] one would have thought that *Smith* was that case. Equally, if common law duties were still expanding under the influence of the Convention rights, then this case (where there surely might have been reasonable grounds to apprehend an attack) should stand a chance of success. The House, however, held that no duty of care arose.

Lord Bingham, in dissent, would have recognized a duty on the police in this case. His view on the separation of common law and Convention rights is far less stark than the majority view.

> **Lord Bingham (dissenting)**
>
> 58. … It seems to me clear, on the one hand, that the existence of a Convention right cannot call for instant manufacture of a corresponding common law right where none exists: see
> p. 330 *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406. On the other hand, one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law, and it is demonstrable that the common law in some areas has evolved in a direction signalled by the Convention: see the judgment of the Court of Appeal in *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558, paras 55–88. There are likely to be persisting differences between the two regimes, in relation (for example) to limitation periods and, probably, compensation. But I agree with Pill LJ in the present case (para 53) that 'there is a strong case for developing the common law action for negligence in the light of Convention rights' and also with Rimer LJ (para 45) that 'where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it'. Since there is no reliance on the Convention in this case I do not think it profitable to consider whether, had he chosen to do so in time, Mr Smith could have established a breach of article 2 on the facts of this case.

Lord Bingham proposed a 'liability principle' which reflects the content of the Convention right to life. He was prepared to say there was an 'assumption of responsibility', if that was thought necessary.

> **Lord Bingham (dissenting)**
>
> 44. Differing with regret from my noble and learned friends, I consider that the Court of Appeal were right, although I would go further: if the pleaded facts are established, the Chief Constable did owe Mr Smith a duty of care. The question whether there was a breach of that duty cannot be addressed until the defence is heard. I would hold that if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed. I shall for convenience of reference call this 'the liability principle'.

This principle was not accepted by the other members of the House. Lord Hope concluded that the policy goals served by *Hill* and *Brooks* could not be secured if duty depended on a case-by-case analysis. There needed to be a clear and general denial of duty. This would appear to be the very sort of 'immunity' based on policy considerations, rather than proximity, which was applied in *Osman v Ferguson*. It stands in contrast to Lord Hope's own judgment in relation to service personnel in the later case of *Smith v Ministry of Defence* (extracted later in this section). It should be noted that this way of thinking has now been reversed by the Supreme Court in *Michael* and *Robinson*. It is not, now, the policy reasoning which takes centre stage, but the distinction between acts and omissions. Lord Hope's reasoning in *Brooks* serves as an example of the difference that these recent cases—extracted below—have made.

> **Lord Hope**
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> 75. The phrase ‘the interests of the whole community’ was echoed in the last sentence of the passage which I have quoted from Lord Steyn’s opinion in *Brooks*. There is an echo too in
> p. 331 *Brooks* of the warning against yielding to arguments based on civil liberties: see the first sentence of that quotation where he warns against a retreat from the core principle. The point that he was making in *Brooks*, in support of the core principle in *Hill*, was that the principle had been enunciated in the interests of the whole community. Replacing it with a legal principle which focuses on the facts of each case would amount, in Lord Steyn’s words, to a retreat from the core principle. We must be careful not to allow ourselves to be persuaded by the shortcomings of the police in individual cases to undermine that principle. That was the very thing that he was warning against, because of the risks that this would give rise to. As Ward LJ said in *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464, 487, the greater public good outweighs any individual hardship. A principle of public policy that applies generally may be seen to operate harshly in some cases, when they are judged by ordinary delictual principles. Those are indeed the cases where, as Lord Steyn put it, the interests of the wider community must prevail over those of the individual.

Lord Brown emphatically proposed that there was no need for common law to develop in such cases. He argued, like Lord Hope, that such claims were much better ruled out ‘on a class basis’, since cases far less meritorious than the one before the House would be brought if the doors were opened to this claim. He also, like Lord Hope, emphasized that on occasion, individuals will lose out in their civil claims in order to benefit the public. *Caparo* itself was an instance of this. Lord Bingham’s view was that the content of basic human rights guarantees should be reflected in domestic law, and that such rights are rather different from the kind of interest that the claimants in *Caparo* sought to protect. By contrast, the existence of a remedy under the HRA is a vital link in Lord Brown’s argument: given the existence of liabilities under the HRA, development of the common law is ‘simply unnecessary’. The question was, which view would prevail? Would policy reasons for restraining the tort of negligence continue to be invoked, even as claims in respect of positive duties under Article 2 become increasingly familiar? We have already seen that in relation to child welfare, the existence of claims under the HRA has been used as a reason to *dismiss* the policy reasoning, and find alternative bases for decisions. The following case made an important contribution to the developments in public authority liability in general, and became a catalyst for much wider development in *Robinson* (below) and *Poole* (in the previous section).

Michael v Chief Constable of South Wales Police [2015] UKSC 2

The victim was murdered by her former partner. She had made an emergency call to the police on her mobile phone, saying that the former partner had found her at her home with another man and had left to take him home, but that he said he planned to return and hit her. She also mentioned that he had said he would kill her, but this was not logged by the operator. The call, which was passed from one police force to another, was initially categorized as a high priority requiring attendance within five minutes; but was downgraded to a

lower priority level, requiring a response within sixty minutes. Fifteen minutes after the initial call, the victim called the police again and was heard to scream, and was found to have been stabbed to death. The claim was brought both in negligence, and under the HRA 1998.

The majority found that no duty of care was owed in negligence. This might be seen as merely a further illustration of the principles developed from *Hill* to *Van Colle*. However, the majority judgment of Lord Toulson is notable for its reliance not on policy discussion particular to the police force or public authorities; but on
p. 332 general principles of negligence. ↵ Thus, the key issue where the duty of care was concerned was that it was a case of *omissions liability*; the question therefore was not whether the police should benefit from particular protection; but whether an exceptional liability should be imposed upon them.

Lord Toulson JSC, *Michael v Chief Constable of South Wales Police and Another* [2015] UKSC 2

Issues 1 and 2: Did the Police owe a Duty of Care to Ms Michael on Receiving her 999 Call?

97 English law does not as a general rule impose liability on a defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T): *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 270 (a Scottish appeal in which a large number of English and Scottish cases were reviewed). The fundamental reason, as Lord Goff explained, is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.

98 The rule is not absolute. Apart from statutory exceptions, there are two well recognised types of situation in which the common law may impose liability for a careless omission.

99 The first is where D was in a position of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control. The *Dorset Yacht case* [1970] AC 1004 is the classic example, and in that case Lord Diplock set close limits to the scope of the liability. As Tipping J explained in *Couch v Attorney General* [2008] 3 NZLR 725, this type of case requires careful analysis of two special relationships, the relationship between D and T and the relationship between D and C. I would not wish to comment on Tipping J's formulation of the criteria for establishing the necessary special relationship between D and C without further argument. It is unnecessary to do so in this case, since Ms Michael's murderer was not under the control of the police, and therefore there is no question of liability under this exception.

100 The second general exception applies where D assumes a positive responsibility to safeguard C under the Hedley Byrne principle, as explained by Lord Goff in *Spring v Guardian Assurance plc* [1995] 2 AC 296. It is not a new principle. It embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive. This principle is the basis for the claimants' main submission, to which I will come (issue 3). There has sometimes been a tendency for courts to use the expression 'assumption of responsibility' when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially.

101 These general principles have been worked out for the most part in cases involving private litigants, but they are equally applicable where D is a public body. *Mitchell v Glasgow City Council* [2009] AC 874 is a good example. The victim and T were secure tenants of D and were next door neighbours. On a number of occasions T directed abuse and threats to kill at the victim, which he reported to D. D summoned T to a meeting and threatened him with eviction, without informing the victim. Soon afterwards T attacked the victim, causing fatal

> injuries. The victim's widow and daughter sued D, alleging negligence in failing to warn him of the meeting with T. The House of Lords held that D was not under a duty to do so, applying the principle in *Smith v Littlewoods Organisation Ltd* [1987] AC 241. It rejected the pursuers' arguments that D's relationship with its tenant T was analogous to the relationship of D and T in the *Dorset Yacht case* [1970] AC 1004 or that D assumed a responsibility to protect the victim from T. Mere foreseeability was not enough.

