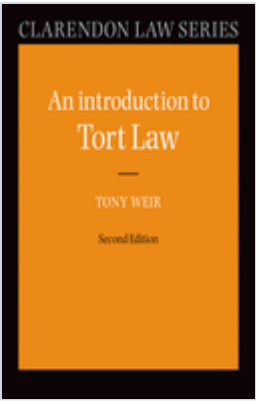

An Introduction to Tort Law (2nd edn)
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2. Negligence

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Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter discusses the tort of negligence. It elaborates on duty of care based on foreseeability, proximity, assumption of responsibility, property damage and personal injury, purely economic harm, psychiatric harm, less serious upset, and liability for omissions. It argues that the common law duty is higher when it requires a person to take active steps to protect others than when it requires only that he refrain from positively causing an injury. But once it is held that a duty exists, its level is always, apparently, the same: it is the duty to take such care as in all the circumstances of the case is reasonable.

Keywords: tort law, duty, foreseeability, proximity, responsibility, personal injury, property damage, economic harm, psychiatric harm, liability

A history of tort law would doubtless start off with the venerable, though still vital, tort of trespass, or possibly nuisance. Those torts will be dealt with later, but today the tort of ‘negligence’ is so dominant and pervasive, controlling traffic accidents, professional liability, and so much else, that it must be dealt with first. It is indeed a relatively recent arrival on the scene, for though there had long been certain specific situations not covered by trespass where liability was imposed if the claimant could prove that the defendant’s misconduct had caused him harm—for example, if he was the patient of a careless doctor, or the victim of injury on the defendant’s premises, or the owner of a thing damaged while in the defendant’s possession—one could not

properly speak of a coherent tort of negligence until these instances were generalised. *Enfin vint Lord Atkin* who said in 1932: '... in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances', and he proceeded to state: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.[1]

The Duty Question

The question which Lord Atkin had to answer was whether the manufacturer of a bottled drink 'is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health'. Rather than asking when there is *liability* for carelessly poisoning people (which is what we are really interested in), he is inquiring about the existence (in a very odd sense) of a legal *duty* to take care not to poison them. This emphasis on duty is a characteristic of English common law, not found in other systems. As another judge put it: 'In most situations it is better to be careful than careless, but it is quite another thing to elevate all carelessness into a tort. Liability has to be based on a legal duty not to be careless...'[2]

The duty concept has been said to be unnecessary, in the sense that all cases could be decided just as well in terms of fault and/or remoteness of damage, but it has proved useful and in any case it is now ineradicable, since it is used not only by the courts but also by Parliament. It was therefore quite daring of counsel recently to argue before the House of Lords that the duty concept be jettisoned in favour of concentrating on the question of breach (*alias* negligence!), and quite surprising that two of their Lordships seemed to warm to the suggestion.[3] Lord Bingham 'would regard that shift as welcome, since the concept of duty had proved itself a somewhat blunt instrument for dividing claims which ought reasonably to lead to recovery from claims which ought not...', and Lord Nicholls, who decided against its use in negligence claims generally, nevertheless said that 'This approach... is not without attraction. It is peculiarly appropriate in the field of human rights.'

This last point is significant. Although rights and duties may be in some sense correlative, emphasis on rights does tend to diminish emphasis on duties. After all, in cases of trespass, where liability depends on the invasion of rights, we do not use the notion of duty, nor do we use it in cases of deceit, where telling lies is as manifestly unlawful as the Human Rights Act 1998 declares invasions of Convention rights to be. The sticking point, however, will surely prove to be those cases where the public body is charged not with a positive unlawful act but with failure to prevent invasions by others: here it seems very difficult to avoid the notion of duty, as it would be if you sought to extend liability in deceit from positive lies to mere non-disclosure. In any case we must not let human rights cases wag the dog of tort. The corrective can be found in the speech of Lord Rodger, which should be mandatory reading for anyone starting out on the law of negligence.[4]

Lord Rodger demonstrates how useful the duty device is when we wish to hold a careless defendant liable to A but not to B, though damage to both is equally foreseeable. Thus while one owes a duty to a pedestrian to take care not to run him over, one owes none to his widow who has a fit when, quite foreseeably, she hears of his

death (it is different if she actually witnesses it). So, too, when young delinquents damaged a yacht in their attempt to escape from their island camp while their warders slept, the warders were held to owe a duty to the yacht company, but only because the yacht was in the 'immediate vicinity', no duty being owed to owners of property further away. Generally, indeed, a person who carelessly damages property is in breach of duty only to those who own or possess it, not to others adversely affected, however foreseeably, such as the insurer of the property or the charterer of a vessel or anyone with merely a contractual liability or right in relation to the physical damage. Again, a shareholder cannot found on breach of a duty owed to the company. And in the very case where counsel made his daring suggestion the decision was precisely that while doctors and social workers who stupidly suspected that a child had been abused owed a duty to the child they owed none to the father.

Yet the duty notion has perhaps become overstrained, in that any discussion of duty now tends to involve consideration not just of the relationship of the parties and the nature of the defendant's conduct, as one would expect, but also of the nature of the harm involved and the link between the conduct of the harm, that is, all the focal points we have identified as relevant in any tort case. It is no longer just the existence of the duty which is crucial, but also its 'scope'.

Whatever the aesthetics of discussing cases in terms of duty, breach, causation or remoteness, it is still the law that before we can hold a careless person liable for the damage he has caused we must find that he owed the claimant a duty of care. Note that the 'duty' question is one of law: it is a matter of argument, not proof. In the distant past, when it was for the jury to decide whether the defendant had misbehaved and how much he should pay, the requirement of duty was useful since it permitted the judge to prevent the case reaching the jury at all by ruling that on the facts there was no duty in law. Even after the demise of the jury in negligence cases, the duty question could still be treated as a preliminary issue to be decided before any actual facts were proved, as in *Donoghue v Stevenson* itself. A negative decision on the duty question is very useful to defendants, for it does away with the need for a trial, since even if it could be shown that the defendant was careless and the harm a foreseeable result of such carelessness, there would, for want of any duty in law, be no liability.

In such a case defendants faced no public inquiry into their actual conduct, and were spared the trouble and expense of pretrial paperwork, sending witnesses to court, and so on. Thus when the courts held that advocates were under no duty of care to their clients as regards matters in court, advocates could calmly proceed to be equally helpful to the next client,[5] and when the House of Lords held that it was contrary to public policy to hold that the police were under any duty of care to the potential victims of crimes they were investigating, the effect was that the police never had to lead evidence of what they actually did or did not do. In deference to a very negative reaction in Strasbourg to any suggestion of an 'immunity', our courts not only abandoned the rule about the immunity of the forensic lawyer and modified their view of police liability but also altered their useful practice of 'striking out' a claimant's pleadings on the ground that they disclosed no duty owed to him by the defendant. Instead they now say that the question of 'duty or no duty' cannot properly be decided until the actual facts are known. Of course this destroys the utility of the duty concept in the respect under discussion, but a compromise has perhaps been reached: if the case asserted by the claimant has no real chance of succeeding in the light of the evidence provided by the affidavits before the court, summary judgment can be given in favour of the defendant without exciting the ire of the judges in Strasbourg who seem to think that tort litigation is an effective and costless way of ascertaining the actual facts.

