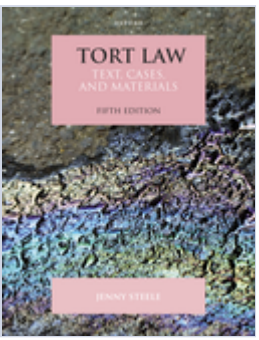

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

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3. The Standard of Care in Negligence

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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 introduces the reader to the fault principle or negligence standard, along with its positive and negative implications. This chapter first asks. 'What is negligence?'. It covers the standard of care and, within this, it looks at the objective standard. The chapter goes on to explore the way in which professional skill and care are assessed in the medical context. It also considers reasonable risk-taking and the absence of evidence of fault.

Keywords: tort, negligence, liability, breach of duty, fault principle, negligence standard

Central Issues

i) Negligence dominates the modern law of tort. One of the reasons for this is the broad appeal, and potential broad application, of the negligence or 'fault' principle on which it is based. Liability under the negligence principle depends on showing that the defendant's conduct has **fallen short of an objective standard**. Section 1 of this Chapter explores the objective standard in more detail.

ii) The objective standard does not vary in order to fit the particular abilities of defendants, though as we see in Section 1, an exception exists for children to the extent that they are held to the standard of a reasonable child of their age. The objective standard does not even vary to

adapt to illness on the defendant's part. The standard does, however, respond to the circumstances and nature of the defendant's activities: it asks what the reasonable person would have done in the same circumstances and carrying out the same activity. It therefore addresses the reasonable driver; sportsman; doctor, and so on. Assessment of *professional* skill and care has raised particular challenges, not least in the medical context. Related issues, about how courts grapple with determining whether risk-taking by professionals with special skills falls short of an appropriate standard, are considered in Section 2.

iii) Establishing the relevant standard is only part of the enquiry into fault. In many contexts, risks are evidently created by the defendant's activities. Beyond lapses of judgment or inadvertent acts, there remains a question of how much foreseeable risk the reasonable person would take (or impose on others) in particular circumstances, and what precautions a reasonable person would take in response to these risks. In other words, it is not the case that *all* risks of foreseeable harm imposed on others are unreasonable. Section 3 addresses two aspects of what might be considered 'reasonable risk-taking'. First, the common law has developed its own approach to the general question of which risks are considered reasonable. Second, statutory interventions have attempted to state the law in such a way as to protect socially valuable activities from the perceived deterrent effect of potential tort liability. Whether these alter the law, or merely restate the law for reasons either of transparency, or political capital, is a moot question.

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iv) A **positive** implication of the fault principle may be thought to be that where there is faulty conduct which foreseeably causes damage, the defendant *ought* to make good the damage caused. But this aspect of the negligence standard, together with the range of damage which it will compensate, raises the spectre of virtually limitless liability, and the prospect of litigation aimed at an essentially factual enquiry in a vast range of circumstances. The negligence standard is insufficient not least because fault, in the form of negligence, is a fact of life. However keen we may be to reduce fault, it is also recognized that it will occur and that there are means, other than tort liability, of dealing with its impact. Key examples are insurance, and social welfare. There will be liability in negligence only if the tortfeasor **breached a duty of care owed to the claimant**. The notion of duty and its applications are considered in Chapters 4 and 5. For the purposes of this chapter, it must be remembered that negligence establishes liability only if the party at fault owed a duty to the claimant to take due care not to cause them damage. The boundary between duty and breach in particular cases is capable of shifting.

1 Standard of Care: What is 'Negligence'?

In order to succeed in a claim in negligence, the claimant must show that the following criteria are met:

1. The defendant owes the claimant a duty to take care.
2. That duty has been breached: the defendant was 'negligent'.

3. The defendant's breach of duty has caused the claimant to suffer loss or damage of a relevant sort.
4. That damage is caused in law by the defendant's negligence/is not too remote/is within the scope of the duty.

Many texts begin with the first question, whether a duty of care is owed. And yet, 'duty of care' is a relatively abstract and difficult notion, which does not have an exact parallel in any other tort. By contrast, the standard of care is more easily grasped, can more easily be compared with the standards required by other torts, and is of at least equal importance.[1] It provides the substance of the tort, since it defines what conduct will count in law as negligence or lack of care. There is too much scope for the significance of lack of care to be forgotten, given the complexities of other aspects of negligence.

Historically, lack of care (together with damage) could be said to be the prime mover in the development of the
p. 125 tort. According to David Ibbetson, a series of 'innominate' (unnamed) ↵ tort actions involving loss to the claimant were redefined during the nineteenth century as components of a tort of negligence. What they had in common was the nature of the defendant's conduct, and thus 'carelessness' was the key feature of the emerging tort:

David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), 169

> The law of torts at the beginning of the nineteenth century was still recognizably medieval. It was characterized by a division between the action of trespass and the action on the case, the latter of which was subdivided into a number of nominate forms and a large residual group linked together by nothing stronger than that the defendant was alleged to have caused loss to the plaintiff. In the nineteenth century a substantial part of this residual group coalesced as the tort of negligence. This brought about a wholesale realignment of the law of torts, as this tort, defined by reference to the quality of the defendant's conduct, cut across the previously existing categorisation of torts.

While some other torts (for example, the actions in defamation) are defined according to the interest they protect, the tort of negligence was and is defined primarily according to the 'quality of the defendant's conduct'. In this text, we will therefore begin our exploration of negligence with the standard of care, but readers may of course use the chapters of this section in whichever order suits them.

1.1 'Mapping' Torts and the Negligence Standard

In Chapter 1, we discussed the way that torts may be 'mapped' according to their essential elements. These elements included the nature of the protected interests, and the nature of the defendant's 'wrong'. We noted that in some torts, such as libel, there is no required element of fault on the part of the defendant: liability is strict. Here, relevant defences will be particularly important in defining the ambit of liability. In the case of negligence, however, there clearly is a requirement that the defendant's conduct should be defective (and that damage must be caused). In negligence, conduct is judged according to whether it falls short of a relevant objective standard of care.

This distinctive negligence standard has tended to infiltrate other torts, sometimes displacing existing and different standards of liability: see, for example, Chapter 12 on *Rylands v Fletcher*. This may be because the idea of liability based on fault has intuitive appeal. But on the other hand, the 'objective' standard, which we introduce in the section that follows, is quite adaptable, and its exact link with personal fault is open to question.

The relevant standard peculiar to negligence is that of the 'reasonable person': **we must judge the defendant by the standards of a reasonable person who is undertaking the task or activity in the course of which the negligence is said to arise**.[2] The 'reasonable person' test is generally an objective one, which is not adjusted to
p. 126 fit the particular qualities of the ↵ defendant. Therefore, although negligence is concerned with 'falling short' of a relevant standard, it does not necessarily involve actions for which we would 'blame' an individual defendant. In the sense that it sets standards which are sometimes not reasonably attainable for particular defendants, negligence does indeed involve an element of 'strict' liability. This is inherent in the 'objective' standard.

2 The Objective Standard

2.1 Key Cases

Nettleship v Weston [1971] 2 QB 691

In *Nettleship v Weston*, the defendant was a learner driver. She was given driving lessons by the plaintiff, a family friend. She 'froze' at the wheel, so that her car mounted the pavement and struck a lamp post. This caused injury to the plaintiff instructor. The plaintiff and defendant were in joint control of the car, since the instructor was operating the gear stick and handbrake while the defendant was steering.

The Court of Appeal held that the defendant's conduct fell below the required standard of care, which was the same objective standard owed by every driver. One of the judges, Salmon LJ, dissented on this point. There was a reduction of damages on account of the instructor's own fault in respect of the accident.

In Chapter 8, we will consider this case again in respect of defences, in particular the failed defence of *volenti non fit injuria* (acceptance of risk). For the time being, we concentrate on those elements of the case that relate to the standard of care.

Lord Denning MR

The Responsibility of the Learner Driver in Criminal Law

Mrs Weston was rightly convicted of driving without due care and attention. In the criminal law it is no defence for a driver to say: 'I was a learner driver under instruction. I was doing my best and could not help it.' Such a plea may go to mitigation of sentence, but it does not go in exculpation of guilt. The criminal law insists that every person driving a car must attain an objective standard measured by the standard of a skilled, experienced and careful driver ...

The Responsibility of the Learner Driver Towards Persons on or near the Highway

Mrs Weston is clearly liable for the damage to the lamp post. In the civil law if a driver goes off the road on to the pavement and injures a pedestrian, or damages property, he is prima facie liable. Likewise if he goes on to the wrong side of the road. It is no answer for him to say: 'I was a learner driver under instruction. I was doing my best and could not help it.' The civil law permits no such excuse. It requires of him the same standard of care as of any other driver. 'It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question': see *Glasgow Corporation v. Muir* [1943] A.C. 448, 457 by Lord Macmillan. The learner driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a
p. 127 manner as a driver of skill, ↵ experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity ...

The high standard thus imposed by the judges is, I believe, largely the result of the policy of the Road Traffic Acts. Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill of a high standard: see *The Merchant Prince* [1892] P. 179 and *Henderson v. Henry E. Jenkins & Sons* [1970] A.C. 282. Thus we are, in this branch of the law, moving away from the concept: 'No liability without fault.' We are beginning to apply the test: 'On whom should the risk fall?' Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her.