In the above extract, Lord Toulson expressly moves from cases involving private parties, to cases involving public authorities. In making this move, policy is relevant in the particular sense that there ought to be a compelling reason to override the general rule against omissions liability in this particular instance.

Lord Toulson, *Michael v Chief Constable of South Wales*

> 113 … it is a feature of our system of government that many areas of life are subject to forms of state controlled licensing, regulation, inspection, intervention and assistance aimed at protecting the general public from physical or economic harm caused by the activities of other members of society (or sometimes from natural disasters). Licensing of firearms, regulation of financial services, inspections of restaurants, factories and children's nurseries, and enforcement of building regulations are random examples. To compile a comprehensive list would be virtually impossible, because the systems designed to protect the public from harm of one kind or another are so extensive.
>
> 114 It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.
>
> 115 The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. Examples at the highest level include *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 (no duty of care owed by financial regulators towards investors), *Murphy v Brentwood District Council* [1991] 1 AC 398 (no duty of care owed to the owner of a house with defective foundations by the local authority which passed the plans), *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 (no duty of care owed by a highway authority to take action to prevent accidents from known hazards).
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> 116 The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case.
>
> 117 Ms Monaghan has advanced essentially two arguments in support of the interveners' liability principle. The first is that the nature and scale of the problem of domestic violence is such that the courts ought to introduce such a principle to provide protection for victims and a spur to the police to respond to the problem more effectively. The second is that the common law should be extended in harmony with the obligations of the police under articles 2 and 3 of the Convention.

p. 334

Lord Toulson and the majority rejected both of the arguments referred to in the final paragraph above. Yet this might have seemed a strong case for an assumption of responsibility: the victim had, after all, spoken directly to an operator. The treatment was brief, and it seems that the argument for an assumption was rejected

because no *assurances* were given about the speed of response, nor instructions given. This appears a rather narrow reading of the 'assumption of responsibility':

Lord Toulson, *Michael v Chief Constable of South Wales*

> 138 Mr Bowen submitted that what was said by the Gwent call handler who received Ms Michael's 999 call was arguably sufficient to give rise to an assumption of responsibility on the Hedley Byrne principle as amplified in *Spring v Guardian Assurance plc* [1995] 2 AC 296. I agree with the Court of Appeal that the argument is not tenable. The only assurance which the call handler gave to Ms Michael was that she would pass on the call to the South Wales Police. She gave no promise how quickly they would respond. She told Ms Michael that they would want to call her back and asked her to keep her phone free, but this did not amount to advising or instructing her to remain in her house, as was suggested. Ms Michael's call was made on her mobile phone. Nor did the call handler's inquiry whether Ms Michael could lock the house amount to advising or instructing her to remain there. The case is very different from *Kent v Griffiths* [2001] QB 36 where the call handler gave misleading assurances that an ambulance would be arriving shortly.

It may be recalled that at the end of the previous section, we queried the very malleable way in which the meaning of 'assumption of responsibility' was being developed in different contexts, and drew particular attention to the way in which the 'voluntary' nature of such an assumption was being disapplied in *Poole v GN*. However, the expansive element of the reasoning in *Poole* related to general assumptions of responsibility through the conduct of a public authority. Lord Toulson's focus here is on specific assumptions of responsibility, arising from particular circumstances.

In dissent, Lord Kerr disagreed with the starting point of Lord Toulson's analysis, namely that the authorities in relation to police negligence indicate a general rule that there is no liability for omissions. For Lord Kerr, the critical feature of the case which was overlooked by Lord Toulson was the proximity of relationship between the victim, and the defendant. Lord Kerr also explored the policy reasons behind cases such as *Hill* and *Brooks*, and argued that they were not compelling. Lord Kerr's approach recognizably derives from *Caparo v Dickman*. Lord Toulson by contrast avoided reliance on *Caparo*, arguing instead as we have seen from the position in respect of omissions liability particularly.

Before leaving *Michael*, we extract Lord Toulson's reasons for rejecting the second argument, that common law should develop in harmony with the positive duties under Articles 2 and 3. Lord Toulson conceded that tort law had developed significantly in response to HRA through the development of privacy actions (Chapter 15), but continued as follows:

p. 335 **Lord Toulson, *Michael v Chief Constable of South Wales***

> 125 The circumstances of the present case are different. The suggested development of the law of negligence is not necessary to comply with articles 2 and 3. On orthodox common law principles I cannot see a legal basis for fashioning a duty of care limited in scope to that of articles 2 and 3, or for gold plating the claimant's Convention rights by providing compensation on a different basis from the claim under the Human Rights Act 1998. Nor do I see a principled legal basis for introducing a wider duty in negligence than would arise either under orthodox common law principles or under the Convention.
>
> 126 The same argument, that the common law should be developed in harmony with the obligations of public bodies including the police under the Human Rights Act 1998 and articles 2 and 3 of the Convention, was advanced in the *Smith* case [2009] AC 225 as a ground for holding that the police owed a duty of care to the deceased after he reported receiving threats. Reliance was similarly placed on the approach of the Court of Appeal in *D v East Berkshire Community NHS Trust* [2004] QB 558 (as noted by Lord Phillips MR, who had delivered the judgment of the Court of Appeal in that case). Counsel for Mr Smith relied particularly on the analysis of the effect of the Human Rights Act 1998 in *D v East Berkshire Community NHS Trust*, at paras 55–87: see the reported argument [2009] AC 225, 240. The argument by analogy with that case which presently commends itself to Baroness Hale DPSC is therefore not a new argument, but one which failed to persuade the majority in the Smith case.
>
> 127 The argument was rejected by the House of Lords for reasons given by Lord Hope (paras 81–82), Lord Phillips (paras 98–99) and most fully by Lord Brown: paras 136–139. Lord Brown did not consider that the possibility of a Human Rights Act claim was a good reason for creating a parallel common law claim, still less for creating a wider duty of care. He observed that Convention claims had different objectives from civil actions, as Lord Bingham pointed out in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673. Whereas civil actions are designed essentially to compensate claimants for losses, Convention claims are intended to uphold minimum human rights standards and to vindicate those rights. The difference in purpose has led to different time limits and different approaches to damages and causation. Lord Brown recognised that the violation of a fundamental right is a very serious thing, but he saw no sound reason for matching the Convention claim with a common law claim. To do so would in his view neither add to the vindication of the right, nor be likely to deter the police from the action or inaction which risked violating it in the first place.

Lord Toulson suggests here that the functions of HRA claims and tort claims are very different; and that there is no reason for tort to develop in order to provide remedies that are often more generous than those under HRA ('gold-plating'). In discussing the decision in *Michael*, Nick McBride has suggested that whether this is persuasive depends on one's approach both to the functions of the law of tort (which many recognize as capable of protecting rights); and to what is required to protect rights effectively. Does common law appear to fall short of the more 'ambitious' rights recognized through the Human Rights Act, and if so is this a defect

that needs correcting? If the Human Rights Act were to be repealed, would common law once again expand to create remedies for similar wrongs? The 'uniform' approach mentioned here by McBride refers to an approach which treats public bodies, like the police, as owing the same duties as any other defendant.

p. 336 **Nick McBride, '*Michael* and the Future of Tort Law' (2016) PN 14**

> If the ambitious view of what positive human rights we have against the state is correct, then it does indeed follow that the common law of negligence -as set out in *Michael*-is backward in adopting a uniform approach to determining when a public body owes us a duty of care to save us from harm. If, on the other hand, the personalist view is correct, then it is cases like *Osman* that have taken a wrong turn and that need to be hauled back so that a public body only comes under a positive obligation under the ECHR (and, by extension, the HRA) where it knows someone is in serious danger of suffering serious harm, and even then the only duty it will come under is a duty to try to save that person from harm, not a duty to take care that it does so. And if the contractual view is correct, nothing need change -while the decision in *Michael* was correct to have adopted a uniform approach to determining what rights we have against the state under the common law of negligence, so long as the UK government binds itself to the mast of the ECHR by keeping the HRA in force, it must follow the ECHR ship wherever the decisions of the ECtHR take it.