As Lord Rodger made clear, the notion of duty is useful in allowing us to hold the defendant liable to one person and not to another. It also makes it possible to hold that the duty is owed to the claimant only in some particular capacity: when auditors circulated to shareholders an allegedly negligent report on their company and the claimant shareholder proceeded to take it over, the issue was whether the accountants owed the claimant a duty of care (a) in his capacity as potential investor, and (b) in his capacity as actual shareholder.[6] This comes close to holding that the duty can be restricted to certain kinds of harm, and it is certainly true that a duty to take care to avoid causing physical harm by no means entails a similar duty regarding harm which is purely economic, even if both types of harm are suffered by the same person in the same incident.[7] A recurrent phrase is 'the scope of the duty'. Thus in the auditors case Lord Bridge said: 'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless'. Or as it has been put more recently: was there 'a duty in respect of the kind of loss which in the event was suffered'?[8] One can accordingly rationalise the holding that the manufacturer of a defective product is not liable to the consumer whose loss is purely financial by saying that the scope of his duty of care does not extend that far.

But the 'scope of duty' approach can lead to oddities. In quite a simple case where the defendant motorist collided with a pedestrian who suddenly stepped out from behind a parked vehicle which blocked the defendant's vision, the trial judge held that though the defendant was negligent in driving too fast, her negligence did not cause the injury. The Court of Appeal correctly dismissed the claimant's appeal, but held that the judge had given the wrong reason: the right reason, forsooth, was that the motorist owed the pedestrian no duty![9] In fact the trial judge was quite correct. Although the defendant was driving faster than was safe in the circumstances, the accident could only have been avoided if she had been driving much more slowly than proper care required; accordingly her excess speed did not contribute to the injury, for it would have occurred had she been driving quite properly. To decide the case on the ground of 'no duty' rather than, as the trial judge did, on causation, is decidedly peculiar.

The duty question tends to come first in the books: this is natural enough, since it has often been a preliminary question in the courts and is always a precondition of liability in negligence. But though it is an important question, it is not one very commonly raised in court. In fact, the duty question is raised only in novel cases where it is plausibly arguable that there should be no liability even if the harm was foreseeable and the defendant was careless in causing it. In the great majority of cases, the existence of the duty of care is taken for granted. It is quite unnecessary to argue or state that persons using the highway owe each other a duty to take care not to injure them or their property, that the occupier of premises owes his visitors a duty to look out for their safety, or that the person in possession of another's goods must do his best to guard them from damage and loss. Glimpses into the obvious should be avoided: where the answer is self-evident or well established by authority, the question of the existence of the duty does not arise.

Foreseeability

The leading case on when a duty to take care exists is the 1932 case from which we have already quoted.[10] The facts alleged were that Mrs Donoghue went to Minchella's café with a friend who bought her some ice-cream in a glass and a bottle of ginger beer to pour over it. After the effervescence had abated, Mrs Donoghue

emptied the bottle into her glass and found to her horror that a decomposed snail, obscured by the opacity of the bottle, had been lurking within. She alleged that the presence of this noxious foreign body and the harm she had suffered in consequence were due to the negligence of the producer. The Court of Session in Scotland had held that a manufacturer owed a consumer no duty in law not carelessly to injure her, but this decision, so inimical to consumer protection, was reversed by a bare majority in the House of Lords, led by Lord Atkin.

Two features in the facts alleged were rather underemphasised by his Lordship. The first relates to the harm suffered, and the second to the defender's conduct: Mrs Donoghue supposedly suffered actual personal injury —indeed she was poisoned—and the defender was guilty of a positively dangerous act. This last point is often misunderstood. When asked what Stevenson did wrong, students usually say 'He failed to keep the snail out of the bottle' or 'He didn't wash the bottles carefully enough' or words to that effect, always using a negative formulation, focussing on what Stevenson didn't do. But in truth one can keep as many snails in bottles as one likes (subject to the rules about cruelty to animals). What one must not do is send out into the highways and byways of commerce a bottled snail masquerading as wholesome ginger beer. And that is what Stevenson did. He added a danger to life: he didn't just fail to save Mrs Donoghue from the snail, he inflicted the snail on her.

Lord Atkin's views on the existence of a duty are thus appropriate in cases where the tortfeasor's positive act has caused physical harm to a foreseeable victim, but quite possibly distinguishable where either the tortfeasor's conduct was not positive or the claimant's harm was not physical, or both. As Lord Hoffmann said in a later case: 'Omissions, like economic loss, are notoriously a category of conduct in which Lord Atkin's generalisation... offers limited help'.[11] Yet it was precisely in a case of omission causing economic loss that Lord Wilberforce sought to improve, nearly 50 years later, on Lord Atkin's formulation. In *Anns v Merton London Borough Council* he said: '... the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity, or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise'.[12] He proceeded to hold a local authority liable for failing to exercise its powers to prevent a jerry-builder putting up an unstable house which the plaintiff later purchased to his financial detriment. The case therefore involved pure economic loss resulting from an omission— both the points on which *Donoghue v Stevenson* is unauthoritative. It is accordingly less than very surprising that the decision was dramatically overruled by an afforced House of Lords eleven years later as 'impossible to reconcile... with any previously accepted principles of the tort of negligence'.[13]

Proximity

In between times some doubt had been cast on Lord Wilberforce's formulation, which seemed unduly to extend liability for purely economic loss. In the accountancy case already mentioned Lord Bridge said this: '... in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in

which the courts considers it fair, just, and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But... the concepts of proximity and fairness embodied in these additional requirements are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.'[14] This is commonly referred to as the *Caparo* test for the existence of a duty of care.

Proximity, which is after all just Latin for closeness, relates to the physical world, and it is not an easy notion to apply figuratively, any more than the cognate notion of 'neighbour'. Indeed Lord Goff has said that ' Once proximity is no longer treated as expressing a relationship founded on foreseeability of damage, it ceases to have an ascertainable meaning, and it cannot therefore provide a criterion for liability'.[15] Quite so, but since it is now clear that the foreseeability of harm is not in itself enough to impose a duty to take care to avoid it, 'proximity' must somehow be dealt with. If it resists analysis, its application can perhaps be exemplified. In one case, the police were aware that there was a serial rapist on the loose, but knew neither who he was nor who his next victim might be; there was no proximity between the police and the eventual victim.[16] In another case the police knew the identity of both the person threatening violence and his intended victims, but did not have him in custody; there was probably sufficient proximity between the police and the known victim.[17] In a third case, a tape on which the police had recorded sensitive information given in confidence by the plaintiff was stolen from a police car and came into the hands of the suspect; there was clearly proximity between the police and the claimant (though at trial it was found that the police had not been negligent).[18]

Assumption of Responsibility

Those were all cases of physical harm. Where the harm is purely economic, rather more may be required, and it is here that one comes across the phrase 'assumption of responsibility'. Now if the defendant personally has as good as said to the claimant personally 'You can rely on me to do this, or to do it properly'; then if he is paid (consideration) he will be contractually bound, and obviously liable for failure to act, and even if he is not paid he may be held to be under a tort duty to act with care, if he acts at all, perhaps even under a duty to act. Indeed as early as 1793 we find the following in a case where the defendant gratuitously undertook to effect insurance on behalf of the plaintiff and failed to do so effectively: 'That though there was no consideration for the plaintiff's undertaking to procure an insurance for another, yet where a party voluntarily undertook to do it... but did it so negligently or unskilfully, that the party could obtain no benefit from it, that in that case he should be liable to an action'.[19] Here we have an undertaking on the side of the defendant and reliance on that undertaking on the side of the claimant.