The Responsibility of the Learner Driver towards Passengers in the Car

... The driver owes a duty of care to every passenger in the car, just as he does to every pedestrian on the road: and he must attain the same standard of care in respect of each. If the driver were to be excused according to the knowledge of the passenger, it would result in endless confusion and injustice. One of the passengers may know that the learner driver is a mere novice. Another passenger may believe him to be entirely competent. One of the passengers may believe the driver to

> have had only two drinks. Another passenger may know that he has had a dozen. Is the one passenger to recover and the other not? Rather than embark on such inquiries, the law holds that the driver must attain the same standard of care for passengers as for pedestrians. The knowledge of the passenger may go to show that he was guilty of contributory negligence in ever accepting the lift—and thus reduce his damages—but it does not take away the duty of care, nor does it diminish the standard of care which the law requires of the driver: see *Dann v. Hamilton* [1939] 1 K.B. 509 and *Slater v. Clay Cross Co. Ltd* [1956] 2 Q.B. 264, 270 …

Comments

Lord Denning had three reasons for holding the learner driver to the same standard as an experienced driver. First, she had already been convicted of driving without due care and attention, illustrating that the criminal law did not excuse the learner driver who was doing her 'incompetent best'. It would be strange if tort law, which in these circumstances has as its consequence the payment of compensation from an insurance fund, should *more* readily accept excuses than does the criminal law, whose sanctions here are generally punitive.

Lord Denning's second reason is practicality. It would be inappropriate, and confusing, for the driver of a car to owe different duties to different passengers in the car, and to different individuals outside the car, depending on what they knew or did not know about the driver's competence.

Lord Denning's third reason concerns insurance. We should consider this reason with care. Lord Denning states very clearly that the law in this area, governed by the Road Traffic Acts, is less concerned that there should be 'no liability without fault', and more concerned with the distributive question, 'on whom should the risk fall?' This effectively flags up a continuing dispute within the tort of negligence, concerning the purpose
p. 128 and nature of ↵ the tort as a whole. That general dispute certainly applies to the operation of the standard of care. It is clear that negligence liability attempts to shift loss to a person whose conduct is defective, from a person who has suffered injury as a consequence—though only in those circumstances where the defective conduct amounts to a breach of duty owed to the injured party. It is less clear why it does so, particularly where there is compulsory insurance. Is the shifting of losses justified by the faulty conduct of individual defendants? If so, why do we require them to insure, since this will make sure that they do not bear the loss themselves? Alternatively, is the shifting of loss justified through more distributive questions concerning the most effective or fairest means of spreading loss, ensuring (as Lord Denning put it) that no individual has to bear the loss alone?

The insurance context was introduced in Chapter 1, and similar questions will be encountered in various chapters of this book. But it would be wrong to assume that the background insurance position has only one effect on the case law, namely that judges will 'see to it' (in Lord Denning's blunt expression) that those who carry liability insurance will be liable for losses they cause. This is by no means always the case. English courts have on many occasions been eager to prevent claimants from pursuing those with deep pockets (including insurance companies) simply in order to transfer losses from themselves. An example is *Transco v Stockport MBC* [2003] UKHL 61; [2004] 2 AC 1, a case concerning the limits of strict liability for escapes, which is considered in Chapter 12. It needs to be remembered that on some occasions the claimant's case is pursued by an insurance company which has contracted to indemnify the claimant against losses (a 'first party' insurer), and is seeking a liable party from whom to recover some of the compensation paid. In such a case,

the practical outcome of a negligence claim will be to determine which of two insurers will ultimately bear the burden of compensating (or indemnifying) the injured party or, if the defendant has no valid insurance, it may even shift the loss to an uninsured party. This is not limited to situations of *compulsory* liability insurance as we will see below; but these situations (road traffic, and employer liability) have the important special feature that insurance is predictable.

A case raising essentially the same issues as *Nettleship v Weston* reached the High Court of Australia in *McNeilly v Imbree* [2008] HCA 40. Prior to this case, the High Court of Australia had decided that the standard of care of an inexperienced driver should be varied in relation to a passenger who knows of the relative lack of experience and has voluntarily taken on the role of supervising or instructing the driver (*Cook v Cook* (1986) 162 CLR 376). In *McNeilly*, the variable standard applicable within such 'relationships' was abandoned and a position akin to the English approach was adopted. The outcome was unanimous, but the reasoning was not. The 'plurality' (a term used in Australia to refer to a group of judges whose joint reasoning represents the majority in a case) explained that *Cook v Cook* had been decided at a time when the existence of a duty of care was thought to respond primarily to 'proximity' between the parties—and had extended this thinking to the content of the duty. That general approach had since been rethought. Kirby J on the other hand went out of his way to emphasize that the insurance position had played not only a role, but a decisive role in his reasoning. The particular feature of the insurance position in this case was that liability insurance for drivers was not merely commonplace, but also compulsory, throughout Australia. This, he argued, was a vital piece of information in deciding whether it was appropriate to hold an inexperienced driver to a higher standard of care than was justified by his or her particular level of skill and experience, in respect of a supervising passenger. The policy of compulsory insurance legislation made it appropriate to measure that lack of care objectively.

p. 129 **Kirby J, *Imbree v McNeilly***
[2008] HCA 40

> 169 *Compulsory insurance: a special case:*
>
> ...
>
> 171 The availability and existence of voluntary liability insurance is one thing. The compulsory provisions for universal statutory third party insurance of all motor vehicles registered for use on Australian roads is quite another. The latter form of insurance exists to provide coverage against 'fault' on the part of drivers of motor vehicles. It does so because of the recognition, by the 1930s, that the use of vehicles would inevitably occasion a toll of death and injury, for which a system of compulsory insurance was essential. That system was necessary to prevent intolerable burdens of unrecoverable losses falling upon persons injured in consequence of the ever-increasing use of motor vehicles on Australian roads of varying conditions. Such persons would otherwise often have been thrown back upon social security entitlements, welfare agencies or their families. Instead, a statutory insurance fund was provided from subventions paid by *all* motorists. That is the context in which the applicable principle of the common law falls to be determined.
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> 172 Another way in which the existence of compulsory third party motor vehicle insurance operates in this area of tort law concerns the applicability of the second purpose of tort law, namely to encourage care to avoid personal liability and thereby to modify potentially harmful behaviour. Where, as in this context, the payment of a compulsory (but relatively small) premium exempts the driver or owner from personal liability for negligence in all but the most exceptional of cases, it is hard to see how the second objective of the common law is attained. This simply serves to reinforce the conclusion that the common law liability in issue is not 'pure'. It is a hybrid form of liability in which the common law is inescapably affected by the presence of compulsory statutory insurance.

Of the other members of the High Court, only one mentioned insurance, and this was in order to state explicitly that the insurance position *could not be* a step in the court's reasoning toward a result. Even so, he emphasized the enormous significance of insurance in making sure that the law did not operate with 'intolerable harshness' in this area.

Kirby J went as far as to say that tort is really a 'hybrid', so that some of its principles and rules can make sense only when viewed in tandem with the insurance position. How could we hold certain drivers to a standard higher than they could reasonably be expected to reach, if they personally were accountable to the sometimes enormous damages that may be the consequence of a breach? Gleeson CJ merely described the principles of tort as having an 'overlay' of statutory intervention. Even so, he recognized clearly that tort's operation is framed by insurance.

2.2 Mental and Physical Impairment

The following decision takes the objective standard of care still further. Here, the Court of Appeal decided that the standard of care was not varied to reflect mental or physical impairment; only if actions were **involuntary** would there be no liability.

p. 130 ***Dunnage v Randall* [2015] EWCA Civ 673; [2016] QB 639**

The claimant, whose intervention was recognized by the judge as heroic, had tried to stop a visitor to his house from setting fire to himself with petrol. The visitor died as a consequence, and the claimant was badly burned. The claimant brought an action in negligence against the visitor, who was retrospectively diagnosed as affected by schizophrenia. His goal was to obtain damages from the defendant's insurers through a household policy which covered liability for 'accidental' personal injury. As is typically the case, the insurance policy excluded liability arising from 'wilful or malicious' actions on the part of the insured. Thus there were two questions: had the defendant breached his duty of care and acted negligently, despite the effect of his schizophrenia? And if he had, was the liability excluded from the insurance policy because it was 'wilful and malicious'?

The Court of Appeal unanimously held for the claimant. On the first question, the Court emphatically stated that the standard of care applicable in negligence is objective; and this means that it does not vary to reflect the capacity and state of mind of an individual defendant. No distinction is to be made between mental and physical incapacity in this regard; and the sole exception was said to be the case of children (considered below), where the objective standard is set according to age. The situation would be different only if it could be said that the defendant 'had not acted at all': in such an extreme case, for example, where a driver suffers an unforeseen attack and 'blacks out' at the wheel of a vehicle (*Mansfield v Weetabix* [1998] 1 WLR 1263), the defendant is simply not responsible. On the analysis in *Dunnage*, this is not a question of departing from the objective standard, but a recognition that the defendant has done nothing that could amount to a breach of duty.[3]

Vos LJ, *Dunnage v Randall*

> 130 … is there some principle that requires the law to excuse from liability in negligence a defendant who fails to meet the normal standard of care partly because of a medical problem. In my judgment, there is and should be no such principle. The courts have consistently and correctly rejected the notion that the standard of care should be adjusted to take account of personal characteristics of the defendant. The single exception in respect of the liability of children should not, I think, be extended. People with physical and mental health problems should not properly be regarded as analogous to children, even if some commonly and inappropriately speak of adults with mental health problems as having a 'mental age of five'.
>
> 131 In my judgment, only defendants whose attack or medical incapacity has the effect of entirely eliminating any fault or responsibility for the injury can be excused. It is only defendants in that category that have not actually broken their undoubted duty of care. The actions of a defendant, who is merely impaired by medical problems, whether physical or mental, cannot escape liability if he causes injury by failing to exercise reasonable care.
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> 132 What then does it mean to say that a medical condition entirely eliminates any fault or responsibility for the injury? It simply means that the defendant himself did nothing to
p. 131 cause the injury. Mr Michael Davie QC, leading counsel for the first defendant, gave the example of a person whose arm is holding a knife and who is overcome by another forcing him to stab a victim. The person holding the knife cannot have broken his duty of care because he did nothing himself.
>
> 133 In my judgment, however, at all intermediate stages where the defendant does something himself he risks being liable for failing to meet the standards of the reasonable man. This approach avoids the need for medical witnesses to become engaged with difficult and undefined terms such as volition, will, free choice, consciousness, personal autonomy and the like. It is only if the defendant can properly be said to have done nothing himself to cause the injury that he escapes liability. …
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> 134 This approach also has the attraction of not requiring any fine distinction to be made between the effects of physical health problems and mental health problems. Such a distinction seems to me, in the light of modern science, to be outdated and inappropriate. Even mental health problems often have some physical cause or manifestation. There is neither a logical nor a societal reason why the law should differentiate in this area between the two.