For the time being, the difference between negligence duties, and the more ambitious duties under the HRA, is well illustrated by *Michael*, since a claim under the HRA was said to depend upon determination of the facts of the case, so that it should go to trial. In *Michael*, Lord Toulson mentioned, but did not offer an opinion on, the HRA claim in the following case, which was at that time awaiting decision in the Court of Appeal. Here, we examine the subsequent decision in the Supreme Court.

D v Commissioner of Police of the Metropolis [2018] UKSC 11; [2019] A.C. 196

The claimants were subjected to serious sexual assaults by a taxi driver, John Worboys, who was a serial rapist attacking over 100 women. They brought actions against the defendant for failure to conduct effective investigations. They were awarded compensation on the basis that the investigations were so significantly flawed that they constituted violations of a duty to investigate inherent in Article 3 ECHR, which protects against inhuman and degrading treatment by the state. The contrast with not only *Hill*, but also *Michael*, could not be more marked. It will be recalled that negligent investigation of a serial murderer was the very subject matter of the rejected duty in *Hill*.

In applying Article 3, a majority of the Supreme Court determined that, as in the case of liability under Article 2, sufficiently serious 'operational' failings could suffice to breach the positive duty under Article 3. There was no need to show wider 'systemic' failings. The Justices also commented on the divergent answers given by domestic tort law (which did not recognize the positive duties), and by the HRA (applying the Convention in domestic law). Despite the very recent decision in *Michael*, all of the Justices explained the position of domestic tort law in terms of policy reasons, and set out to explain that the same reasons did not—and need not—apply to the HRA claim. This illustrates that the approach of Lord Toulson was swimming against the tide of established ways of reasoning. Lord Neuberger's judgment, extracted below, is one example:

p. 337 **Lord Neuberger, *DSD v Commissioner of Police for the Metropolis***

> 97. I do not consider that my view is undermined by the reasoning expressed or conclusions reached in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 <https://uk.westlaw.com/Document/IC049A400E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>, *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495 <https://uk.westlaw.com/Document/I7BF25EF0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>, *Van Colle v Chief Constable of Hertfordshire Police (Secretary of State for the Home Department intervening)*; *Smith v Chief Constable of Sussex Police [2009] AC 225* and *Michael v Chief Constable of South Wales Police (Refuge intervening)* [2015] AC 1732 <https://uk.westlaw.com/Document/I8376AC00A71211E48D9BFE15FEBA9566/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>. Those cases establish that, absent special factors, our domestic law adopts the view that, when investigating crime, the police owe no duty of care in tort to individual citizens. That is because courts in this country consider that the imposition of such a duty would, as Lord Hughes JSC puts it, at para 132 'inhibit the robust operation of police work, and divert resources from current inquiries; it would be detrimental, not a spur, to law enforcement'. That view is entirely defensible, but, at least in the absence of concrete evidence to the contrary, so is the opposite view that the imposition of such a duty, provided that it is realistically interpreted and applied, would serve to enhance the effectiveness of police operations. It is therefore understandable that human rights law, with its investigatory duty under article 2 and 3, differs from domestic tort law in holding that it is right to impose an investigatory duty on the police. Just as the majority of this court accepted in *Michael's* case, at paras 123–128, that the domestic tortious test for liability should not be widened to achieve consistency with the human rights test, so should the human rights test for liability not be narrowed to achieve consistency with the domestic, tortious test.

This clearly explains that tort law, and Human Rights Act liability, are entirely separate and need not develop to resemble each other. But it explains the position adopted by tort law in terms of (contestable) policy decisions, and does not enter into discussion of why domestic tort law generally does not (according to *Michael*) recognize positive duties to benefit, of the very nature that are recognized by the Convention on the part of 'public authorities'. That divergence is greater than a policy divergence, and so far it remains unexamined, largely because it has only recently come to the fore in the Supreme Court's decisions.

It is also worth noting that in *SXH v Crown Prosecution Service* [2017] UKSC 30; [2017] 1 WLR 1401, a case argued on the basis of a violation of Article 8 ECHR, Lord Toulson suggested that some of the factors that prevented the courts from recognizing a duty of care in negligence in relation to prosecutorial decisions on the part of the CPS could also apply in relation to an HRA claim:

Lord Toulson, *SXH v Crown Prosecution Service*

> 37. In *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335 <https://uk.westlaw.com/Document/IA0D063C0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)> (cited with approval in *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495 <https://uk.westlaw.com/Document/I7BF25EF0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)>, Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening) [2009] AC 225 and *Michael v Chief Constable of South Wales Police (Refuge intervening)* [2015] AC 1732 <https://uk.westlaw.com/Document/I8376AC00A71211E48D9BFE15FEBA9566/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)>) two claimants were arrested, charged and remanded in custody for some weeks before the CPS discontinued proceedings against them. In the first case the claimant contended that the CPS was negligent in failing to act with due diligence in obtaining the results of forensic evidence which showed him to be innocent. In the second case the claimant contended that
> p. 338 it should not have taken the CPS three months to conclude that the prosecution was bound to fail. In both cases the Court of Appeal upheld decisions striking out the statements of claim against the CPS. Steyn LJ in the leading judgment said that a citizen who is aggrieved by a prosecutor's decision has potentially extensive remedies for a deliberate abuse of power, but the court rejected the argument that the CPS should owe a duty of care towards those it decided to prosecute.
>
> 38. The duty of the CPS is to the public, not to the victim or to the suspect, who have separate interests. To recognise a duty of care towards victims or suspects or both, would put the CPS in positions of potential conflict, and would also open the door to collateral interlocutory civil proceedings and trials, which would not be conducive to the best operation of the criminal justice system. Similar considerations are relevant when considering the applicability of article 8 in the context of a decision to prosecute. A decision to prosecute does not of itself involve a lack of respect for the autonomy of the defendant but places the question of determining his or her guilt before the court, which will itself be responsible for deciding ancillary questions of bail or remand in custody and the like.

The reasons that are recognized here can be described as 'policy' reasons, though they are concerned with the kinds of 'legal policy' we have seen acknowledged in decisions such as *Poole*: the potential for conflicting duties at common law, and in statute. At the same time, the decision in *D* suggests that HRA claims are not affected by considerations of this sort. This underlines the continued separation between tort actions, and actions under HRA; but it raises afresh the issue encountered in relation to *D v East Berkshire*, in relation to child welfare: to the extent that public authorities are open to actions under HRA, they are already potentially subject to 'conflicting duties'. Why should this be sufficient reason to reject a tort claim? For the moment, it remains the case that HRA actions will step in where tort fears to tread. We return to negligence actions with the next, highly significant decision of the Supreme Court.

Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] AC 736

The facts of this case were set out in Chapter 4, where we explored the broader impact of the decision for the approach to the duty of care in negligence. The Supreme Court followed the lead provided by Lord Toulson in *Michael*, and purported to apply 'long established' principles, rather than pursuing policy concerns. As Lord Reed put it,

> **Lord Reed**
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> 3. As will appear, the simple facts of this case have given rise to proceedings raising issues of general importance. Most of those issues can be decided by applying long-established principles of the law of negligence. The fact that the issues have reached this court reflects the extent to which those principles have been eroded in recent times by uncertainty and confusion.

This, the Supreme Court argued, should be regarded as an easy case. It was not a case of failure to benefit, like *Michael* or *Hill*. Although the police were engaged in activities aimed at investigation and suppression of crime, it was not a case where they had failed to apprehend or prevent a suspect from harming another. Rather, it was a case where police operations—and therefore their positive actions—had resulted in personal injury to the claimant.

p. 339

Lord Reed, *Robinson*

68. On examination, therefore, there is nothing in the ratio of any of the authorities relied on by the respondent which is inconsistent with the police being under a liability for negligence resulting in personal injuries where such liability would arise under ordinary principles of the law of tort. That is so notwithstanding the existence of some dicta which might be read as suggesting the contrary.