Assumption of responsibility and reliance were key features in the second most important case in the law of negligence, namely *Hedley Byrne & Co v Heller and Partners* in 1963.[20] The letter which the defendant bank wrote in response to an inquiry about the solvency of a common customer, though not actually inaccurate, misled the plaintiff into continuing to afford credit to the customer, who quickly went bankrupt. The lower courts held that there was no duty to take care what one said, as opposed to what one did, and that in consequence inaccurate statements were not actionable unless deliberately false or warranted true, and here

there was no deceit and, because the information was provided gratuitously, no contract. The House of Lords nevertheless held that, but for the letterhead which excluded liability, the defendants might well be under a duty to take care what they said, notwithstanding that the only harm apt to ensue from the plaintiff's reliance was purely economic.

The five speeches, unanimous in the conclusion that there might well be a duty to take care of another's merely financial interests, varied in their terms. Leading notions were whether there was a 'special' relationship between the parties (described by Lord Devlin as 'equivalent to contract'), whether the defendant was an expert, whether he knew or should have known that the recipient of his information would rely on its accuracy (as is apt to be the case if the recipient asked for it) and whether, by responding when he was under no duty to do so, there had been a 'voluntary assumption of responsibility' by the defendant for what he was saying (this being the point on which the defendant in the case escaped liability, since his disclaimer showed that he was not assuming responsibility).

But 'reliance' is a weasel word. It can be used very loosely, as in Lord Nolan's speech in *White v Jones:* 'If the defendant drives his car on the highway, he implicitly assumes a responsibility towards other road users, and they in turn implicitly rely on him to discharge that responsibility'.[21] This is to rob the idea of all utility, but it does indicate the connection between assumption of responsibility and reliance, properly understood. In its strictest denotation it refers to the case where A takes action in the belief that things are as they have been made to appear. Indeed if A wishes to persuade the court that B's representation *caused* him loss, he will usually have to demonstrate that he relied on it in this sense.

Two-party cases are relatively simple to understand, for there the assumption of responsibility is *towards the claimant,* and the claimant has relied on the defendant's undertaking. The addition of a third party makes for complications, as usual. Must the undertaking be by the defendant personally to the claimant personally, or is it enough that the claimant was affected by the defendant's undertaking towards a third party who relied on it, or that the claimant relied on an undertaking made by the defendant to a third party?

In *Harris v Wyre Forest District Council* the plaintiff purchased a modest house with the aid of a loan from the first defendant, the local authority, to which their employee, the second defendant, had negligently reported that the house was in better condition than was the case. The report was not shown to the plaintiff, but the local authority made the loan. It was held that *both* defendants were liable, that is, both the local authority for implicitly representing the value of the property and their employee who effected the erroneous valuation. It is fair to say that no argument was addressed to their Lordships to the effect that the employee should not be held liable.[22]

In that case, at any rate, the plaintiff, by proceeding to buy the house, had relied on the representation, as did the plaintiff in *Hedley Byrne* (where, however, there was no discussion of whether the director or secretary who drafted or signed the misleading banker's reference was personally liable). It was, however, far from obvious that the employee who did the actual valuation had assumed responsibility towards the plaintiff purchaser, as well as to the local authority, and it was certain that the plaintiff was not relying on any such assumption of responsibility by the employee, of whom he knew nothing whatever. Perhaps that is why Lord Griffiths said 'I do not think that voluntary assumption of responsibility is a helpful or realistic test for liability... the phrase "assumption of responsibility" can only have any real meaning if it is understood as referring to circumstances in which the law will deem the maker of a statement to have assumed

responsibility to the person who acts on the advice'.[23] Those circumstances were of course present in *Hedley Byrne* in which the notion of assumption of responsibility played a prominent part, if we ignore the disclaimer, a like disclaimer having been held void as unreasonable under the Unfair Contract Terms Act 1977 in a case decided concurrently with *Harris*.

Notwithstanding Lord Griffiths' observations, the idea of assumption of responsibility as the source of a duty to take care was resuscitated with vigour by Lord Goff in what has been the most extreme case so far (and by far), where a solicitor failed to execute his client's instructions to draw up a will in favour of the client's two daughters, and was held liable to them.[24] Lord Browne-Wilkinson was of the opinion that merely by undertaking to do a job one assumed responsibility to anyone apt to be affected by its non- or misperformance (thereby in effect extending *Donoghue v Stevenson* to omissions causing economic loss). This manifestly goes too far, and it is agreed that Lord Goff's view represents the ratio of the decision. His Lordship accepted that the *Hedley Byrne* decision could not itself 'give rise on ordinary principles to an assumption of responsibility by the testator's solicitor towards an intended beneficiary' but held that since solicitors were professionals and legacies were important to individuals, it was only just that careless solicitors should be liable to disappointed legatees, and that this could be done by extending '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…'. Lord Mustill's powerful dissent explained why *Hedley Byrne* could not, consistently with principle, apply (as Lord Goff accepted) but denied that justice required its extension (as Lord Goff proposed). The difficulty was that the disappointed legatees could in no sense be said to have relied on the solicitor's acting promptly: they may well not even have known that he had been instructed to act, but in any case they took no action in reliance on his acting: there was no 'mutuality' between the legatees and the solicitor, between plaintiff and defendant, and mutuality was, according to Lord Mustill, of the essence of *Hedley Byrne*. On the other hand, there was clearly 'proximity', since the solicitor knew perfectly well for whom the legacies were intended: indeed he must have written their very names down on his note of instructions.