The Court of Appeal has clearly stated therefore that the standard of care is not varied to take into account mental or physical conditions suffered by the defendant. It is strongly hinted by Vos LJ here, and by Arden LJ in her judgment, that part of the appeal of the objective standard in such cases is that there is no need for experts to be asked to make complex judgments which could complicate and extend the process of litigation.

As to the second question, the Court of Appeal held that the damage did fall within the terms of the insurance policy.

Arden LJ, *Dunnage v Randall*

> 156 The next question is whether damages payable to the claimant fall within Vince's householder policy. The critical matter is whether the injury suffered by the claimant was accidental bodily injury. In my judgment, the injury was accidental because on the evidence Vince had clearly lost control of his ability to make choices and therefore he could not be said to have intended to cause injury to the claimant (see the cases already cited, and see per Lord Clarke of the Outer House of the Court of Session in *Howie v CGU Insurance plc* [2005] CSOH 110, at para 11) …

The strength of support for the objective standard of care in this case is illustrated by the answers given to the two questions. On the negligence question, the defendant was in law 'negligent', in the sense that he fell short of the objective standard of care. The fact that his will was overborne was irrelevant since he did act, and the events were not 'involuntary'. On the insurance question, however, it was said that the capacity to make choices had been lost. Thus, the acts were not wilful. It seems then that to avoid liability in negligence, there must be more than lost capacity to make meaningful choices: there must be a loss of capacity to act. It is hard to resist the conclusion that in this case too, the fact that the defendant is not the person who is to pay the
p. 132 damages has an impact on the policy of the law. In the absence ↵ of a suitable insurance policy, however, application of the same principles would mean that the burden of paying damages might have fallen on the widow of the deceased.

2.3 The Nature of the Objective Standard: What Is the Standard of Care for?

John Gardner, *The Negligence Standard: Political Not Metaphysical* (2017) 80 MLR 1–21, 20–21

Negligence and Legal Policy

Why might the law sometimes assign us strict responsibilities and sometimes negligence-limited responsibilities? The explanation is political, not metaphysical. Sometimes, as in the case in which I drive out in front of your car, we are both in the same role so far as the law is concerned. We are both drivers and we have, fundamentally, the same responsibilities to each other. These include the responsibility not to cause accidents. But who caused this accident? That, alas, is not so clear. Or rather, insofar as it is clear, that is because of a rule that we inherit mainly from the law. It is a rule that the law uses to attach the (legally relevant) causation of accidents to particular drivers, and it attaches that causation according to negligence. That rule is not, of course, the only rule in play. Things are a bit more complicated. … Yet the central organising rule remains the negligence rule. It is needed because, without it, the situation of colliding drivers is very often too symmetrical to allow assignable responsibility, in respect of the avoidance of particular accidents, to be assigned. Even when all the more specific rules of the road are considered, often we do not have enough to determine who, for the purpose of liability to pay for the damage of the other, was the cause of the accident. The law's central rule, it seems to me, simply assigns the assignable responsibility, hence the role of accident-causer in law, to whichever of the two drivers was negligent, building the negligence in turn on failure to observe various other rules of the road, some legal, some not, about the significance of painted lines, signage, indicator lights, speed, road position, etc.

This is a common arrangement in the modern law of torts not only in the traffic case, but more generally. In other cases, however, the law may reflect an asymmetry of roles. Gas engineers and the householders for whom they provide boiler repairs do not need the negligence standard to differentiate them. They are already differentiated by the fact that only one of them is a gas engineer (or, in derivative cases, holds himself out as a gas engineer) and the law can make that differentiation without waiting to see how either person handles the interaction between them. It can assign a strict responsibility to the engineer for ensuring that the boiler is adequately ventilated. Should it do so? Many considerations including the extent of the hazard from poor ventilation, the difference in relative expertise between typical gas engineers and their typical customers, the existence of a licensing and certification scheme, the availability of professional indemnity insurance, the availability of carbon monoxide alarms, and so forth, bear on the choice of arrangements for assigning responsibility.

It has not been my aim here to defend the use of the negligence standard in driving cases and the rival 'strict' standard in boiler repair cases. Indeed it has not been my aim here to defend the use of the negligence standard in some cases and not in other cases. My aim has been to show you what kind of considerations bear on the choice. Not only are considerations of this kind the ones that
p. 133 matter when assignable responsibility is assigned by the law. ↵ Considerations of this kind are

> also the ones which bear on who has assignable responsibility even before anybody, including the law, assigns it. Such considerations bear, in other words, on the role that the negligence standard plays in everyday life outside the law, as well as in the law.
>
> I hope that you can now see what kind of considerations they are. They are, in the widest sense, political considerations. They relate to the desirability or appeal or merit or attractiveness of the arrangements whereby some people have responsibility for some things, and others have responsibility for others. They point to the fairness, the efficiency, or more generally the reasonableness, of responsibilities being carved up in that way, or in some other way. They do not relate to the tragedy of the human condition or the impossibility of our escape from our rational nature. They do not belong to the metaphysics of basic responsibility. They belong instead to the politics of assignable responsibility.

In the above extract, John Gardner throws down a challenge to any notion that 'fault-based' liability is a better reflection of moral responsibility than strict liability. Indeed, he argues that 'basic responsibility' is essentially strict. With this challenge, we may also see that to adopt an *objective* fault standard is also no deviation from a moral notion of responsibility. In other words, these standards are legal, and the reasons for adopting a particular standard may rightly reflect a whole range of notions which might be dismissed by some as elements of 'policy'. Legal standards are 'political' in the sense that they may be chosen for a variety of reasons. They are not 'metaphysical', in the sense that they are not attempts to state basic moral truths about the human condition or the nature of responsibility.

2.4 Variations of the Objective Standard

Children

Where children are concerned, despite all that has been said about the objective standard of care above, it is recognized that the applicable standard of care will be varied to suit the defendant's age. This does not depart entirely from the objective standard. A child will not be judged according to his or her *particular* level of maturity or ability. Rather, the approach is an application of the objective standard, but it is adjusted to the case in hand in the manner that was rejected for those with medical conditions in *Dunnage v Randall*. Children will be held to the standard of the 'typical' child of their own age. Whilst in principle it is hard to reconcile this approach with the instances explored above, it does protect children, and more particularly their parents, from litigation for the ordinary errors that children make. The notion of 'ordinariness' is used frequently in the extracts below. There is a reluctance to attach legal responsibility to 'ordinary' childishness.

Mullin v Richards [1998] 1 WLR 1304 (CA)

The claimant suffered an injury to her eye when a plastic ruler broke during a mock swordfight at school. Her claim against the education authority (based on alleged failures of supervision) was unsuccessful, but the judge awarded damages against her fellow pupil, subject to a reduction of 50 per cent for contributory

negligence. The Court of Appeal reversed the decision to award damages. Both schoolgirls were 15 years of
p. 134 age, and the extract below ↵ deals with the question of whether the injury could be said to have been foreseeable. In answering this, age was a relevant factor.

> **Hutchison LJ, at 1308–9**
>
> The argument centres on foreseeability. The test of foreseeability is an objective one; but the fact that the first defendant was at the time a 15-year-old schoolgirl is not irrelevant. The question for the judge is not whether the actions of the defendant were such as an ordinarily prudent and reasonable adult in the defendant's situation would have realised gave rise to a risk of injury, it is whether an ordinarily prudent and reasonable 15-year-old schoolgirl in the defendant's situation would have realised as much. In that connection both counsel referred us to, and relied upon, the Australian decision in *McHale v. Watson* (1966) 115 C.L.R. 199 and, in particular, the passage in the judgment of Kitto J., at pp. 213–214. I cite a portion of the passage …
>
> > "The standard of care being objective, it is no answer for him, [that is a child] any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard."
>
> Mr Stephens also cited to us a passage in the judgment of Owen J., at p. 234: 'the standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience.' I venture to question the word 'intelligence' in that sentence, but I understand Owen J. to be making the same point essentially as was made by Kitto J. It is perhaps also material to have in mind the words of Salmon L.J. in *Gough v. Thorne*:
>
> > "The question as to whether the plaintiff can be said to have been guilty of contributory negligence depends on whether any ordinary child of 13½ can be expected to have done any more than this child did. I say 'any ordinary child.' I do not mean a paragon of prudence; nor do I mean a scatter-brained child; but the ordinary girl of 13½."