69. In relation to this discussion, it is necessary to respond briefly to some of the points made by Lord Hughes JSC in his judgment:

We extracted parts of this paragraph, relating to the general approach to the duty of care and particularly policy, in chapter 4. Lord Reed continued:

6. In relation to the cases discussed in para 114 of Lord Hughes JSC's judgment, it follows from the foregoing explanation of the distinction between acts and omissions that the *Hill* and *Smith* cases were concerned with omissions, as in each case the claimant sought to have the police held liable for death or personal injuries which had been caused not by the police but by a third party. The *Calveley*, *Elguzouli-Daf* and *Brooks* cases, on the other hand, were concerned with positive acts, but were cases in which a duty of care was held not to exist for other reasons, as explained earlier. In *Calveley's* case the plaintiffs sought to have the police held liable for economic loss and other harm which they had caused by subjecting the plaintiffs to disciplinary proceedings which were unduly prolonged. In *Elguzouli-Daf's* case, the plaintiffs sought to have the Crown Prosecution Service held liable for a loss of liberty which they had caused by subjecting the plaintiffs to criminal proceedings which were unduly prolonged. In *Brooks*, the claimant sought to have the police held liable for a mental illness which they had caused by treating him inconsiderately.

7. So far as the cases discussed in paras 115–117 of Lord Hughes JSC's judgment are concerned, *Goldman v Hargrave* [1967] 1 AC 645 <https://uk.westlaw.com/Document/IB244ED10E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)> and *Thomas Graham & Co Ltd v Church of Scotland General Trustees 1982 SLT (Sh Ct) 26* concerned the responsibilities of an occupier of land in respect of dangers to his neighbours' property which arise on his land: responsibilities which can be understood as arising from his exclusive right of possession. *Michael's* case was clearly concerned with an omission, as Lord Toulson JSC's judgment made clear: the police were sought to be made liable for the death of a woman at the hands of a third party. *Barrett v Enfield London Borough Council* [2001] 2 AC 550 <https://uk.westlaw.com/Document/I6FD3A610E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>, as explained in *Gorringe's case [2004] 1 WLR 1057* <https://uk.westlaw.com/Document/IB2C20C51E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>, para 39, was a case where there was an assumption of parental responsibilities. *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 <https://uk.westlaw.com/Document/I1E89E7F0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=

> (sc.Search)>, as explained in *Gorringe's* case at para 40, concerned a relationship which involved an implied undertaking to exercise reasonable care, akin to the relationship between doctor and patient.
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> 70. Returning, then, to the second of the issues identified in para 20 above, it follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency, as in the *Dorset Yacht case* [1970] AC 1004 <https://uk.westlaw.com/Document/IC3259AD0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)> and *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273 <https://uk.westlaw.com/Document/I69CB2770E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility.

p. 340 ↵ There is a good deal of reinterpretation involved in this account, as Lord Reed appears to accept. Not all of it is persuasive: for example, the House of Lords in *Brooks* did not present it as a case where the defendant was claimed to have been merely 'inconsiderate'. The approach is certainly consistent with the later decision in *Poole v GN* as we have seen; but the denial of any significant role for policy considerations clashes with the approach of the Supreme Court in closely related decisions at much the same time, such as *D* (extracted above). It is interesting to consider the following decision of a differently constituted Supreme Court, a few months after *Robinson*.

James-Bowen v Commissioner of Police for the Metropolis [2018] UKSC 40; [2018] 1 W.L.R. 4021

The claimants in this case were not members of the public, but police officers who argued that the Commissioner of Police—by analogy, given their role as public servants, their employer—owed them a duty of care when deciding to settle claims brought against her and involving allegations against the officers. The settlement effectively admitted their guilt; and they were subsequently charged with, and acquitted of, violent offences. Despite the recent decision in *Robinson*, the Supreme Court was clearly concerned with the policy implications of holding that there could be a duty in such a case, and was ready to treat those policy considerations as decisive.

Lord Lloyd-Jones

22. In the present case the courts below have proceeded on the basis that, with the exception of the claim in respect of psychiatric injury which is no longer pursued, harm was arguably foreseeable. Furthermore, it was clearly arguable that by virtue of their relationship, akin to that of employer and employee, the parties were in a sufficiently proximate relationship to give rise to a duty of care. The argument therefore focused on whether the imposition of a duty of care was fair, just and reasonable as indicated in *Caparo Industries plc v Dickman* [1990] 2 AC 605 <https://uk.westlaw.com/Document/I821B84F0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>. In *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR 595 <https://uk.westlaw.com/Document/I597834D00CC911E886A2D99321F34449/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)> this court recently held, with regard to this aspect of *Caparo*, that it is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Since the police generally owe a duty of care not to inflict physical injury by their actions when such a duty arises under the ordinary principles of the law of negligence, unless statute or other common law principle provides otherwise, there was no requirement in that case to examine whether the recognition of the claimed duty would be fair, just and reasonable. However, this ingredient will be of critical importance in a situation where it is proposed that a duty of care should be imposed in novel circumstances. Thus Lord Reed JSC observed, at para 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."

p. 341 ↵ The discussion of analogous cases included the decision in *Spring v Guardian Assurance*, extracted above. Lord Lloyd-Jones continued:

> 25. This decision should be contrasted with *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228 <https://uk.westlaw.com/Document/I80E6FC90E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>. Following their reinstatement, police officers, against whom disciplinary proceedings had been taken, brought actions in negligence against their chief constables on the basis that they were vicariously liable for the investigating officers. The claimants alleged that the investigating officers had failed to conduct the proceedings properly or expeditiously and claimed, inter alia, damages in respect of loss of overtime earnings during their suspension and damages for injury to reputation. The House of Lords considered the submission that a duty of care was owed to the claimants to be unsustainable. First, Lord Bridge explained, at p 1238B–G, that anxiety, vexation and injury to reputation did not constitute reasonably foreseeable damage capable of sustaining an action in negligence within *Donoghue v Stevenson* [1932] AC 562 <https://uk.westlaw.com/Document/I99FC57C0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)>. Secondly, it was not reasonably foreseeable that the negligent conduct of a criminal investigation would cause injury to the health of the suspect, whether in the form of depressive illness or otherwise. Thirdly, while it is reasonably foreseeable that a suspect may suffer some economic loss which might have been avoided had more careful investigation established his innocence at an earlier stage, such a claim would encounter the formidable obstacles in the path of liability in negligence for purely economic loss. Fourthly, it would be contrary to public policy to prejudice the discharge by police officers of their public duty of investigating crime by requiring them to act under the shadow of a potential action for damages for negligence by the suspect.
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> 26. To my mind *Calveley* has an important bearing on the present case. If a chief constable does not, in principle, owe a duty of care to protect the economic and reputational interests of his officers in respect of the prosecution of an investigation or disciplinary proceedings, it is difficult to see why he should owe a duty to his officers as to the manner in which he defends a claim brought against him by a third party. In the former situation the chief constable has himself initiated the investigation or proceedings over which he has at least a substantial measure of control and he is responsible for making allegations against officers. In the latter situation his role is essentially responsive to allegations made by third parties.
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> 27. In these circumstances it is necessary to test the proposed duty of care against relevant policy considerations and to consider the coherence of the resulting state of the law if such a duty is recognised.

In other words, even after *Robinson*¸ the Supreme Court has been ready to refer directly to policy considerations when determining whether or not to develop the law and recognize novel duties. The sea change in *Michael* and *Robinson* does cut across the reasoning in previously decided cases, and the approach in those two cases has been unevenly taken up, even in the Supreme Court itself.

Positive Convention Duties: Developments

As we have seen, the decisions in *Michael* and *Robinson* proposed that English tort law generally does not recognize positive duties to benefit, except in certain exceptional categories. But at the same time, HRA liability has developed to incorporate a wider range of such positive duties. The development of such positive
p. 342 duties under the Convention is not purely ↵ an effect of 'Strasbourg jurisprudence'. Before *Michael,* English courts had themselves been extending the ambit of positive operational duties under the ECHR, creating tort-like liability. In *Savage v South Essex Partnership Trust* [2008] UKHL 74; [2009] 2 WLR 115, the House of Lords recognized that although negligence in the course of hospital treatment will not generally breach the positive duty to protect life under Article 2,[63] the situation is different in the case of a 'detained' patient—that is, a patient who is not voluntarily in hospital. The deceased here was to be treated as akin to a prisoner in custody. Where prisoners are concerned, the European Court of Human Rights had recognized positive 'operational' duties, for example, to protect from the risk of suicide: *Keenan v UK* (2001) 33 EHRR 913. The vulnerability and lack of freedom of a detained patient were significant.