Lord Goff's espousal of the concept of 'assumption of responsibility', which had the further advantage of making it easier to impose liability for failing to act, as in the case at hand, has not rendered it immune to criticism. Lord Slynn has subsequently said that 'The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognized or imposed by the law'.[25] In between times, however, it had been emphatically relied on with the approval of a unanimous House. The case was one where a firm had sold the plaintiffs a franchise for a health food store after sending them, on the firm's writing paper, an inaccurately optimistic forecast of the profits likely to be achieved. The actual source of this misinformation was the managing director, with whom the claimants had no personal dealings, but who was sued by them when the firm was wound up. The House of Lords, reversing the Court of Appeal, dismissed the claim: it was the firm, not the managing director who owned the firm, on whom the plaintiffs had relied, and the managing director had not undertaken responsibility towards them. Lord Steyn, with whom Lord Goff and the others agreed, said 'The test is whether the plaintiff could *reasonably* rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company'.[26]

Lord Steyn described *Harris v Wyre Forest District Council,* as 'decided on special facts'. There, it will be recalled, liability was imposed not only on the local authority which represented the value of the property but also on the employee who made the actual valuation on its behalf, in a report which was not shown to the plaintiffs. The conflict between this holding and the reasoning in the health food case is clear, and came before the Court of Appeal in another valuation case. The building society sought from the Plymouth branch of a firm a valuation of a property which the claimant wished to buy. The valuation was negligently effected by Mr Babb, an employee, who signed his report and was sued by the claimants when the firm which employed him went bankrupt. The Court of Appeal by a majority held the employee personally liable; they quoted the depreciatory remarks of Lord Griffiths and Lord Slynn about assumption of responsibility and decided to follow *Harris v Wyre Forest District Council* rather than the health food case, ignoring the rule that a case is not authoritative for a point which was not argued.[27] It is a pity that the House of Lords refused leave to appeal, for while the individual valuer in *Harris* would certainly have been indemnified by the local authority which employed him, Mr Babb's employer's insurance policy, which would have covered him, had been cancelled by the trustee in bankruptcy (whose personal liability to Mr Babb might be difficult to establish).[28]

It is to be noted that in the *Harris* case Lord Templeman spoke of it as concerning 'negligence in circumstances which are akin to contract'.[29] When a creditor suffers a financial loss because the firm with which he has contracted has failed to perform or has performed badly, the breach is generally due to the fault of one of its employees, or even the deliberate decision of a director. There can be no question of rendering the employee or even the director liable for the breach of contract. There should equally be no question of rendering them liable for the financial loss suffered by the creditor by allowing him to invoke the law of tort, in particular the case of *Hedley Byrne* which depends upon there being between the parties a relationship described by Lord Devlin in that case as 'akin to contract'. While contract looks to the firm which is to be paid, tort looks to the individual at fault and although, as we shall see, the principle of vicarious liability in tort renders the firm liable for the harm done by its employee, it seems wrong in the transactional area to render the employee liable in addition to the firm.

Fair, Just, and Reasonable

But even foreseeability of damage, proximity and arguably assumption of responsibility may not be enough. Note that in the quotation from *Caparo* given above, Lord Bridge said that in addition to proximity it must be 'fair just and reasonable' to impose a duty (meaning, to impose liability for unreasonably harmful conduct). This criterion, apparently (but only apparently) less objective than the others, was used in a case of considerable interest.[30]

A vessel carrying the plaintiff's goods was en route to the Black Sea from Chile and Peru when it sprung a leak in the Gulf of Mexico and put in to Puerto Rico. The owners of the vessel were keen for it to proceed to a port where major repairs would be cheaper, and managed to persuade the surveyor of the defendant classification society, whose permission was essential for the maintenance of the vessel's insurance, to agree that it could sail on if temporary repairs were effected on the spot. As matters turned out, the surveyor should have insisted that permanent repairs be effected then and there, for the vessel sank with the plaintiff's cargo on board. The question put to the House of Lords was whether the classification society owed the plaintiff a duty

to take care not to endanger its cargo (the real question being whether the defendant would have to pay if the surveyor were shown to have acted unreasonably). The House held that although the harm was perfectly foreseeable and there was probably proximity between the surveyor and the cargo-owner (the surveyor had, after all, been fully aware of the existence of the cargo and must indeed have inspected the hold in which it lay), nevertheless it would not, in all the circumstances, be fair, just, and reasonable to impose a duty on the society, that is, to make it liable for unreasonably causing foreseeable damage to the cargo.

One can hardly dissent from the proposition that the courts should refrain from imposing liability where to do so would be unfair, unjust, or unreasonable (or all three, supposing there is any difference between them), but the question whether, in a particular case, it would indeed be unfair, unjust, and unreasonable to apply the traditional rules of liability in negligence may provoke quite divergent views. Indeed, it did so in this case, for Lord Lloyd dissented very vigorously. 'All that is required', he said, 'is a straightforward application of *Donoghue v Stevenson*': the defendant had sent the vessel forth to its doom when he should have realised it was unsafe to do so and had thereby caused foreseeable physical harm to the cargo owner, just as a careless ship-repairer might have done. His Lordship asserted (correctly) that theretofore the 'unfair unjust unreasonable' mantra had been developed to deal with cases of merely economic harm, not physical harm due to dangerous conduct, which was the present case.

Nevertheless, *in the particular circumstances of this case,* which involved not only the surveyor and the cargo-owner, but also the shipowner, who was under a strict contractual duty to the cargo-owner, it *would* have been unfair, unjust, and unreasonable to hold the defendant liable. Most of the relevant considerations militating against liability were laid out in the majority opinion of Lord Steyn. He emphasised that to impose liability on the defendant, one of a mere handful of classification societies worldwide, which was acting for the public good in seeing to the safety of vessels, would render the resolution of cargo claims more complex and also put up the price of surveys to the shipowners (who would pass on the extra cost to the cargo-owners). His point that the defendant did not *directly* cause the harm is, as Lord Lloyd showed, less persuasive, but he was surely right to say that there was no ground for 'voluntary assumption of responsibility', given that it was the shipowner who relied on the surveyor, and not the cargo-owner, who knew nothing about what was going on.

Two other factors which justify this decision were not mooted. The first, a point of which the law has not yet overtly taken account and which counsel would not dare to raise, is that the plaintiff's loss had already been met by his insurer (all cargo afloat is in fact insured, as it must be if it is for sale), so that it was not really the owner of the sunken cargo that was making the claim, but its insurer, which had suffered only an economic loss, and that, too, as a result of its own undertaking, for which it had been paid. Secondly, if Lord Lloyd had had his way and the defendant had been held liable, it would have ended up paying 95% of the total value of the cargo (over six million dollars) although it was the shipowner that was primarily at fault in putting to sea in a leaky vessel in breach of its contract with the cargo-owner. Now when two parties are liable for the same damage, as the shipowner and the defendant would have been had the defendant been held liable, they usually share the loss in proportion to their responsibility for it (see Chapter 7 below), but where the liability of one of them to the victim is limited by contract or statute, as was the shipowner's liability in this case, that limitation also applies to the claim for contribution.

Two questions invite consideration. First, if the defendant had been held liable for the cargo, must he also have been held liable for the vessel, equally at the bottom of the Sargasso Sea? And given that the defendant was held not liable for the loss of the cargo, would he also have been held not liable to the crew if injured and their widows if drowned? Note that the crew would not be insured (and if they had been, their damages if injured could be cumulated with the insurance proceeds, which would in any case be neglected in a suit by their widows) and the contribution problem would not arise since in the case of injury to crew members the shipowner's liability is not subject to any limit. There would therefore be no difficulty in holding that it would be quite fair, just, and reasonable to hold the surveyor and his employer liable to the crew and their widows.