Very similar issues affect children as *claimants* where their contributory negligence is in issue, and these are discussed in Chapter 7, in relation to Defences; but we touch on this issue in relation to the standard of care owed by parents, below.

Sporting Events and Playtime Dangers

In certain circumstances, decisions have to be made and actions taken when time is short. The law continues to require that the defendant must exercise reasonable care, but it is accepted that ‘reasonable care’ is affected by these circumstances.

Wooldridge v Sumner [1963] 2 QB 43

The plaintiff, a photographer, was seriously injured when the defendant, a participant in a horse show, rode his horse too fast around a corner and veered into the area where the photographer was standing.

p. 135

Diplock LJ, at 67–8

A reasonable spectator attending voluntarily to witness any game or competition knows and presumably desires that a reasonable participant will concentrate his attention upon winning, and if the game or competition is a fast-moving one, will have to exercise his judgment and attempt to exert his skill in what, in the analogous context of contributory negligence, is sometimes called 'the agony of the moment.' If the participant does so concentrate his attention and consequently does exercise his judgment and attempt to exert his skill in circumstances of this kind which are inherent in the game or competition in which he is taking part, the question whether any mistake he makes amounts to a breach of duty to take reasonable care must take account of those circumstances.

The law of negligence has always recognised that the standard of care which a reasonable man will exercise depends upon the conditions under which the decision to avoid the act or omission relied upon as negligence has to be taken. The case of the workman engaged on repetitive work in the noise and bustle of the factory is a familiar example. … a participant in a game or competition gets into the circumstances in which he has no time or very little time to think by his decision to take part in the game or competition at all. It cannot be suggested that the participant, at any rate if he has some modicum of skill, is, by the mere act of participating, in breach of his duty of care to a spectator who is present for the very purpose of watching him do so. If, therefore, in the course of the game or competition, at a moment when he really has not time to think, a participant by mistake takes a wrong measure, he is not, in my view, to be held guilty of any negligence.

Furthermore, the duty which he owes is a duty of care, not a duty of skill. Save where a consensual relationship exists between a plaintiff and a defendant by which the defendant impliedly warrants his skill, a man owes no duty to his neighbour to exercise any special skill beyond that which an ordinary reasonable man would acquire before indulging in the activity in which he is engaged at the relevant time. It may well be that a participant in a game or competition would be guilty of negligence to a spectator if he took part in it when he knew or ought to have known that his lack of skill was such that even if he exerted it to the utmost he was likely to cause injury to a spectator watching him. No question of this arises in the present case. It was common ground that Mr Holladay was an exceptionally skilful and experienced horseman.

The practical result of this analysis of the application of the common law of negligence to participant and spectator would, I think, be expressed by the common man in some such terms as these: 'A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety.'

It could be argued that Diplock LJ was over-elaborate in his argument here. Why should we need to introduce the idea of 'consent' on the part of the spectator, when we could simply say that the standard of care varies with the circumstances, reflecting the fact that even the reasonable person will be less able to take precautions in those circumstances? Diplock LJ makes two separate points about the standard of reasonable care:

1. in the heat of the moment, a reasonable person may be unable to avoid causing injury; *and*
2. reasonable care varies with the expectation of a person in the position of the claimant.

p. 136 ↵ While this case dealt with spectators, it is clear that duties may also be owed to fellow participants and the standard of care owed will be similarly judged. In *Condon v Basi* [1985] 1 WLR, a local league footballer broke the leg of the claimant, an opposing player, with a tackle. The Court of Appeal accepted the authority of *Rootes v Shelton* [1968] ALR 33, a decision of the High Court of Australia. Sir John Donaldson MR pointed out that there were two different approaches to the standard of care in the case of *Rootes v Shelton*. One of these (the approach taken by Barwick CJ) takes up the second point derived from *Wooldridge v Sumner* because it refers to the level of risk that has been accepted by fellow participants. The other, the judgment of Kitto J, was more straightforward, concentrating simply upon reasonableness 'in relation to the special circumstances of the conduct': this is the first point from *Wooldridge v Sumner* above. Sir John Donaldson MR said that he would prefer the more straightforward approach of Kitto J, but that it did not matter on the facts of *Condon v Basi* itself, where the defendant through his foul play showed 'reckless disregard' of his opponent's safety.

In *Blake v Galloway* [2004] EWCA Civ 814; [2004] 1 WLR 2844, the Court of Appeal reviewed the sporting authorities in order to determine the right approach to an injury suffered in the course not of sport but of simple 'horseplay'. Five teenagers were throwing bark and twigs at one another for amusement when one of them suffered an eye injury. The Court of Appeal concluded that there had been no breach of duty. Participation in the game was thought to make its tacit 'rules' consensual. Applying the case law on sporting injuries, this meant that the test for breach of duty would require something more than a simple 'error of judgment or lack of skill' (Dyson LJ at [17] quoting Diplock LJ in *Wooldridge*).

Dyson LJ, *Blake v Galloway*

> 15 I recognise that the participants in the horseplay owed each other a duty to take reasonable care not to cause injury. What does that mean in the context of play of this kind? … I consider there is a sufficiently close analogy between organised and regulated sport or games and the horseplay in which these youths were engaged for the guidance given by the authorities to which I have referred to be of value in the resolution of this case. The only real difference is that there were no formal rules for the horseplay. But I do not consider that this is a significant distinction. The common features between horseplay of this kind and formal sport involving vigorous physical activity are that both involved consensual participation in an activity (i) which involves physical contact or at least the risk of it, (ii) in which decisions are usually expected to be made quickly and often as an instinctive response to the acts of other participants, so that (iii) the very nature of the activity makes it difficult to avoid the risk of physical harm.
>
> 16 I would, therefore, apply the guidance given by Diplock LJ in *Wooldridge*, although in a slightly expanded form, and hold that in a case such as the present there is a breach of the duty of care owed by participant A to participant B only where A's conduct amounts to recklessness or a very high degree of carelessness.

The decision in *Blake v Galloway* makes clear that the different approach to breach in sporting cases is not
p. 137 simply a question of what expectation is reasonable 'in the heat of the ↵ moment', since the pressure and speed referred to in the sporting cases did not exist. In this particular case, a less demanding standard imposed on the defendant is justified by the consensual nature of the game.

Domestic Settings and Ordinary Parents

Mullins v Richards illustrates the propensity of tort claims to arise in as wide a range of circumstances as there are opportunities to cause one another harm. This raises the question of what burdens may appropriately be placed on ordinary citizens, where they are exercising no particular expertise and not pursuing an enterprise or business. In *Perry v Harris* [2008] EWCA Civ 907, a very serious injury was suffered by a child on a bouncy castle which had been hired for a birthday party. The Court of Appeal ruled that the relevant standard was that of the reasonable parent, so that knowledge of the detailed contents of 'official' documents and guidance relating to the equipment was not assumed. The domestic setting was therefore very important to the outcome.[4] As with children, there is an emphasis on 'ordinary parents', and a reluctance to attach legal liability to the ordinary choices that parents make.

Thus, a 'reasonable parent' would not necessarily have kept the children under constant surveillance; nor stopped the children from somersaulting; nor prevented children of different sizes from using the bouncy castle at the same time, even though these were touched upon in the instructions supplied.

A similar point was explored in *Ellis v Kelly* [2018] EWHC 2031 (QB); [2018] 4 WLR 124. Here, a child of 8 had been very seriously injured by a car while running diagonally across a road towards a zebra crossing. The car was travelling at excessive speed, and the child had miscalculated. His mother had allowed him to go to the park with older cousins (of 10 and 11), though he had wandered away from them on this occasion. The court found that the child was not contributorily negligent, given his age and the excessive speed of the car. But the defendant driver (or rather the motor insurers) argued that the mother was also at fault, and that she should bear some of the liability. This was an application of the principle of 'Contribution' between liable parties, which is explored in Chapter 9. Yip J declined to hold Mrs Ellis partly responsible. Once again, the notion of 'ordinariness' was called into action. So too was the notion of reasonable risk-taking; and the need to avoid the spectre of law intruding to second guess the way in which a reasonable parent may decide to introduce their children to ordinary risks and dangers.

***Ellis v Kelly* [2018] EWHC 20131 (QB)**

> 66 No matter how careful a parent is, it is impossible for children to be completely protected from risk. Keeping children cooped up and not allowing them to experiment with small freedoms carries its own risk. There is a difficult balance to be struck. Different parents in different circumstances will make different decisions about how best to strike that balance. Sadly, when something goes wrong, a parent may look back and agonise over the choice they made. The fact that, with hindsight, they would have taken a different course is very far from establishing that their original choice was wrong, still less that they were negligent. …
>
> p. 138 71 It seems to me that holding Mrs Ellis responsible would be to impose far too high a standard on an ordinary parent making ordinary decisions in the course of parenting as to how to keep her child reasonably safe while gradually being allowed more responsibilities and freedoms.

It was also apparent that Yip J was keen to discourage a practice of joining parents of injured children to an action in order to reduce the amounts payable by road traffic insurers. As she put it, 'parents are not reasonably able to secure insurance to secure against the risks arising out of their parenting generally' (para [77]). Although the standard of care operates according to legal principles, this is further illustration that it also does so with awareness of where loss might be expected to lie, and what incentives the law may create for litigation. The message is that courts should be mindful of the implications of bringing tort liability into the domestic setting.