The later case of *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72 moved this line of cases forward significantly. The Supreme Court extended the positive duty under Article 2 further than in *Savage* and, perhaps more importantly, further than it had been pressed by the European Court of Human Rights itself. The decision is criticised in the Government's 2021 Consultation on the Human Rights Act. The patient in this case was not formally detained, but she was known to be at risk of suicide. The Court found that she was owed the positive operational duty under Article 2.

The boundary between cases governed exclusively by negligence, and cases where an operational duty to protect life is found to exist, is more difficult to place. This point was made by Lord Mance, who concurred in the result but appears to have been markedly less comfortable than Lord Dyson with the path taken. There is a distinct shadow of the Article 6 issue, and a resistance to Strasbourg intrusion into an area governed by private law,[64] in the following comments, which capture the particular significance—for tort law—of the development of positive duties under Article 2.

Lord Mance, *Rabone v Pennine Care NHS Trust*
[2012] UKSC 2

118 An extending series of cases exemplifies the specific operational duty. … Although the European Court of Human Rights described the incidence of this duty as 'well-defined' in the Osman case, the subsequent case law suggests that this was over-optimistic. … But it is at least clear … that various factors, such as control, assumption of responsibility and the nature (as well as the reality or immediacy) of the risk, may lead to the duty arising. Taking those factors into account in the present case, I agree with Lord Dyson JSC that, for reasons he gives in para 34, the operational duty existed in relation to Melanie. It was a duty to protect her from any real or immediate risk that she would commit suicide, of which state authorities knew or ought to have known. In that context (although the contrary was submitted to us) simple negligence in failing to identify or to guard appropriately against such a risk appears sufficient to establish breach of the duty.

119 A line has been sought to be drawn between this series of cases and cases of 'casual acts of negligence' by medical authorities in relation to persons submitting themselves voluntarily
p. 343 to medical care. Such persons are entitled to the benefit of the general substantive duty referred to in para 113 above, but the state does not answer directly for ordinary acts of negligence by public health authorities, however clear it was that the particular medical emergency, procedure or treatment in the context of which the negligence occurred involved a real or immediate risk to the patient's life.

120 It follows that, in the event of a breach of the operational duty, the range of persons entitled as victims to bring claims against the state, and the nature and scale of compensation or just satisfaction which they may receive, will depend upon legal principles established by the European Court of Human Rights. In contrast, in the event of ordinary negligence by a public health authority, the range of victim and the nature and scale of compensation are defined by the domestic law of tort.

121 In this way, the European Court of Human Rights has, under the operational duty, began to develop its own Convention rules of, in effect, tortious responsibility, when in other areas it is left to national systems (as part of their general systematic duty 'to establish a framework of laws, precautions and means of enforcement which will, to the greatest extent reasonably practicable, protect life') to develop an appropriate law of tort in the light of particular legal traditions and needs. The court might have left it to national systems in all areas to address any real or immediate risk to life which is or ought to be within their knowledge. It could have left it to national systems, in the event of any failure by state authorities to address such a risk, to recognise a range of victims and to provide compensation consistent with their ordinary law of tort. The court could still have reviewed the appropriateness of the protection and of the recourse available under national tort law. But that is not how the Convention has been interpreted. Hence, the difficult line to be drawn between direct Convention rights and national tort law in cases such as the present.

It is significant that the Supreme Court was willing to lead the way into an area not yet considered in Strasbourg.[65] The need for the HRA claim arose because damages may be awarded to a wider range of claimants under the HRA than in the law of tort, as the crucial question is whether they will meet the definition of a 'victim' under the ECHR. Thus, the fact that these particular claimants had already settled a negligence claim was no barrier to their claim under the HRA: they had recovered nothing on their own account for 'bereavement'. These issues are dealt with in Chapter 10, in relation to HRA remedies; but the idea that the Supreme Court should develop the law in this significant way in order to supply a further head of damages to parties that would otherwise have been compensated has been strongly criticized as undermining the very notion of human rights: A. Tettenborn, 'Wrongful Death, Human Rights, and the Fatal Accidents Act' (2012) 128 LQR 327.

Smith v Ministry of Defence [2013] UKSC 41; [2014] 1 AC 52

This case is of equal significance in extending positive operational duties in domestic courts. Here we deal with the HRA aspects of the decision. We pick up the negligence issues in the following section, where we deal more generally with the decline of immunities. The majority and dissenting judges differed partly on the question of whether one should start with the common law position (the view of the dissenters), or with the
p. 344 positive duty to protect ↵ life under the Convention (the approach of the majority). This case, also, has been subject to criticism in the Government's 2021 Consultation on the Human Rights Act.

The claims in *Smith* were brought by the relatives of service men and women who had been killed on active service overseas, but not on the field of battle. It is established that 'combat immunity' prevents negligence claims arising out of actions on the field of battle, although the boundaries of this immunity—and its precise rationale—are somewhat uncertain. The claims in the cases heard together in *Smith* focused on decisions made away from the field of battle, which would affect the safety of personnel on active service, particularly decisions relating to equipment and training. Claims were made in negligence at common law; and in respect of Article 2, under the HRA. The Article 2 claims related to equipment and particularly the use of 'Snatch Land Rovers' rather than heavier armoured vehicles for patrols, and the use of patrols themselves. The claimants argued that the lives of service men and women were left vulnerable to the actions of the enemy through these decisions.

The Supreme Court first had to decide a question of territorial jurisdiction: did the Convention extend to these claims at all, since the service men and women in question were overseas? That raised the question of how to interpret Article 1 ECHR. Unanimously, the Justices decided that the deceased service personnel were within the jurisdiction of the UK at the time of their deaths. Following the decision of the European Court of Human Rights in *Al-Skeini v UK*, and contrary to the approach taken in earlier case law by the same Court, the question is in each case whether the state was exercising jurisdiction extra-territorially. There is no single answer to the question of jurisdiction. This was a reversal of the Supreme Court's conclusion only two years previously in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, also concerning the death of a service woman overseas. It shows how rapidly the jurisprudence of the Convention is developing, and illustrates both its capacity to change direction, and the need for domestic law to follow.

So far as the positive duty under Article 2 is concerned, the judges were not unanimous. Lord Hope for the majority was undeterred by the fact that the Strasbourg Court had not yet considered the question of whether Article 2 extends to protection of the lives of military personnel from enemy action. The distance between this case and instances where the State itself has posed risks to its service personnel through training exercises, was noted; and Lord Hope also underlined 'the Strasbourg court's concern not to impose a disproportionate and unrealistic obligation on the state' ([74]). He also accepted that decisions which are 'essentially political' should not be reopened in the name of Convention rights. But he did not use these concerns in order to conclude that no duties arose under Article 2. Rather, there *may* be cases where the positive duty under Article 2 is applicable; and trial of the facts was necessary before it could be concluded whether this was the case.

Lord Hope, *Smith v Ministry of Defence*
[2013] UKSC 41

> 76 The guidance which I would draw from the court's jurisprudence in this area is that the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article. It will be easy to find that
> p. 345 allegations are beyond the reach of article 2 if the decisions that were or ought to have been taken about training, procurement or the conduct of operations were at a high level of command and closely linked to the exercise of political judgment and issues of policy. So too if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy. But finding whether there is room for claims to be brought in the middle ground, so that the wide margin of appreciation which must be given to the authorities or to those actively engaged in armed conflict is fully recognised without depriving the article of content, is much more difficult. No hard and fast rules can be laid down. It will require the exercise of judgment. This can only be done in the light of the facts of each case. ...
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> 80 I agree with Owen J that the procurement issues may give rise to questions that are essentially political in nature but that it is not possible to decide whether this is the case without hearing evidence. He said that there was no sound basis for the allegations that relate to operational decisions made by commanders, and for this reason took a different view as to whether they were within the reach of article 2. But it seems to me that these allegations cannot easily be divorced from the allegations about procurement, and that here too the question as to which side of the line they lie is more appropriate for determination after hearing evidence. Much will depend on where, when and by whom the operational decisions were taken and the choices that were open to them, given the rules and other instructions as to the use of equipment under which at each level of command they were required to operate.
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> 81 I would therefore dismiss the MOD's appeal against Owen J's decision, while the Court of Appeal found it unnecessary to consider, that none of these claims should be struck out. The claimants are, however, on notice that the trial judge will be expected to follow the guidance set out in this judgment as to the very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives and also to the way issues as to procurement too should be approached. It is far from clear that they will be able to show that the implied positive obligation under article 2.1 of the Convention to take preventative operational measures was breached in either case.