If Lord Lloyd's view is correct that this was a straightforward *Donoghue v Stevenson* case of unreasonable conduct causing foreseeable physical harm, the decision is one which sidesteps the normal rules of negligence law for reasons of policy. If we move from the high seas of commerce to the oasis of the family home we find another instance of this. When a doctor, who had been retained to conduct a sterilisation operation on a husband, carelessly certified that the operation had been successful and that normal marital relations could be resumed, a healthy child was born. The parents' claim for the cost of bringing up the child was dismissed by the House of Lords.[31] True, the claim was for pure economic loss, but there was a special relationship between the parties, let alone a direct misrepresentation *a la Hedley Byrne,* designed to be relied on, and the harm complained of was not just foreseeable, it was the very thing that the defendant was retained to prevent. Bog-standard negligence law would make the defendant liable, but the House was unanimous that the claim must fail, and though the reasons given varied widely, it is quite clear that they were policy-driven rather than strictly juridical. Three years later the House, invited to overrule the decision, unanimously decided not to do so, but by a bare majority ruled that in similar cases the claimants should be awarded a lump sum of £15,000, a decision so odd as to suggest the unease their Lordships felt at sending the involuntary parents empty away when the actual law was on their side.[32]

Property Damage and Personal Injury

As it happened, the question of the applicability of *The Nicholas H* to personal injury arose shortly afterwards in a case where an amateur aviationist built a light aircraft from a do-it-yourself kit but installed a non-standard gearbox which was incompatible with the propeller. The aircraft required a certificate of airworthiness and the defendant provided it, though he should have realised that the aircraft was not airworthy, as was proved on the test flight when it nose-dived and injured the plaintiff passenger. The defendants naturally invoked *The Nicholas H,* but in vain. Hobhouse LJ in particular was scathing about importing into personal injury cases doctrine applicable to cases of economic loss: this would represent 'a fundamental attack upon the principle of tortious liability for negligent conduct which had caused foreseeable personal injury to others'.[33]

We may conclude, therefore, and without any surprise, that one is more likely to be held liable for causing personal injury than for causing property damage (especially when it is insured), and that this fact is reflected in the apparently neutral discussions regarding the duty of care. It may be instructive in this context to consider the differential treatment of fire brigades sued for property damage and ambulance services sued for personal injury. Of several claims brought by owners of premises against the fire services which had allegedly

allowed them to be burned to the ground when they could have been saved, the only one where the claim succeeded was where the fire brigade had actually made the situation worse by turning off the sprinkler system: the distinction was drawn between acts and omissions, and it was held that there was no liability simply for failure to put out the fire even when that could easily have been done.[34] Shortly thereafter, however, an ambulance which had been called for an emergency took so long to arrive that the patient suffered a serious attack which would probably have been prevented by timely arrival. The ambulance authority was held liable.[35] Despite the fact that in the latter case there was more reliance on the arrival of the ambulance (because if one is told that an ambulance is not coming there is something one can do about it), it is difficult not to attribute the differential treatment to the fact that in one case property only was involved (though people are often burnt in burning houses) and in the other a sick person, and perhaps also to the fact that premises are almost invariably insured against fire (and that consequently the actual plaintiffs in the fire cases were probably insurance companies in disguise).

Purely Economic Harm

If in the law reports, unlike the statute book, the differential treatment of personal injury and property damage is only a matter of inference, the distinction between physical damage of either kind and purely economic harm is quite openly accepted. Some cases could not be clearer. In one case highway engineers carelessly dug up an electric cable they had been told about and thereby cut off the power to the steelworks close by. The result was that the iron ore actually being smelted was destroyed and further smelting was delayed for three days until the power was reconnected. The steelworks recovered damages for the spoilt ore (including the profit they would have made from that particular ore), but not for the profits they would have made during the three days standstill, for that was pure economic loss not consequent on damage to any property. Since the nature of the defendant's conduct and the foreseeability of the harm (as well as directness, if necessary) were identical as to the two items of loss, the only difference was the nature of the harm—the economic loss was 'the wrong kind of harm'. But this was not quite what Lord Denning said. He said: 'Sometimes I say "There was no duty". In others I say: "The damage was too remote". So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable'.[36] Of course the policy decision will continue to be expressed in terms of duty and/or remoteness. It should be noted that it was no novelty to hold that there might be recovery for physical damage but not for pure economic loss suffered in the same incident: a century earlier it had been held that when the defendant flooded a building site the builder could recover for damage to his property but not for the loss suffered under his fixed price contract by reason of the ensuing delay.[37]

Between the workmen on the highway and the steelworks on the hill there was no 'particular relationship', but in *Muirhead v Industrial Tank Specialities*[38] the relationship was that of manufacturer and consumer, a relationship already described as 'special' in *Donoghue v Stevenson*. The plaintiff hoped to make money by buying lobsters in the summer when they are relatively cheap and selling them in the winter when they fetch a great deal more. But if lobsters are to be kept alive, they must be kept in moving water of the correct salinity, so Muirhead obtained a circulating pump manufactured by the defendant. It worked poorly, and not only did

the lobsters already purchased die, but no further lobsters could be kept. As in *Spartan Steel* the defendant was held liable for the property damage (the dead lobsters) but not for the profits foregone through the inability to buy and keep further lobsters. This is correct, but it was not obvious to the trial judge who was so confused by pronouncements in the House of Lords that he held that since lobsters were unforeseeable sort of creatures, no damages could be awarded for their death, but that some commercial use of the pump was foreseeable, so that lost profits were recoverable!

Financial harm is often suffered by one person (Y) as a result of physical harm caused to another (X). Where X dies as a result of suffering *personal injury* and Y loses money as a result, Y has a claim only if he is a human being and his relationship to X is one specified in the Fatal Accidents Act 1976. Where X survives his injuries and Y suffers a loss by looking after him, perhaps giving up a job to do so, Y has no claim against the tortfeasor but X may claim a reasonable sum in respect of Y's care and holds this sum for Y.[39] Where the tort causes damage to *property* in X's possession, Y may claim for his own loss only if he also had a property interest in it. Thus although the charterer of a vessel stands to lose if it is damaged in a collision, and may be the only person who stands to lose, he cannot claim against the ship which negligently collides with it since he has only a contractual right to the use of the vessel, which remains in the shipowner's possession through the master and crew.[40]

The fact that purely economic interests are less well protected against mere negligence than are physical interests in person and property is perhaps unsurprising, given that the only rights protected by its ancestor tort of trespass were physical. Indeed, for 30 years after *Donoghue v Stevenson* it was thought that the only duty actionable in negligence was a duty to take care to avoid physical damage, that is, to refrain from acting dangerously, and that one could never recover in negligence (as opposed to deceit or contract) unless there was physical damage. That changed in 1963, in *Hedley Byrne v Heller,* a case already considered, but it occurred in a curious way, for the case involved not only harm which was not physical but also conduct which was not action, but speech. Doubtless because of the arguments of counsel, their Lordships concentrated less on the nature of the harm caused than on the means by which it was caused—the defendant's conduct rather than the victim's harm—though manifestly both were crucial.