The Ordinary Skilled Person Professing to Have a Special Skill

Just as the applicable standard of care is lowered in the case of children, and adjusted for actions taken 'in the heat of the moment', so also it will be higher if the defendant is performing actions which require special skill. In the leading case of *Bolam v Friern Hospital Management Company* [1957] 1 WLR 582, McNair J advised the jury that the question of 'negligence' in a medical procedure should be approached as follows:

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

McNair J went on to discuss how the law should approach differences of opinion among medical practitioners, and we return to this element of his judgment later in this section.

Rank and experience Experience is generally not a factor in identifying the standard of care; but the post that is held is important. In *Wilsher v Essex Area Health Authority* [1987] QB 730 (CA), Mustill and Glidewell LJJ explained that there would be no exception to the 'objective' standard of care where an inexperienced or newly qualified medical professional was concerned. Rather, the applicable standard would be set according to
p. 139 the post that is ↵ filled by the defendant. Where the plaintiff was cared for in a specialist unit, in this case a neonatal unit, the applicable standard of care was a high one. This standard would be variable according to the post held within the team providing care for the plaintiff, but it would not be variable according to the level of experience held by the particular individual member of staff. (There was an appeal to the House of Lords from this case on the issue of causation, but the House of Lords did not reconsider the issue of standard of care.) In *FB v Rana* [2017] EWCA Civ 334, it was emphasized that some tasks should be performed equally competently by any medical professional. Here, a baby had been inspected by a Senior House Officer—a junior doctor—in the Accident and Emergency Department. The Court found that the task in hand was one of 'history taking', and that with this common activity, there was no lower standard of care because of the rank of the medical professional involved. The question is whether the activity in question falls within the remit of the post, occupation, or activity of the person whose breach of duty is in issue.

Darnley v Croydon Health Services NHS Trust [2018] UKSC 50; [2018] 3 WLR 1153

Here, the claimant had been attacked and struck on the head by an unknown assailant. Feeling very unwell, he went to the Accident and Emergency Department of the defendant's hospital, accompanied by a friend. He was advised that there would be a wait of four to five hours before being seen. He ought to have been advised that he would be seen by a 'triage' nurse to assess the seriousness of his condition within 30 minutes. Expert evidence suggested that if he had waited to see the nurse, he would have been rapidly treated, making a full recovery. Instead, feeling too unwell to wait, he left and returned home, without notifying staff. An hour later his condition deteriorated and his family called an ambulance. Sadly, despite surgery, he suffered permanent brain damage. This was an avoidable injury, but did a receptionist owe a duty to advise that a nurse would be seen in around 30 minutes? Clearly, had she done so, he would not have left when he did, so that the causation test (addressed in Chapter 6) was satisfied.

Lord Lloyd-Jones JSC

Negligent Breach of Duty

24 The reception desk at the A & E department was the first point of contact between the defendant trust and members of the public seeking medical assistance. It has not been suggested that the defendant was in any way at fault in allocating this responsibility to receptionists who were not medically qualified. Moreover, it has not been suggested that the receptionists should have provided accurate information to each patient on arrival as to precisely when he or she would be seen by a medically qualified member of staff. Anyone who has any experience of A&E departments will know that this would be impossible. The pressures on medical staff are enormous, the demand for attention is constantly fluctuating and priorities are likely to change. However, it is not unreasonable to require receptionists to take reasonable care not to provide misleading information as to the likely availability of medical assistance.

p. 140

25 The particular role performed by the individual concerned will be likely to have an important bearing on the question of breach of the duty of care. As Mustill LJ explained in Wilsher v Essex Area Health Authority [1987] QB 730, 750–751, the legitimate expectation of the patient is that he will receive from each person concerned with his care a degree of skill appropriate to the task which he or she undertakes. A receptionist in an A & E department cannot, of course, be expected to give medical advice or information but he or she can be expected to take reasonable care not to provide misleading advice as to the availability of medical assistance. The standard required is that of an averagely competent and well-informed person performing the function of a receptionist at a department providing emergency medical care.

Much of the controversy of this case concerned the potential burden on busy and chaotic A & E departments of imposing what the Supreme Court defined, above, as a duty not to provide misleading information. The case shows how issues of whether there is a duty, and whether the duty has been breached, may tend to overlap. In *Darnley*, the Supreme Court took the view that the claimed duty was not novel, but fell within an established category. According to the Court's newly developed approach (set out in recent cases such as *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR 595 and explored in Chapter 4), 'policy' issues surrounding the likely burdens of liability do not need to be reconsidered simply because there is some variation in the facts compared to earlier decisions. These policy issues were dismissed as irrelevant: in terms of whether there was a duty of care, this was an easy case, and the only issues surrounded breach.

> **Lord Lloyd-Jones JSC**
>
> 22 … I consider that the submissions of Mr Havers QC on behalf of the defendant and the observations by the majority in the Court of Appeal (at paras 55 and 88) on the social cost of imposing such a duty of care are misplaced. This is not a new head of liability for NHS health trusts. In any event, I consider that what are said to be the undesirable consequences of imposing the duty in question are considerably over-stated. Jackson LJ considered (at para 55) that litigation about who said what to whom in the waiting rooms of A & E departments could become a fertile area for claimants and their representatives. Alternatively, in his view, health care providers could close down this area of risk altogether by instructing reception staff to say nothing to patients apart from asking for their details. In the same way, Sales LJ considered (at para 88) that the imposition of such a duty could lead to defensive practices on the part of NHS trusts resulting in the withdrawal of information which is generally helpful to the public. There is no reason to suppose that the factual context of an A & E department is likely to give rise to any unusual evidential difficulties. The burden of proof of the provision of misleading information will be on the claimant. Hospital staff will be able to give evidence as to their usual practice. So far as substantive liability is concerned, the requirements of negligence and causation will remain effective control factors. It is undoubtedly the fact that Hospital A & E departments operate in very difficult circumstances and under colossal pressure. This is a consideration which may well prove highly influential in many cases when assessing whether there has been a negligent breach of duty.

p. 141 ↵ Increased emphasis, therefore, falls on the issue of breach of duty.[5] As we have seen, this requires a focus on what is reasonable *in the circumstances*; and for the particular role which is being fulfilled. It was argued that this does not require attention to the kinds of policy issues above; but the standard of care does respond both to the circumstances, and to the kind of expertise that might be expected of the person giving the information. All things considered, it was reasonable to expect that a receptionist would not offer misleading information, as happened in this instance. A & E departments will therefore have to consider the way that they convey information to patients. What is interesting is that focus on breach *narrows* the range of questions seen as relevant. This shift is considered further in Chapter 4.2.4, when we consider the Supreme Court's new approach to the duty of care in 'established' duty situations.

3 Assessing Professional Skill and Care

Earlier, we extracted a statement by McNair J, in the case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583, concerning the correct approach to the standard of care in respect of activities which require special skill. A still more important aspect of his summary of the law concerned *differences of opinion* among practitioners. How should the law approach a case of alleged negligence against a professional person where that person's conduct is supported by some, but perhaps not all, fellow professionals? Should the court be free to choose which opinion to prefer? Indeed, should the existence of settled professional practice be decisive at all? The words used by McNair J on this point have become known as 'the *Bolam* test'. This test has been applied on numerous occasions.

> **McNair J, at 587**
>
> … he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. … Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.

This approach could remove the final judgment on carelessness from the court, in cases where a defendant adheres to a recognized professional practice. In an article published soon after *Bolam*, J. L. Montrose pointed out that there is no reason to take issue with the second sentence in the statement by McNair J reproduced above: certainly a 'man' is not to be held negligent *merely* because there is a body of opinion against his practice. It is the first sentence which, according to Montrose, appears to make due care synonymous not with what *should* be done, but with what is generally done—or at least with what is defended by a responsible body of appropriately skilled professionals. Montrose gives some powerful reasons why courts should not defer to those with expertise too readily:

p. 142 **J. L. Montrose, 'Is Negligence an Ethical or a Sociological Concept?' (1958) 21 MLR 259, at 263**

> It is surely negligent not to provide against risks which ought to have been known. The fact that it was not appreciated by men experienced in the particular province is, of course, strong evidence that it could not reasonably have been guarded against, but not conclusive evidence. Experts may blind themselves by expertise. The courts should guard the citizen against risks which professional men and others may ignore.

These words were prescient. Over the ensuing years, the '*Bolam* test' became the principal means of approaching claims of professional negligence, and was synonymous with deference to the expertise of the professions.

3.1 *Bolam* in the Medical Context

Most particularly in the medical context, the application of the *Bolam* test led to accusations of a protectionist stance towards doctors. Two broad problems were identified with the courts' interpretation of the *Bolam* test in such cases, at least up until the decisions in *Bolitho* and *Montgomery* (considered below). In the specific case of disclosure of risks associated with medical procedures, it was held by the Supreme Court in *Montgomery* that the *Bolam* test is no longer regarded as the correct approach, and it seems likely that this will have broader effects: *Montgomery v Lanarkshire Health Board* [2015] AC 1430.

A first problem is that *Bolam* has been applied in medical cases in such a way that the court's judgment is replaced with the judgment of the defendant's medical expert, as long as the expert is found to be honest and respectable. In the extract below, Brazier and Miola explain this effect, while also proposing that it is particular to medical cases:

M. Brazier and J. Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution?' (2000) 8 Med L Rev 85–114

> What distinguishes medical litigation from other areas of professional liability is in part that a series of judgments (or maybe a gloss on those judgments) have given rise to a perception that all *Bolam* requires is that the defendant fields experts from his or her medical specialty prepared to testify that they would have followed the same course of management of the patient-plaintiff as did the defendant. If such experts can be identified, are patently honest and stand by their testimony vigorously, neither they nor the defendant will be asked to justify their practice … Yet in other professional negligence claims, time after time, judges have made it clear that expert opinion must be demonstrably responsible and reasonable.