Lords Mance and Carnwath, dissenting, preferred to approach the issues by considering domestic tort law—and the limitations to duty—first. In different ways, they each suggested that the position under the Convention was uncertain at best and that the sound reasons which they thought would exclude a duty in the

law of tort should, since the claim under Article 2 had no precedent, take priority.

> **Lord Carnwath**
>
> 156 … I consider that our primary responsibility should be for the coherent and principled development of the common law, which is within our own control. We cannot determine the limits of article 2. Indeed, the multiplicity of views expressed by the nine members of this court, when this issue was previously considered in Catherine Smith, shows how difficult and unproductive it can be, even at this level, to attempt to predict how Strasbourg will ultimately draw the lines. The trial judge will be in no stronger position. With respect to Lord Hope DPSC (para 79), if the problem is a lack of directly relevant guidance from Strasbourg, it is hard to see how, simply by hearing further evidence or finding further facts, he or she will be better able to fill that gap, still less to do so 'with complete confidence'.

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> **Common Law—the Nature of the Issues**
>
> 157 It is important to recognise that we are being asked to authorise an extension of the law of negligence (as indeed of article 2), into a new field. We have not been referred to any authority in the higher courts, in this country or any comparable jurisdiction, in which the state has been held liable for injuries sustained by its own soldiers in the course of active hostilities. Further we are concerned only with duties at common law, rather than under statute. As the Court of Appeal recognised…, statutory regulations governing the responsibilities of the ministry as employers do not apply outside the United Kingdom.

Particularly notable are the different approaches taken to the capacity of domestic courts to take on the role of developing Convention rights. Lord Carnwath made plain his view that the inability of domestic courts to determine the extent of those rights should lead to caution in extending them to areas where Strasbourg itself has not yet ventured. This raises the general issue, of how far domestic courts will embrace rights with a direct impact on matters previously dealt with as aspects of domestic private law, and where interpretive authority now lies elsewhere.[66]

4 Immunities

4.1 Immunities and Article 6

In the preceding section, we considered the role played by Article 6 in leading courts to avoid ruling out duties of care in any general or 'blanket' sense and, in particular, to avoid use of the term 'immunity'. In *Matthews v Ministry of Defence* [2003] 1 AC 1163, the House of Lords considered the validity, in respect of the Convention, of an immunity conferred by statute. Proceedings against the Crown were made possible by the Crown Proceedings Act 1947; but section 10 of this statute preserved an exception for the armed forces in relation to

injury or death in service, subject to certain conditions. One of these was a certificate of entitlement to a service pension. The legislation selected an alternative route to supporting injured service personnel, in place of tort actions. This immunity itself was repealed by the Crown Proceedings (Armed Forces) Act 1987; but with a provision allowing the Secretary of State to revive section 10 in circumstances of 'imminent national danger or great emergency'; or 'for the purpose of any warlike operations'. The House of Lords concluded that such an immunity, being substantive rather than procedural, did not violate Article 6. There was some doubt whether this stance would be accepted by the European Court of Human Rights. But in *Roche v UK* (2005), the court considered the same statutory immunity against actions in tort, and held that Article 6 is violated only when a *procedural* immunity is created.

4.2 Immunities and Common Law

The question remains whether common law immunities, not conferred by statute, retain a place in the modern tort of negligence. The general trend of recent years has been for immunities recognized at common
p. 347 law, rather than created by statute, to be analysed critically; ↵ and in important instances, they have been overturned or restricted. The House of Lords, and subsequently the Supreme Court, have been inclined to ask whether the policy concerns which justify immunity from negligence proceedings are sufficiently compelling.

Immunities connected with legal proceedings offer an illustration. The immunity of **advocates** was recognized in *Rondel v Worsley* [1969] 1 AC 191, but abolished in *Arthur JS Hall v Simons* [2002] 1 AC 615, the House of Lords declaring that the underlying policy considerations had changed, as had the tort of negligence itself and the organization of the legal profession. More recently, in *Jones v Kaney* [2011] UKSC 13; [2011] 2 AC 398, the immunity of **expert witnesses** to negligence liability was also ended.[67] A majority of the Supreme Court reasoned that expert witnesses who are paid by a client should be treated as analogous to other professionals providing services, so that a duty was appropriate. The decision does not alter the immunity enjoyed by witnesses of 'fact' (for example, eyewitnesses), who do not work for a particular party to litigation. The majority took the view that relevant safeguards were provided through the law's general approach to the existence and breach of a duty of care; and that expert witnesses could in any event be expected to insure against liability. The dissenting judges, Baroness Hale and Lord Hope, were less comfortable with making such a change in the established principles of liability on the basis of suppositions and presumptions about its likely impact, and would have preferred such a change in established principles to be considered by the Law Commission, on the basis of empirical evidence and broad consultation. Immunities should be retained only where there are clear reasons to do so.

Lord Phillips, *Jones v Kaney*

> ### Is the Immunity Justified?
>
> 51 In the *Darker* case [2001] 1 AC 435, 456–457, Lord Clyde remarked:
>
> > "since the immunity may cut across the rights of others to a legal remedy and so runs counter to the policy that no wrong should be without a remedy, it should be only allowed with reluctance, and should not readily be extended. It should only be allowed where it is necessary to do so."
>
> With this principle in mind, I would adopt the approach advocated by Lord Reid in *Rondel v Worsley* [1969] 1 AC 191, 228, when considering the immunity from suit enjoyed by advocates: 'the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable.' It would not be right to start with a presumption that because the immunity exists it should be maintained unless it is shown to be unjustified. The onus lies fairly and squarely on the defendant to justify the immunity behind which she seeks to shelter.

In reality, only the highest court will be able to go through this process of disposing of an established immunity; but it seems generally clear that immunities are to be treated as exceptional and always need to be justified. The decision of the Court of Appeal in *Smart v Forensic Science Services* [2013] EWCA Civ 783 illustrates
p. 348 that there is some role for this ↵ approach in lower courts. The Court concluded that a claim in negligence could be brought in respect of incorrect forensic evidence which had been used in the course of prosecution of the claimant for a criminal offence, namely possessing live ammunition. Since this is a strict liability offence, the claimant had no choice but to plead guilty in light of the forensic report, which stated that ammunition taken from his home was live. The report proved to be incorrect. As the Court pointed out, in terms of the effect on the claimant this was equivalent to planting evidence in his home. Since a claim in deceit was to be pursued, exploring whether there was intention, there was no legitimate reason why a claim in negligence should not also proceed: the evidence would in any case need to be reviewed. There was no space for an immunity in negligence to operate, when the issues were to be before a court in any event.

4.3 Combat Immunity

One possible justification for an immunity is that it sets out an area of 'non-justiciability', where courts have no jurisdiction to question the decisions and actions taken by participants. This is not so much a generalized policy judgment, as a question of the court's jurisdiction. A form of immunity which has been understood in these terms is 'combat immunity'. While the specific statutory immunity of the armed forces against claims on the part of injured servicemen has been repealed, 'combat immunity' at common law remains even if its scope, boundaries, and justification remain uncertain. The existence of the immunity was recognized in the Australian case of *Shaw Savill & Albion v Commonwealth* (1940) 66 CLR 344; and much more recently in the UK courts in *Mulcahy v Ministry of Defence* [1996] QB 732.

We outlined the nature of the claims in *Smith v Ministry of Defence* in the previous section, where we dealt with the way that the Supreme Court handled positive duties under Article 2. The case was also argued in negligence, and raised the question of the scope of combat immunity. The majority interpreted the scope of the immunity relatively narrowly, but its discussion was consistent with a basis in 'justiciability' rather than in, for example, the difficulties facing decision-makers in the heat of battle.