The reaction of one of the first judges on whom this decision was pressed was to say that '… that case was very much nearer contract than tort',[41] and there is no doubt that we are here concerned with transactions rather than with actions, since it is commonly by transactions that money is lost. As is shown by the cases of the iron ore and the circulating pump the decision was not extended across the whole area of negligence: financial harm was not simply equated with physical harm. At first almost all the cases involved statements, whether representations of fact or advice. Especially important was the holding that it applied to statements made in negotiations for a contract (though special statutory provision was made in 1967 for the case where a contract was actually reached between the parties). The great expansion came when it was decided that it applied not only to statements but to commercial and professional services in general: solicitors, for example, became liable to their clients in tort for professional negligence.[42] This being so, the question arose whether the tort claim could concur with a claim for damages for breach of contract, contracts for professional services normally involving an undertaking to use due care. In *Henderson v Merrett Syndicates*[43] the House of Lords held

that claims in tort and for breach of contract did indeed concur, with the result that almost every breach of a professional's contract could be treated as a tort by his client (and possibly others, since this was not a contractual claim), an untidy position which other systems have had the good sense to avoid.

Then the question arose whether this liability could be expanded to cover non-performance of an undertaking as well as misperformance, and it was so held in the case already discussed, where intended legatees were allowed to sue a solicitor for failing to follow the testator's instructions to draw up a will reinstating them.[44] It remains to be seen whether the move from misperformance to nonperformance will be matched by a movement from misrepresentation to silence. If so, persons negotiating a contract had better watch out, for hitherto the courts have been chary of requiring persons to divulge information when dickering for a deal other than insurance.

Most cases of misrepresentation, like *Hedley Byrne* itself, involved a communication made directly by the defendant to the plaintiff, but as was seen in *Harris v Wyre District Council* it has been held that a person who makes a statement to A may be under a duty to B who predictably relies on it. In such cases the misrepresentation (or the assumption of responsibility for it) is the source of the duty, but a misrepresentation to A may constitute a breach of an independent and antecedent duty owed to B, and if A relies on it to B's detriment, B may well have a claim for damages. It was so held in a case where an ex-employer gave a possible future employer a needlessly disparaging report on the plaintiff.[45] In the absence of such a duty the subject of the statement would have to prove malice, just as the addressee, in the absence of a duty of care owed to him, would have to prove fraud.

Psychiatric Harm

Although in an extreme case financial collapse may lead to suicidal stress, it may be thought eccentric to juxtapose purely economic harm and psychiatric damage, which seem to be at opposite ends of the spectrum of misfortunes. Different though they are, they nevertheless pose similar problems to the lawyer, one of legal technique, one of social value-judgment. The technical difficulty is to keep the number of claimants within manageable limits, a recurrent problem in the law. Where physical harm is in issue this is done for us by the restrictive physical law of inertia. In other cases one needs devices of a legal nature. Foreseeability alone is certainly unduly inclusive in cases of economic or psychiatric harm, for just as B may be impoverished by damage to A's property, so B may go into a decline out of grief or shock at A's death or injury, as where A is President Kennedy or Princess Di.

The other reason is one of value-judgment. Just as money, though important, is less important than health (we do not have a National Wealth Service—indeed, we have the very opposite, in the form of HM Revenue and Customs!), so, it is widely if unfeelingly felt, mental harm is less significant than physical harm, inability to cope through neurosis less serious than inability to walk by reason of amputation. Admittedly this is much controverted; there is no doubt that clinical depression is a serious affliction and that it is not only wounds which cause pain, but we do distinguish psychiatrists and surgeons, we do have special mental wards in hospitals and we do have a Mental Health Act which does not apply to patients with broken limbs. However

this may be, it is at present clear that special obstacles have to be overcome by those who, without being exposed to physical danger, seek compensation for the psychiatric harm they suffer owing to the negligence of the defendant.

The bulk of recent cases arose from the dreadful disaster at Hills-borough in Sheffield in April 1989 when the police allowed a crowd of excited football fans into an already overcrowded enclosure and chaos ensued. Ninety-five people were crushed to death. Those on the other side of the football field could actually see this happening, and thousands more were at home watching an edited version on television. The situation was very grim and gruesome, and many spectators, television viewers, and even policemen were shocked in varying degrees. The trauma had the usual consequences—loss of sleep, recurrent nightmares, inability to cope, feelings of helplessness and anger, and a claim for damages.

Damages were awarded to all those physically injured but to very few of those merely shocked, although there was nothing unforeseeable about the shocking nature of the event, since it was precisely to avoid such a crush that the police should have kept the fans out. Claims by those watching television were dismissed because even if they were closely related to the primary victims, they were not close to the actual scene; claims by those actually in the grounds were dismissed unless they were very closely related to one of the primary victims;[46] claims by the policemen were dismissed although they were helping with the rescue operations and were employed by the defendant whose fault it was.[47] None of these plaintiffs had been themselves at physical risk; had they been exposed to such a risk, they could have recovered for psychiatric harm. In this way the range of *possible* physical harm is used to limit the number of possible claimants unrelated to the principal victim. While practical enough, this rule is barely rational except where the shock results from the fear of such harm, and it is rendered even more irrational by a very dubious decision of the House of Lords that a person at any physical risk may recover for psychiatric harm even if the foreseeable physical harm did not occur and the psychiatric harm, due to the plaintiff's ultrasensitive predisposition, was entirely unforeseeable.[48]

The current rules are much criticised as irrational and unsympathetic, but the problem cannot properly be resolved by saying that psychiatric harm is simply personal injury (as several statutes seem to proclaim) and that therefore all that is required is that the harm be real and foreseeable as likely to be suffered by a normal person. Indeed, one of the prime difficulties in this area is that normality is hard to ascertain, given that people vary very much more in psychological resilience than in physical robustness.

Attempts by the courts to widen liability have actually made things worse. When the Court of Appeal suggested that only spouses and parents should be entitled to sue (a practical rule adopted in other systems, and indeed by our own legislation as regards bereavement damages) the House of Lords substituted a requirement that the plaintiff must prove that he was in a close loving relationship with the primary victim. Is it really helpful to require a person allegedly suffering from shock to dwell on the intensity of their love for the dear departed? Again, there was a rule that the plaintiff must actually have witnessed the shocking event. This rule the House of Lords modified by holding that it was enough if the plaintiff happened upon the 'immediate aftermath' of the event, as if it was just as easy to say that a person was nearly there as that he was actually there. This is surely an area in which it is best to adopt rules that are clear, even if artificial, since the claimants will inevitably (unless lying) be in a disturbed state which is sure to be worsened by prolonged uncertainty about the outcome of their claim.