Second, it has been suggested that many aspects of medical negligence litigation have been inappropriately 'Bolamized'.[6] In other words, wherever a tricky issue arises concerning the standard of care in a medical context, the habitual response of the courts has been to reach for the *Bolam* test, and to resist making their own judgments. Brazier and Miola, ↵ in the article quoted above, suggest in particular that three aspects of medical ethics had been treated in this way: advice of patients and consent to medical treatment (particularly through the judgment of Lord Diplock in *Sidaway v Royal Bethlem Hospital*); the treatment of medically incapacitated patients; and the treatment of mature minors as considered in *Gillick v West Norfolk Area Health Authority* [1985] 3 All ER 402. Montgomery, in a wide-ranging appraisal of the state of present medical law, has suggested that for three decades, the courts set out 'a position of deferential judicial oversight of clinical judgment that remained remarkably stable': this was 'based on the *Bolam* test as a golden thread running through the law'.[7] As already noted, *Bolam* no longer holds sway in relation to consent to medical treatment. In beginning to effect this change, the judgment of the House of Lords in the following case was significant.

p. 143

Bolitho v City of Hackney Health Authority [1998] AC 232

In principle, this case clarified that the *final* judgment on breach of duty lies with the court, not with medical practitioners. In relation to informed consent, that step was taken more clearly in the later case of *Montgomery*; and *Bolitho* may therefore be seen as a step in the development of the law away from deference to medical practitioners. Certain of Lord Browne-Wilkinson's comments, including his approval of dicta in *Hucks v Cole* (a case from 1968 reported at [1993] 4 Med LR 393), show the importance of this clarification of the *Bolam* test.

In *Bolitho*, a 2-year-old boy suffered brain damage, and later died, as a result of cardiac arrest following respiratory failure. He was in the care of hospital staff and had suffered two severe episodes of respiratory difficulties before the final attack. On both occasions the nurses caring for the little boy called for a doctor to attend, but on neither occasion did a doctor attend. It was the claimant's case that the doctor should have attended the little boy; that he should have been intubated following the first two episodes; and that if this had been done then this would have prevented the respiratory failure and cardiac arrest. It was the doctor's case that even if she had attended, she would not have intubated the child, so that her failure to attend had not, she argued, caused the injury.

The following extract deals with the standard of care of a medical professional.[8] In particular, the question arose of whether it would have been negligent of the doctor not to intubate the child, had she attended him after the two initial attacks. If this course of inaction would have been negligent, then her defence to the negligence claim would fail.

Lord Browne-Wilkinson, at 241–3

The *Bolam* test—Should the Judge have Accepted Dr Dinwiddie's Evidence?

...

Mr Brennan ... submitted that the judge had wrongly treated the *Bolam* test as requiring him to accept the views of one truthful body of expert professional advice even though he was unpersuaded of its logical force. He submitted that the judge was wrong in law in adopting that approach and that ultimately it was for the court, not for medical opinion, to ↵ decide what was the standard of care required of a professional in the circumstances of each particular case.

p. 144

My Lords, I agree with these submissions to the extent that, in my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice. In the *Bolam* case itself, McNair J. [1957] 1 W.L.R. 583, 587 stated that the defendant had to have acted in accordance with the practice accepted as proper by a '*responsible* body of medical men.' Later, at p. 588, he referred to 'a standard of practice recognised as proper by a competent *reasonable* body of opinion.' Again, in the passage which I have cited from *Maynard's* case [1984] 1 W.L.R. 634, 639, Lord Scarman refers to a 'respectable' body of professional opinion. The use of these adjectives—responsible, reasonable and respectable—all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.

There are decisions which demonstrate that the judge is entitled to approach expert professional opinion on this basis. For example, in *Hucks v. Cole* [1993] 4 Med. L.R. 393 (a case from 1968), a doctor failed to treat with penicillin a patient who was suffering from septic spots on her skin though he knew them to contain organisms capable of leading to puerperal fever. A number of distinguished doctors gave evidence that they would not, in the circumstances, have treated with penicillin. The Court of Appeal found the defendant to have been negligent. Sachs L.J. said, at p. 397:

> "When the evidence shows that a lacuna in professional practice exists by which risks of grave danger are knowingly taken, then, however small the risk, the court must anxiously examine that lacuna—particularly if the risk can be easily and inexpensively avoided. If the court finds, on an analysis of the reasons given for not taking those precautions that, in the light of current professional knowledge, there is no proper basis for the lacuna, and that it is definitely not reasonable that those risks should have been taken, its function is to state that fact and where necessary to state that it constitutes negligence. In such a case the practice will no doubt thereafter be altered to the benefit of patients. On such occasions the fact that other practitioners would have done the same thing as the defendant practitioner is a very weighty matter to be put on the scales on his behalf; but it is not, as Mr. Webster readily conceded, conclusive. The court must be vigilant to see whether the reasons given for putting a patient at risk are valid in the light of any well-known advance in medical knowledge, or whether they stem from a residual adherence to out-of-date ideas."

Again, in *Edward Wong Finance Co. Ltd v. Johnson Stokes & Master* [1984] A.C. 296, the defendant's solicitors had conducted the completion of a mortgage transaction in 'Hong Kong style' rather than in the old fashioned English style. Completion in Hong Kong style provides for money to be paid over against an undertaking by the solicitors for the borrowers subsequently to hand over the executed documents. This practice opened the gateway through which a dishonest solicitor for the borrower absconded with the loan money without providing the security documents for such loan. The Privy
p. 145 Council held that even though ↵ completion in Hong Kong style was almost universally adopted in Hong Kong and was therefore in accordance with a body of professional opinion there, the defendant's solicitors were liable for negligence because there was an obvious risk which could have been guarded against. Thus, the body of professional opinion, though almost universally held, was not reasonable or responsible.

These decisions demonstrate that in cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence (I am not here considering questions of disclosure of risk). In my judgment that is because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.

I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence. As the quotation from Lord Scarman makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views

> both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark by reference to which the defendant's conduct falls to be assessed.

Lord Browne-Wilkinson went on to explain that this was not 'one of those rare cases' where there were grounds to dismiss the body of expert opinion as illogical. In particular, he was mindful that intubation was by no means a routine or risk-free procedure.

Informed Consent

In *Sidaway v Bethlem Royal Hospital* [1985] AC 871, the House of Lords appeared to close the door to a doctrine of informed consent in English law. However, courts did not rest easy with this, and the position has now been resoundingly reversed. In *Sidaway,* with the exception of Lord Scarman, the House of Lords thought that the content of a medical practitioner's duty to advise a patient of the risks of medical procedure was to be determined by considering *the steps the reasonable medical practitioner should take*. There was some variation between their Lordships' judgments, and Lord Bridge in particular proposed that a reasonable doctor would respond honestly to questions asked by an inquisitive patient. However, the general position was that the reasonableness of disclosure and advice was to be approached by reference to the *Bolam* test. As we have seen, the interpretation of this test appeared to offer little space for courts to reach their own judgments, since the question would be one of accepted practice.

p. 146 ↵ We saw above how *Bolitho* built on earlier decisions of the courts to qualify the *Bolam* test. *Bolitho,* however, was not a case of advice or disclosure; and it described the case where the court would substitute its own judgment as 'rare'. Some years after *Bolitho*, in *Chester v Afshar* [2004] UKHL 1; [2005] 1 AC 134, the House of Lords treated patient autonomy as a well-established and significant value protected by the law. In *Chester*, the defendant seems to have conceded that the patient should have been warned of a small risk of very significant injury associated with surgery. That risk did in fact come to pass, and the sole question was one of causation: given that the patient would most likely have had the same treatment if properly advised, albeit on a different occasion, was the failure to advise a cause of her injury? Despite the fact that standard of care was not directly in issue, the emphasis placed on patient autonomy and on the right to self-determination appeared to mark a distinct change in approach.

Lord Steyn, *Chester v Afshar*

> 14 … The starting point is that every individual of adult years and sound mind has a right to decide what may or may not be done with his or her body. Individuals have a right to make important medical decisions affecting their lives for themselves: they have the right to make decisions which doctors regard as ill advised. Surgery performed without the informed consent of the patient is unlawful. The court is the final arbiter of what constitutes informed consent. Usually, informed consent will presuppose a general warning by the surgeon of a significant risk of the surgery
>
> …
>
> 24 Standing back from the detailed arguments, I have come to the conclusion that, as a result of the surgeon's failure to warn the patient, she cannot be said to have given informed consent to the surgery in the full legal sense. Her right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles.
>
> 25 On a broader basis I am glad to have arrived at the conclusion that the claimant is entitled in law to succeed. This result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision announced by the House today reflects the reasonable expectations of the public in contemporary society.
>
> 26 The result ought to come as no surprise to the medical profession which has to its credit subscribed to the fundamental importance of a surgeon's duty to warn a patient in general terms of significant risks: Royal College of Surgeons, Good Surgical Practice (2002), ch 4, guidelines on consent.