> **Lord Hope**
>
> 90 … In *Bici v Ministry of Defence* [2004] EWHC 786 (QB) at [90], Elias J noted that combat immunity was exceptionally a defence to the government, and to individuals too, who take action in the course of actual or imminent armed conflict and cause damage to property or death or injury to fellow soldiers or civilians. It was an exception to the principle that was established in *Entick v Carrington* (1765) 19 State Tr 1029 that the executive cannot simply rely on the interests of the state as a justification for the commission of wrongs. In his opinion the scope of the immunity should be construed narrowly. That approach seems to me to be amply justified by the authorities.

Some of the claims, on this basis, did not fall within combat immunity because they referred to decisions taken 'far from the theatre of war', even if the deaths themselves were suffered in the course of active engagement. But some of the claims were 'less obviously' directed to decisions taken at such a remove. They
p. 349 might raise issues, for example, about what patrols ↵ should have been undertaken, and with which vehicles, in the context of war-like engagement, even if not strictly in the course of combat. Strikingly, the lower courts which would now hear the claims would need to determine not just whether there was a breach of Article 2 (above), but also whether the facts disclosed a proper case for the application of combat immunity ([96]).

Perhaps curiously, having dismissed the argument that the claims in these cases necessarily fell into the area of the immunity, the majority did little to consider whether there were nevertheless reasons for rejecting the duties proposed by the claimants. The minority Justices, Lords Mance and Carnwath, approached matters very differently, and particularly highlighted these policy issues. Lord Mance thought that the immunity itself was simply a particular instance of a case where it was not 'fair, just and reasonable' to impose a duty on policy grounds; and reasoned by analogy with the restrictive approach taken to claims against the police in relation to the investigation and suppression of crime, concluding that no duty was owed.

Lord Mance, *Smith v Ministry of Defence*
[2013] UKSC 41

> 150 Still more fundamentally, the approach taken by the majority will in my view make extensive litigation almost inevitable after, as well as quite possibly during and even before, any active service operations undertaken by the British army. It is likely to lead to the judicialisation of war, in sharp context with Starke J's dictum in the *Shaw Savill* case (1940) 66 CLR 344, 356 that 'war cannot be controlled or conducted by judicial tribunals'. No doubt it would be highly desirable if all disputes with international legal implications were to be submitted to international judicial resolution, with those involved abiding by the outcome; and if wars were no more. But, in the present imperfect world, there is no precedent for claims to impose civil liability for damages on states whose armed forces are killed or injured in armed combat as a result of alleged failures of decision-making either in the course of, or in procuring equipment or providing training for, such combat. All the claims made in these appeals fall in my view within one or other of these areas where the common law should not tread.

5 Conclusions

i. The duty of care criterion continues to be key to the shape and extent of the tort of negligence, whose other criteria are inclined to lead to expanding liability. The law has not always produced predictable outcomes, and it is hard to say (for example) whether the shape of economic loss liability will change again, as its categories have the capacity to influence one another. More serious perhaps are areas where it has proved difficult to explain the law in rational terms even once decisions have been reached. As to this, there have been doubts, and even anomalies, in some areas. An example is the law of psychiatric harm, where the decision in *White v Chief Constable* is a confessed obstacle to achieving a rational and consistent approach.

ii. This kind of problem is not, however, the general rule. In some instances, the *Caparo* criteria have
p. 350 offered quite a successful means of focusing attention on the most relevant issues. Indeed in two of the most notoriously difficult areas of application for the tort of negligence—economic loss and public authority liability—it can be argued that courts had applied *Caparo* criteria with increasing success, edging their way towards a more consistent method of deciding such cases. Policy arguments had become predictable, and a pattern of reasoning had emerged which could be predicted reasonably well. All this has been changed by the decisions in *Michael*, *Poole*, and *Robinson*, though the take-up of the approach in these cases has been somewhat uneven.

iii. The hallmark of the new approach in these decisions is that it retains the capacity of *Caparo* to restrain growth in the duty of care in novel cases, but it does so with less overt reference to policy considerations. Instead, emphasis is on a small range of 'established legal principles', primary among them the distinction between causing harm, and failing to confer a benefit. This requires a considerable amount of reinterpretation of existing law, as we have seen, since previous cases were

decided using *Caparo* criteria. We have also questioned whether the Supreme Court placed undue emphasis on the decisions in *Stovin v Wise* and *Gorringe v Calderdale*, giving them a much broader significance than their reasoning suggests.

iv. We have noted the strain that is placed on the 'assumption of responsibility', which has emerged as the key exception to justifying liability in areas where the general rule is one of no liability. So far as 'assumption of responsibility' is concerned, recent decisions have not only extended its significance through reinterpretation of previous case law, but have also put the notion under considerable pressure. For example, assumptions of responsibility may be general and, in this case, may not be voluntary (*Poole*); they may be assessed chiefly in terms of reasonableness of reliance (*Steel v NRAM*); and may be sought in circumstances where it does not easily apply (*Steel v NRAM*). Is the idea able to take the weight it is being asked to bear?

v. Why, it may be asked, has the Supreme Court been so eager to make the changes described above? As already explained, not all members of the Court have been ready to leave *Caparo* behind and to reason in this more confined way, and there have been decisions which do not follow the same path. The reasons for the new approach may include a desire to shorten judgments and make outcomes more predictable, by applying relatively few settled principles. It is ironic though that in order to do this, the basis of many leading decisions is rendered unstable. It is equally possible that there is an evaluative preference for recognisably 'legal' reasons to be used in legal decisions, avoiding the broadest kind of policy reasoning, as seen, for example, in *Hill*. So far at least, the new approach has not been used to resolve the genuine loose ends of duty of care analysis, for example, in psychiatric harm cases involving secondary victims. Therefore, its main impact has been to alter the basis for decisions in areas whose rationalization had begun to be relatively stable and predictable applying *Caparo* principles.

vi. Finally, there is a lack of clarity about how the new approach will deal with cases beyond the reach of the narrow range of established principles outlined above. Lord Reed, in *Poole*, mentioned that liability in a novel case must be 'fair and reasonable'. Beyond the notion of conflicting duties, it is not clear how far this will mean that *Caparo* style policy reasoning will remain a feature of the duty of care in genuinely novel cases—nor how this will operate now that it has been categorically denied that there is a *Caparo* test at all.

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Notes

[1] In *Dulieu v White* itself there was a physiological response to shock: premature birth was brought about through shock and fear.

[2] This was clearly spelt out in *Alcock v Chief Constable of South Yorkshire Police* (Section 1.4).

[3] This criterion of ‘ordinary fortitude’, also referred to as ‘customary phlegm’, provides the opportunity for deeply evaluative judgments as to what is normal. There have been suspicions of male bias in this evaluation. What degree of fortitude is expected of an ordinary pregnant woman, for example? Or is no pregnant woman regarded as ‘ordinary’? The issues do not only concern gender, however. Consider the facts of *McFarlane v EE Caledonia* (Section 1.4). What reaction to the violent deaths of one’s colleagues is considered reasonable and ordinary?

[4] *YAH v Medway* was followed and applied to a case of stillbirth in *Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 980 (QB).

[5] Though note the variation in *White v Chief Constable*, Section 1.4.

[6] Examples are *Daw v Intel* [2007] EWCA Civ 70; [2007] 2 All ER 126; and *Dickins v O2 Plc* [2008] EWCA Civ 1144. The latter decision has been superceded by *BAE Systems v Konczak*, discussed in the main text.

[7] *Hillsborough*, The Report of the Hillsborough Independent Panel, September 2012. This Report, and a great deal more, is freely available through the website of the Independent Panel: http://hillsborough.independent.gov.uk/ *<http://hillsborough.independent.gov.uk/>*.

[8] https://www.theguardian.com/uk-news/2016/apr/26/hillsborough-inquests-jury-says-96-victims-were-unlawfully-killed *<https://www.theguardian.com/uk-news/2016/apr/26/hillsborough-inquests-jury-says-96-victims-were-unlawfully-killed>*.

[9] Peter Benson, 'The Basis for Excluding Economic Loss in Tort Law', in D. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford University Press, 1997), offers a holistic explanation of the shape of recovery (and non-recovery) of pure economic losses, through analysis of the contractual context of many such losses and the relationship with concepts of ownership.

[10] See further the discussion in Chapter 4.

[11] See P. Giliker, 'Revisiting Pure Economic Loss: Lessons to be Learnt From the Supreme Court of Canada?' (2005) LS 49, arguing that English law could learn from a more complete categorizing approach.