The Law Commission has naturally made proposals for reform in this area. They are unlikely to be enacted and most unlikely, if enacted, to improve the situation. One proposal is that A should be able to sue B if A is shocked by what B does to himself. It is quite true that a housemaid coming to work may be shocked by finding that the householder has hanged himself in the hallway, but the proposal goes too far. Indeed, a judge has subsequently held that a fireman who was called to the scene of a motor accident and was shocked to discover his own son injured and unconscious at the wheel of the car he had been driving had no claim against the son (actually the Motor Insurers' Bureau, since the son was driving uninsured as well as negligently).[49]

Two further points should be made. First, where the victim has himself suffered physical injury there has never been a problem about awarding him damages for the psychological consequences, if adequately proved, just as there is none about awarding him damages for consequent financial harm. Secondly, the law awards no damages for grief. The reason for this is that no claim whatever lay at common law when someone else had been killed, and when a remedy was introduced by statute the judges held (contrary to its terms) that it covered only economic loss and therefore not human harm, such as grief. It is no answer to say that everyone suffers grief (see Queen Gertrude's admonition to Prince Hamlet), for not everyone suffers disabling grief; nor is it an answer to say that grief is immeasurable: it is no more immeasurable than pain, for which the courts award damages every day.

Most litigated cases of psychiatric harm have involved a claimant shocked by injury to someone else. In a sense such claimants are secondary victims (though they are called 'primary' if they are in the zone of physical risk). But is a shocking event necessary? Must there be a trauma preceding the stress? Certainly industrial injury benefit cannot be claimed for the mere fact of suffering stress from being engaged in a stressful occupation,[50] but under the Law Commission's proposals 'It is not a condition of the claim's success that the illness was induced by a shock', and in fact we are increasingly seeing cases where there is no physical trigger to the psychiatric collapse. These include cases of stress at work, not heeded or alleviated by the employer,[51] the case where the police failed to warn a volunteer that the interviews she agreed to attend were to be with a gruesome serial killer,[52] or the case where parents who had insisted that they would not foster a child abuser were shocked to find, some time after the event, that the youth sent to them for fostering had indeed proceeded to abuse their children.[53] In the last-mentioned case the House of Lords held that the claimants could arguably recover. In all these cases there was a special relationship between claimant and defendant, whereas in the mainstream shock cases there is generally no such relationship. We have seen that in claims for pure economic loss a special relationship is highly significant, and it might well be the same as regards psychiatric harm. Certainly the employer's duty to his staff includes the duty to take care to avoid causing them psychiatric illness and to help them if they suffer it. May it not be necessary to reconsider the holding that the Hillsborough policemen got no special consideration by reason of the fact that their employer was responsible for the situation which shocked them, even if their Lordships were understandably reluctant to reward the police while dismissing the claims of the public they are supposed to serve?[54]

Less Serious Upset

Damages for distress falling far short of any pathological harm have often been awarded by the courts against a contractor who failed to do something known to be important for the customer's peace of mind.[55] In the light of this, the position as regards the employment contract seems very unstable, especially as to dismissal. In 1909 the House of Lords, in a case not yet formally overruled, held that no damages could be awarded for distress caused by a brutal method of dismissal.[56] It is true that compensation may now be awarded by special statutory tribunals if the dismissal is unfair, as is common when the correct procedural steps have not been danced, but the compensation those tribunals can award is subject to a fixed maximum and covers only economic loss (restrictions which do not apply in cases of racial or sexual discrimination). This statutory scheme would be eclipsed if persons dismissed could bring a claim at common law free from those restrictions, so the House of Lords has reached a very uneasy compromise: no claim at all lies at common law in respect of actual dismissal and its consequences, but improper conduct by the employer prior to any dismissal may generate a claim for damages for both economic and emotional harm.[57] The position as regards other contracts is quite established: first, a package holiday company was held liable to a disappointed holiday-maker,[58] then solicitors had to pay for the distress caused to their client by their mismanagement of proceedings to enjoin molestation,[59] so now one could surely claim significant damages from a vet who carelessly killed one's beloved pet.

Distress may also be caused by a stranger, as was the case in *Wilkinson v Downton* where the defendant shocked the claimant badly by telling her as a practical joke that her husband had been injured in an accident.[60] After a moment's doubt, it has now been held that the case does not provide a remedy for distress which does not amount to recognised psychiatric injury, and *if* there is a tort of intentionally inflicting distress by a single act or word (a remedy for repeated misconduct is provided by the Protection from Harassment Act 1997) it must be shown that the defendant really intended to cause such distress.[61] As to liability in the absence of such an intention or a special relationship, the words of Lord Bridge appear to remain good: 'Those trapped in the crush at Hillsborough who were fortunate enough to escape without injury have no claim in respect of the distress they suffered in what must have been a truly terrifying experience.'[62]

Omissions

We have seen that the duty notion is put under some strain in cases of financial or psychiatric harm, and that in the former case some confusion results from the categorisation of the defendant's conduct as either speech or action. The duty notion is also put under some stress when the defendant's conduct consists of an omission rather than an action, where instead of adding a danger to life the defendant has simply failed to protect the claimant. Just as the distinction between words and acts is slightly fuzzy and capable of being confused, so is the distinction between acts and omissions to act. Lord Atkin, it will be recalled, classed them together. Nevertheless the distinction is an important one, as it determines when a person must not only refrain from causing harm to another but must take positive steps, busy himself, to protect that person from harm emanating from elsewhere, be it a third party, some natural phenomenon, or even the victim himself.

In certain special relationships it is well established that one party may be under a duty to act for the benefit of the other party to the relationship: the employer must take active steps to look out for the safety of his staff, the occupier of premises must bestir himself to see that his visitors are reasonably safe there, the bailee of a chattel must positively protect the goods entrusted to him, doctors cannot simply wash their hands, and so on.

If the defendant is in control of the source of a danger, he may well come under a duty to take active steps to prevent its doing damage. Thus the occupier of premises must take reasonable steps to save his neighbour's property from harm emanating from a danger on his own premises, even if it is due to natural causes or the acts of third parties.[63] It is true that in one case it was denied that the occupier of a disused cinema was liable for the destruction by fire of a neighbouring church, the fire having been started by trespassers who broke into the cinema and set fire to film scrap there, but the decision is best seen not as denying the existence of a duty (as Lord Goff held) but as denying the existence of a breach of duty on the facts of the case (as Lord Griffiths did).[64] Of course occupiers of adjoining properties are in a special relationship, but when the House of Lords held that the owner of a yacht damaged by escaping borstal boys could sue the warders for failing to prevent their attempt to escape from the island on the ground that the yacht was in the 'immediate vicinity', their decision certainly seemed to extend liability for omissions (though the boys were in the defendant's control). However, the decision is now being taken not as an instance of pure omission at all but as turning on the fact that the warders had brought the boys to the island in the first place, and had thus introduced the danger they had then failed to control. That they were not at fault in bringing the boys to the island is irrelevant: one who innocently causes a danger comes under a duty to try to prevent damage resulting from it. For example, a motorist who, entirely without any fault on his part, injures a pedestrian, cannot simply leave the victim lying on the road to be run over by someone else: he must take reasonable steps to protect him from further harm. Likewise, an occupier who knows that a trespasser is lying injured on his premises must surely take steps to alleviate his condition, even if it is not at all the fault of the occupier that he was injured in the first place.