In the final paragraph of this extract, Lord Steyn refers to changes in the medical profession's approach to advice of risks. This illustrates a significant factor in the evolving law here, namely a change in attitudes. In the following case, the Supreme Court reinterpreted *Sidaway*. As an exercise in interpretation, this may not be persuasive. But more importantly, it also noted change both in general expectations of the doctor-patient relationship; and in the nature of the law of tort. Tort law now, according to Lord Kerr, is more inclined to recognize what he calls 'fundamental values'—here, the value of patient autonomy. After *Montgomery*, questions of disclosure are approached primarily in terms of the patient's right to be adequately informed, in order to make decisions about their treatment. Lord Kerr emphasizes that this also brings with it a share of
p. 147 decisional responsibility: the hope is that ↵ the involvement of patients in decision-making about their treatment may reduce litigation, by enhancing the patient's role.

Montgomery v Lanarkshire Health Board [2015] UKSC 11; [2015] AC 1430

The claimant's son suffered severe injury during birth, as a result of his shoulders being unable to pass through the pelvis. The claimant was diabetic, and 'shoulder dystocia' is a recognized risk for diabetic mothers, which would be placed at 9–10 per cent. There was a smaller, but recognized further risk that this would cause grave injury to the child. The claimant had expressed concern at her final scan about her ability to deliver the baby vaginally. Her doctor, employed by the defendants, had not advised of the risk of shoulder

dystocia, nor of the further risk of injury to the child. Her reason was that if so advised, most diabetic mothers would opt for a caesarean delivery; and this was not in the maternal interest. The claimant argued that she would indeed have elected to have a caesarean delivery if advised of the risks. The Supreme Court held that *Bolam* did not offer the right approach to such a case. The leading judgment of Lord Kerr and Lord Reed JJSC does not shy away from general issues.

Lord Kerr and Lord Reed, *Montgomery v Lanarkshire Health Board*

> 74 The Hippocratic Corpus advises physicians to reveal nothing to the patient of her present or future condition, 'for many patients through this cause have taken a turn for the worse': *Decorum*, XVI. Around two millennia later, in *Sidaway's case* [1985] AC 871 Lord Templeman said 'the provision of too much information may prejudice the attainment of the objective of restoring the patient's health' (p 904); and similar observations were made by Lord Diplock and Lord Bridge. On that view, if the optimisation of the patient's health is treated as an overriding objective, then it is unsurprising that the disclosure of information to a patient should be regarded as an aspect of medical care, and that the extent to which disclosure is appropriate should therefore be treated as a matter of clinical judgment, the appropriate standards being set by the medical profession.
>
> 75 Since *Sidaway's* case, however, it has become increasingly clear that the paradigm of the doctor-patient relationship implicit in the speeches in that case has ceased to reflect the reality and complexity of the way in which healthcare services are provided, or the way in which the providers and recipients of such services view their relationship. One development which is particularly significant in the present context is that patients are now widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession. They are also widely treated as consumers exercising choices: a viewpoint which has underpinned some of the developments in the provision of healthcare services. In addition, a wider range of healthcare professionals now provide treatment and advice of one kind or another to members of the public, either as individuals, or as members of a team drawn from different professional backgrounds (with the consequence that, although this judgment is concerned particularly with doctors, it is also relevant, mutatis mutandis, to other healthcare providers). The treatment which they can offer is now understood to depend not only on their clinical judgment, but on bureaucratic decisions as to such matters as resource allocation, cost-containment and hospital administration: decisions which are taken by non-medical professionals. Such decisions are generally understood within a framework of institutional rather than personal responsibilities, and are in principle susceptible to challenge under public law rather than, or in addition to, the law of delict or tort.

p. 148 ↵ The Justices explored evidence of 'changes in society' reflected, for example, in professional practice and guidance offered to doctors by the General Medical Council, and continued as follows. (Highlighting has been added to a passage which contains the core test to be applied in relation to disclosure of risks).

81 The social and legal developments which we have mentioned point away from a model of the relationship between the doctor and the patient based on medical paternalism. They also point away from a model based on a view of the patient as being entirely dependent on information provided by the doctor. What they point towards is an approach to the law which, instead of treating patients as placing themselves in the hands of their doctors (and then being prone to sue their doctors in the event of a disappointing outcome), treats them so far as possible as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices.

82 In the law of negligence, this approach entails a duty on the part of doctors to take reasonable care to ensure that a patient is aware of material risks of injury that are inherent in treatment. This can be understood, within the traditional framework of negligence, as a duty of care to avoid exposing a person to a risk of injury which she would otherwise have avoided, but it is also the counterpart of the patient's entitlement to decide whether or not to incur that risk. The existence of that entitlement, and the fact that its exercise does not depend exclusively on medical considerations, are important. They point to a fundamental distinction between, on the one hand, the doctor's role when considering possible investigatory or treatment options and, on the other, her role in discussing with the patient any recommended treatment and possible alternatives, and the risks of injury which may be involved.

83 The former role is an exercise of professional skill and judgment: what risks of injury are involved in an operation, for example, is a matter falling within the expertise of members of the medical profession. But it is a non sequitur to conclude that the question whether a risk of injury, or the availability of an alternative form of treatment, ought to be discussed with the patient is also a matter of purely professional judgment. The doctor's advisory role cannot be regarded as solely an exercise of medical skill without leaving out of account the patient's entitlement to decide on the risks to her health which she is willing to run (a decision which may be influenced by non-medical considerations). Responsibility for determining the nature and extent of a person's rights rests with the courts, not with the medical professions.

84 Furthermore, because the extent to which a doctor may be inclined to discuss risks with a patient is not determined by medical learning or experience, the application of the Bolam test to this question is liable to result in the sanctioning of differences in practice which are attributable not to divergent schools of thought in medical science, but merely to divergent attitudes among doctors as to the degree of respect owed to their patients.

...

86 It follows that the analysis of the law by the majority in *Sidaway's case* [1985] AC 871 is unsatisfactory, in so far as it treated the doctor's duty to advise her patient of the risks of proposed treatment as falling within the scope of the Bolam test, subject to two qualifications of that general principle, neither of which is fundamentally consistent with that test. It is unsurprising that courts have found difficulty in the subsequent application of

Sidaway, and that the courts in England and Wales have in reality departed from it; a position which was effectively endorsed, particularly by Lord Steyn, in *Chester v Afshar* [2005] 1 AC 134. There is no reason to perpetuate the application of the *Bolam* test in this context any longer.

p. 149

87 The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in *Sidaway* by Lord Scarman, and by Lord Woolf MR in *Pearce* [1999] PIQR P53, subject to the refinement made by the High Court of Australia in *Rogers v Whitaker* 175 CLR 479. … An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. **The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.**

88 The doctor is however entitled to withhold from the patient information as to a risk if he reasonably considers that its disclosure would be seriously detrimental to the patient's health. The doctor is also excused from conferring with the patient in circumstances of necessity as, for example, where the patient requires treatment urgently but is unconscious or otherwise unable to make a decision. It is unnecessary for the purposes of this case to consider in detail the scope of those exceptions.

89 Three further points should be made. First, it follows from this approach that the assessment of whether a risk is material cannot be reduced to percentages. The significance of a given risk is likely to reflect a variety of factors besides its magnitude: for example, the nature of the risk, the effect which its occurrence would have on the life of the patient, the importance to the patient of the benefits sought to be achieved by the treatment, the alternatives available, and the risks involved in those alternatives. The assessment is therefore fact-sensitive, and sensitive also to the characteristics of the patient.

90 Secondly, the doctor's advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is then in a position to make an informed decision. This role will only be performed effectively if the information provided is comprehensible. The doctor's duty is not therefore fulfilled by bombarding the patient with technical information which she cannot reasonably be expected to grasp, let alone by routinely demanding her signature on a consent form.

91 Thirdly, it is important that the therapeutic exception should not be abused. It is a limited exception to the general principle that the patient should make the decision whether to undergo a proposed course of treatment: it is not intended to subvert that principle by enabling the doctor to prevent the patient from making an informed choice where she is liable to make a choice which the doctor considers to be contrary to her best interests.

In order to update the law on disclosure of medical risks, the Supreme Court made a decisive move away from application of *Bolam* in this context. All material risks should be disclosed to a patient in order for them to reach a decision about their treatment. The test for materiality of risks is set out in para 87 above (where the emphasis has been added). Material risks are no longer those which appear material to the reasonable doctor. Rather, they are risks which would be regarded as significant by a reasonable person in the patient's position; or the doctor is or should be aware that they would be regarded as significant by *the particular patient*. There is
p. 150 therefore an objective 'reasonable patient' test; and a subjective test relating to what ↵ ought to be known about the particular patient. While the Court's more general remarks are particularly pertinent to questions of consent, the point that courts, rather than medical practitioners, should determine questions of law is of much broader application.

Montgomery and the De-Bolamization of Consent

Not all commentators have been convinced by the Supreme Court's decision in *Montgomery*, and there have been differences of view about the general implications and broader significance of the *Montgomery* decision. For example, Anne Maree Farrell and Margaret Brazier, 'Not so new directions in the law of consent? Examining Montgomery v Lanarkshire Health Board' (2016) 42 *J Med Ethics* 85–88, welcomed the decision as establishing a 'broader shift towards a more patient-centred approach' to the delivery of healthcare' (p.87). The decision was overdue, and had 'at long last' overruled *Sidaway*. (Formally, the Supreme Court did not as such overrule or depart from *Sidaway*; but did reinterpret it in such a way that the minority judgment of Lord Scarman is treated as correct.) The authors argued that the decision will make little difference to healthcare practice and consent, which had been ahead of the courts: the approach reflecting the position set out in *Chester v Afshar* and largely reflected General Medical Council (GMC) guidance on the issue. But they also argued that the decision did not herald an era of 'unfettered patient autonomy' (p.87): respect for patient autonomy must also take account of the doctor's expertise in diagnosis and treatment; and the doctor would not be required to offer treatment that he or she considers futile or inappropriate. The chief uncertainties of the decision would be likely to surround the idea of disclosure tailored to the concerns of the 'particular patient' (the test for materiality of a risk, in para [87]), and a potential perceived need to force excessive information onto unwilling patients.