[12] For example, the case of *Junior Books v Veitchi* [1983] 1 AC 520, which has rarely if ever been followed, could be explained as a case under category C or D—special relationship and reliance. Instead, it is regarded as incorrect because of the strength of the general rule against recovery in category B cases.

[13] *Candlewood v Mitsui* was an appeal from the Supreme Court of New South Wales. The exclusionary rule stated by the Privy Council has, however, been rejected in Australia: see the discussion of *Perre v Apand*, later in this section.

[14] Subsequently, the position was reversed by legislation, giving a remedy to the buyers: Carriage of Goods by Sea Act 1992, s 2(1).

[15] This and other possibilities are explored by K. Low, 'Equitable Title and Economic Loss' (2010) 126 LQR 507.

[16] *The Albazero* [1977] AC 774.

[17] J. Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 LQR 66.

[18] K. Barker, 'Relational Economic Loss and Indeterminacy: The Search for Rational Limits', in S. Degeling, J. Edelman and J. Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011).

[19] Edelman, n 17.

[20] The consequential losses in this case far outstripped the repair costs associated with the physical damage. Compulsory liability insurance under the Road Traffic Act extends to property damage with required coverage of £1 million.

[21] See, for example, *Muirhead v Industrial Tank Specialities* [1985] 3 All ER 705.

[22] In *Jacobs v Morton* 1994 72 BLR 92, a concrete raft was added to foundations as part of repair work. In all the circumstances, the raft (added later, by a different contractor) was separate property. If it was defective, a duty may be owed in respect of damage to the house as a whole.

[23] Though in *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 WLR 498, May J was reluctant to categorize a defect as 'patent' even though there had been awareness of cracks in the product (a factory pipe): he reasoned that since the plaintiff had taken reasonable steps to investigate the cause of the cracks, the true defect remained 'latent' and a claim was not ruled out by *Murphy*.

[24] At the time of the *Invercargill* litigation, the Judicial Board of the Privy Council was the final appellate authority for New Zealand. This is no longer the case since the creation of a New Zealand Supreme Court.

[25] For further development in relation to commercial property see *Hamlin: Body Corporate No. 207624 v North Shore City Council* [2012] NZSC 83.

[26] Although the case concerned commercial, rather than domestic, property, the High Court was careful to explain that this was not the decisive factor.

[27] See, for example, the discussion of cases such as *Phelps v Hillingdon* [2001] 2 AC 619 and *Poole v GN* in Section 3.5, and *Robinson* in Section 3.6.

[28] *Shell UK v Total UK*, explored under 'Category A'.

[29] As we saw in relation to category A, some writers have preferred this sort of route to resolving the problem in *Shell UK v Total UK*.

[30] We do not here include *Phelps v Hillingdon*, which said little about assumption of responsibility and is now interpreted as a case of personal injury. It is discussed below.

[31] The House of Lords did not go quite so far, but did decide that the relationship was 'adverse'. See also the more recent House of Lords decision in *Jain v Trent Strategic Health Authority* [2009] UKHL 4; [2009] 2 WLR 248, a case of economic loss where the issues arising are better discussed in connection with public authority liability generally. *Jain* is discussed in the following section.

[32] Crown Proceedings Act 1947, s 10. This immunity was prospectively repealed in 1987.

[33] Actions for misfeasance in a public office are only available against those holding public office (and their employers). The action is discussed in Chapter 2. Malicious prosecution and false imprisonment are of general application but for obvious reasons, they are inclined to be used against public authorities.

[34] See the discussion in Chapter 9.

[35] See C. Harlow, *State Liability* (Oxford University Press, 2004), chapter 1, relating this to Dicey's constitutional theory. The Law Commission's Consultation Paper, *Administrative Redress: Public Bodies and the Citizen* (LCCP 187, 2008), caused some consternation amongst private lawyers when it floated the idea of removing 'truly public' activities from the law of tort, and introducing an alternative scheme of compensation for these cases based on more serious fault. The Consultation has, however, now been withdrawn.

[36] Sections 7 and 8 (see the discussion in Chapter 1).

[37] As explained in point (2)(a), some statutory duties are actionable at common law. But this means that the common law provides a remedy. The duty is not a duty at common law.

[38] Enterprise and Regulatory Reform Act 2013, s 69.

[39] See *Groves v Wimborne* itself: Chapter 18.

[40] This 'starting point' has only gradually been recognized. Some cases decided soon after the enactment of the HRA proceeded on the basis that common law would simply need to change to fill gaps in the remedies provided.

[41] The applicable principles are discussed in Chapter 16.

[42] Much more complex things *were* said in *Anns v Merton*, but *Anns* is no longer considered correct on this point.

[43] In this case, decided before *Donoghue v Stevenson* by a Court of Appeal including Lord Atkin (then Atkin LJ), a corporation which had a *statutory power to provide lighting* was held to owe no *duty* to provide lighting that would be enforceable by an individual in a claim for damages.

[44] *Murphy v Brentwood*, Section 2.

[45] The type of damage suffered in the education cases was not settled in *X v Bedfordshire*. See further the discussion of *Phelps v Hillingdon*, later in this chapter.

[46] See further the discussion in Chapter 8.

[47] *Phelps v Hillingdon* itself was not a striking out action. But the House of Lords heard that appeal together with three other appeals, which were striking out actions.

[48] Now Senior Courts Act 1981. The same wording is used in the Limitation Act 1980, s 38.

[49] This is notable because of Lord Slynn's important role in *Barrett* and *Phelps*.

[50] An example of general reliance has appeared to exist in New Zealand in respect of local authority supervision of the safety of buildings. Lord Hoffmann referred with approval to *Invercargill v Hamlin* (earlier). *Specific* reliance exists where the particular claimant relies on conduct of the defendant in particular circumstances.

[51] On one view this could have been a case of 'specific reliance', since the claimant's GP was in attendance and could have driven her to hospital, had the assurances not been given that an ambulance would attend.

[52] An example of 'creating a danger' more generally is *Yetkin v Mahmood* [2010] EWCA Civ 776, where a highway authority had planted shrubs in a central reservation, obscuring pedestrians' view of the road.

[53] For discussion of this '*in terrorem*' stance (seeking to avoid an assumed adverse impact on provision of public services), see R. Mullender, 'Negligence, Human Rights, and Public Bodies' (2009) 125 LQR 384.

[54] We deal with the gradual erosion of immunities in the next section.

[55] The relationship between Art 2 and Art 6 is interesting in this regard. There was no violation of Art 2, because there was no precise moment at which the police *should* clearly have acted. They could not be criticized, for example, for applying the presumption of innocence. But the gravity of the harm suffered (death and serious injury) was relevant to the way that the policy objectives behind the 'immunity' in tort law were fulfilled.

[56] See C. Gearty, 'Unravelling *Osman*' (2001) 64 MLR 159.

[57] Note that subsequently, in *Roche v UK* (see later), the European Court of Human Rights has accepted (albeit only by a majority) that a statutory immunity from civil action does not violate Art 6.

[58] 'The Universality of Human Rights' (2009) 125 LQR 416–32.

[59] This decision is criticized in the UK Government's Consultation on the Human Rights Act: Chapter 1.4.

[60] A longer exploration of the mistreatment of the claimant by investigating officers is to be found in the judgment of Lord Steyn.

[61] Lord Brown made the point that this was an exceptional case—but that, at the time of *Osman v Ferguson*, he thought that was an exceptional case too.

[62] It seems clear that there is a recognized exception in the case of a voluntary assumption of responsibility, just as in omissions liability generally.

[63] On the authority of the European Court of Human Rights in *Powell v UK* (2000) 30 EHRR CD 62.

[64] For discussion of judicial sensitivity to this issue, see J. Steele, '(Dis)owning the Convention in the Law of Tort', in J. Lee (ed.), *From House of Lords to Supreme Court* (Hart Publishing, 2010).

[65] Strasbourg followed the lead and recognized a positive operational duty towards a voluntary patient in *Reynolds v UK* (2012) 55 EHRR 35.

[66] For strong views on this, see Lord Hoffmann, and Andrew Tettenborn, Further Reading.

[67] Participants in legal proceedings continue to be enjoy protection from defamation actions.