The general question of liability for omissions was fully ventilated in the case of *Stovin v Wise,*[65] though as usual there were other factors in the case which rather obscure the discussion. The principal disturbing factor in the case was the public nature of the party whose liability was in issue, for, as has been noted, the duties of public bodies may not be identical with those of private parties. A further disturbing factor was that the question of the defendant's liability to the victim was raised not by the victim himself, who had already been paid by the motorist's insurer, but by the insurer seeking contribution from the public body towards that payment.

There was an accident at an acute intersection between a minor road from which a motorist was emerging and a major road along which a motorcyclist was proceeding quite normally. The motorist, whose view to the right was obscured by the existence of a bank of earth on private land beside the highway, was held liable. Her greedy insurer now claimed a contribution from the highway authority on the ground that the authority too could have been sued by the motorcyclist for failing to procure the removal of the embankment, as it had statutory power (though no statutory duty) to do, and had originally decided to exercise it.

The question presented in this tiresome manner was therefore whether the highway authority owed a *common law* duty to users of the highway, such as the motorcyclist, to exercise its statutory powers to improve visibility and consequently safety. By a bare majority the House of Lords reversed the decision of the courts below, and held that the highway authority owed no duty at common law to exercise its powers in this respect. Even the leading dissentient in the House agreed that 'the distinction [between act and omission] is fundamentally sound', and Lord Hoffmann gave eloquent reasons for supporting it and applying it in the case before him. The point of division was whether the public nature of the authority and the existence of its statutory powers took it outside the general rule that in the absence of some special relationship or feature there was no duty at common law to act for the benefit of others. The distinction between act and omission was reasserted shortly afterwards in the Court of Appeal when it decided that fire brigades were not liable simply for failing to douse a fire but would be liable if they did anything stupid which made the situation worse, as by turning off the sprinkler system. As we have seen, however, it is difficult to be categorical, since shortly afterwards liability was imposed on the ambulance service which had accepted an emergency call and failed to turn up reasonably promptly.

We must here again advert to the Human Rights Act 1998, for it lays down (for the purposes of the statute only) that 'An act includes a failure to act'. Consequently, a public authority may be held to have acted unlawfully if it fails to protect a citizen's Convention rights from invasion by a third party, himself not bound by the Act. The extent of such liability is very uncertain, and it will be difficult to hold that the idle authority ' acted' unlawfully unless it can be held that it was under a duty to take appropriate protective action.

Level of Duty

In one sense the common law duty is higher when it requires a person to take active steps to protect others than when it requires only that he refrain from positively causing an injury, but once it is held that a duty exists, its level is always, apparently, the same: it is the duty to take such care as *in all the circumstances of the case* is reasonable. What is reasonable is the matter discussed in the following chapter, when we shall also consider whether it might not be better for the courts to admit that sometimes they should require that the plaintiff show that the defendant had behaved not just unreasonably, but *very* unreasonably, that is, with *gross* negligence.

Notes

1 *Donoghue v Stevenson* [1932] AC 562 at 580.

2 *Moorgate Mercantile Co v Twitchings* [1976] 2 All ER 641 at 659.

3 *D v East Berks Community Health NHS Trust* [2005] UKHL 23 at 49 and 92.

4 *Ibid*. 97 to 119.

5 *Rondel v Worsley* [1967] 3 All ER 993.

6 *Caparo Industries v Dickman* [1990] 1 All ER 568.

7 *Spartan Steel v Martin & Co* [1972] 3 All ER 557.

8 *Corbett v Bond Pearce* [2001] 3 All ER 769 at 780.

9 *Sam v Atkins* [2005] EWCA Civ 1452.

10 *Donoghue v Stevenson* [1932] AC 562.

11 [1996] 3 All ER 801 at 818.

12 [1977] 2 All ER 492 at 498.

13 *Murphy v Brentwood DC* [1990] 2 All ER 908 at 936.

14 *Caparo Industries v Dickman* [1990] 1 All ER 568 at 574.

15 *Leigh & Sillivan v Aliakmon Shipping Co* [1985] 2 All ER 44 at 74.

16 *Hill v Chief Constable* [1988] 2 All ER 238.

17 *Osman v Ferguson* [1993] 4 All ER 344.

18 *Swinney v Chief Constable* [1996] 3 All ER 449.

19 *Wilkinson v Coverdale* (1793) 170 ER 284.

20 *Hedley Byrne & Co v Heller and Partners* [1963] 2 All ER 575.

21 [1995] 1 All ER 691 at 735.

22 [1989] 2 All ER 514.

23 *Smith v Eric S Bush* [1989] 2 All ER 514 at 534.

24 *White v Jones* [1995] 1 All ER 691.

25 *Phelps v Hillingdon London Borough Council* [2000] 4 All ER 504 at 518.

26 *Williams v Natural Life Health Foods* [1998] 2 All ER 584.

27 *Merrett v Babb* [2001] QB 1174.

28 *Burns v Shuttlehurst* [1999] 2 All ER 27.

29 [1989] 2 All ER 520.

30 *The Nicholas H* [1995] 3 All ER 307.

31 *McFarlane v Tayside Health Board* [2000] 2 AC 59.

32 *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52.

33 *Perrett v Collins* [1998] 2 Lloyd's Rep 255 at 257, [1998] TLR 393.

34 *Capital and Countiesplc v Hampshire CC* [1997] 2 All ER 865.

35 *Kent v Griffiths* [2000] 2 All ER 474.

36 *Spartan Steel and Alloys v Martin & Co* [1972] 3 All ER 557 at 562.

37 *Cattle v Stockton Waterworks* (1875) LR 10 QB 453.

38 *Muirhead v Industrial Tank Specialities* [1985] 3 All ER 705.

39 *Hunt v Severs* [1994] 2 All ER 385.

40 *The Mineral Transporter* [1985] 2 All ER 935.

41 *The World Harmony* [1965] 2 All ER 139 at 155.

42 *Midland Bank Trust Co v Hett Stubbs and Kemp* [1978] 3 All ER 571.

43 [1994] 3 All ER 506.

44 *White v Jones* [1995] 1 All ER 691.

45 *Spring v Guardian Assurance* [1994] 3 All ER 129.

46 *Alcock v Chief Constable* [1991] 4 All ER 907.

47 *White v Chief Constable* [1999] 1 All ER 1.

48 *Page v Smith* [1995] 2 All ER 736.

49 *Greatorex v Greatorex* [2000] 4 All ER 769.

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