Other commentators have offered criticism and broader reflection on the implications of *Montgomery*. J Montgomery and E Montgomery, '*Montgomery* on Informed Consent: an Inexpert Decision?' (2016) 42 *Journal of Medical Ethics* 89–94, suggest that the decision is not in fact compatible with professional guidelines taken as a whole, despite claims that it is. To the extent that it draws a clear distinction between the giving of advice, and the selection of treatment, the decision fails to take into consideration the holistic nature of the decision-making process, and undermines the very objective of shared decision-making which it seeks to promote. The authors also suggest that the Supreme Court appears to have overlooked the risks associated with caesarean section, appearing to treat this quite incorrectly as a relatively risk-free procedure. More contentiously perhaps, they suggest that the ruling tended to infantilize the very claimant whose autonomy rights the Justices sought to promote, by treating her as entirely dependent on the medical professional for information about risks, and as essentially 'vulnerable', rather than an intelligent and well-informed individual with a medical family to support her. While this may or may not be a fair appraisal of the approach

of the Justices in *Montgomery* (for example, should an intelligent and confident patient not be considered likely to desire *more* information about risks?), it plays into a much broader discussion, that those undergoing medical treatment are in effect no longer treated by the courts as 'patients', but as 'citizens'.[9]

This broader discussion shows how courts, and in particular the law of tort, may become more central to 'medical' law through the decision in *Montgomery* and the earlier decisions in *Bolitho* and *Chester*. The
p. 151 individual undergoing treatment is not merely someone ↵ whose interests should be protected through the application of sound professional judgment, but a rights-bearing citizen who has the authority to determine their own treatment. The language used in *Montgomery* is of rights-bearers and even 'consumers', rather than of patients. This is an essential aspect of the shift from the 'reasonable doctor' to the 'reasonable patient'; but it also breaks free from respect for professional expertise in support of the interests of the patient. Montgomery proposes that the entire *Bolam* era might be susceptible to reconsideration–implying a much bigger role for the courts in addressing the rights of citizens undergoing medical treatment.

4 Reasonable Risk-Taking

4.1 Common Law: When Does the Reasonable Person Take Risks?

The courts have recognized that there are some circumstances in which the reasonable person *would* choose to run a foreseeable risk. No liability will attach to a defendant who acts reasonably in this sense. In the second part of this section, we will examine two statutory interventions which may or may not add to or vary the common law's approach in this respect, but are at least designed to make it more explicit.

The law's treatment of reasonable risk-taking differentiates negligence liability from strict liability. The negligence position is that only unreasonable behaviour gives rise to liability. This appears on the face of it to be fair. On the other hand, this means that defendants may therefore create risks to others for their own benefit, without accepting any legal consequences. This allows defendants to profit (in the loosest possible sense) at the expense of those who are put at risk. In some situations, then, there is an argument of fairness *against* the negligence standard, and in favour of stricter liability.[10]

Overseas Tankship (UK) Ltd v The Miller Steamship Co ('The Wagon Mound No 2') [1967] 1 AC 617

This was an appeal to the Privy Council from the Supreme Court of New South Wales.[11] The respondents had two ships at Sheerlegs Wharf in Sydney Harbour, undergoing repairs. The appellant was charterer of another ship, *The Wagon Mound*, which was taking on oil from the nearby Caltex Wharf. Because of the carelessness of *The Wagon Mound*'s engineers, a large quantity of oil overflowed on to the surface of the water and drifted towards Sheerlegs Wharf where it accumulated around the respondents' vessels. That oil was set alight, causing extensive damage to the two vessels.

There were two *Wagon Mound* cases arising from this incident. The difference between them turns on a question of fact. In *Overseas Tankship v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 688, an action was brought by the owners of Sheerlegs Wharf (whose welding activities had probably led to the ignition of the oil) for damage to their wharf. This action was unsuccessful because the ignition of the oil
p. 152 while it was on the ↵ surface of the water was found to have been unforeseeable. *The Wagon Mound (No 1)* is a leading authority on remoteness of damage, and is extracted in Chapter 6.

In the present case (*The Wagon Mound No 2*), the owners of the two damaged ships brought an action against the charterer of *The Wagon Mound*. This subsequent action was *successful*. This is what sometimes causes confusion. How can this claim have succeeded, if it was concluded in the first case that the ignition of the oil was unforeseeable? The answer is that in this case, there was a different finding of fact by the first instance court. This was an entirely separate action brought by different plaintiffs in respect of different damage. The finding of fact in the first *Wagon Mound* case was irrelevant. No doubt also the argument of the plaintiffs in this second case was more robustly advanced because the ship owners had played no role in causing the fire. In *The Wagon Mound No 1*, the wharf owners were in a difficult position. If they argued that the ignition of the oil was foreseeable, they might themselves be considered negligent in continuing their welding activities.

In this second case, it was concluded that the ignition of the oil though unlikely was nevertheless foreseeable. The question was whether it was justifiable (not negligent) to create this particular risk by spilling the oil, given that the risk was so low.

The Privy Council held that the spillage of oil was negligent. The reasonable person will sometimes take foreseeable risks where this is worthwhile. But here, there was no benefit to be derived from spreading the oil on the water.

Lord Reid (delivering the judgment of the Board)

> *Bolton v. Stone* posed a new problem. There a member of a visiting team drove a cricket ball out of the ground onto an unfrequented adjacent public road and it struck and severely injured a lady who happened to be standing in the road. That it might happen that a ball would be driven onto this road could not have been said to be a fantastic or far-fetched possibility: according to the evidence it had happened about six times in 28 years. And it could not have been said to be a far-fetched or fantastic possibility that such a ball would strike someone in the road: people did pass along the road from time to time. So it could not have been said that, on any ordinary meaning of the words, the fact that a ball might strike a person in the road was not foreseeable or reasonably foreseeable—it was plainly foreseeable. But the chance of its happening in the foreseeable future was infinitesimal. A mathematician given the data could have worked out that it was only likely to happen once in so many thousand years. The House of Lords held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it.
>
> But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. If the activity which caused the injury to Miss Stone had been an unlawful activity, there can be little doubt but that *Bolton v. Stone* would have been decided differently. In their Lordships' judgment *Bolton v. Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the
> p. 153 qualification that ↵ it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it.
>
> In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately. ...
>
> ... If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.

The mention made in the extract above of 'weighing' the risk against the difficulty of avoiding it supports the view that English negligence law adopts something along the lines of the 'Learned Hand' test. This test is derived from the approach of the American judge Learned Hand in the case of *US v Carroll Towing Co* 159 F 2d 169 (1947), 173. The approach represents the test for whether a duty was breached in terms of a formula:

> if the probability be called P; the injury, L, and the burden [i.e., of precautions or avoidance], B; liability depends on whether B is less than L multiplied by P; i.e. whether B < PL.

The Learned Hand test is itself interpreted by some commentators as enshrining an economic approach to negligence law in which the optimum, which is to say most economically productive, level of risk and precautions will be encouraged.

Although all the elements mentioned in the Learned Hand test are important in English cases on breach of duty, there is no evidence that the question of breach is interpreted in a mathematical or purely economic fashion by English courts. The overriding question is not a mathematical one (which has the lower value, B or PL?). Rather, it is an evaluative one. The question is, as Lord Reid put it in the extract above, whether 'a reasonable man, careful of the safety of his neighbour, would think it right to neglect [the risk]'. Issues of probability and cost are merely elements in this judgment. In addition, English courts have been openly evaluative of the activities of defendants, as we saw in Sections 1 and 2.

4.2 Reasonable Risk Taking and Desirable Activities: Two Statutes

In recent years, legislators have found it necessary to add new provisions to set out the approach to desirable activities, despite the fact that these are clearly already part of the courts' current approach. The perceived need to do so owes a great deal to the threat of 'compensation culture', suspected to be stifling valuable activities whether or not there is a genuine threat of liability (Chapter 1). The goal may be to direct the courts; but it may equally be to reassure those who may otherwise be deterred from their activities.

p. 154

Compensation Act 2006

> **1 Deterrent effect of potential liability**
>
> A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—
>
> (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
>
> (b) discourage persons from undertaking functions in connection with a desirable activity.

The most curious thing about the above provision is that it was generally agreed from the start that courts already took into account the issues to which they are here directed. Indeed, the Explanatory Notes to the Compensation Act 2006 included the following statement concerning section 1:

> **Explanatory Notes to Compensation Act 2006**
>
> 10. This provision is intended to contribute to improving awareness of this aspect of the law; providing reassurance to the people and organisations who are concerned about possible litigation; and to ensuring that normal activities are not prevented because of the fear of litigation and excessively adverse behaviour.
>
> 11. This provision is not concerned with and does not alter the standard of care, nor the circumstances in which a duty to take that care will be owed. …

Section 1 was intended to 'send out a message' that good risks should go ahead; and not to change the law.[12] This is an unusual goal for legislation (see also the Social Action, Responsibility and Heroism Act). It is expressly supposed to make no difference to the standard of care.

How has the section applied in practice? So far, courts have not found that it makes any difference. For example, in *Sutton v Syston RFC* [2011] EWCA Civ 1182, the Court of Appeal noted that 'neither party suggested that the section in any way altered the common law position' (at [13]).

That common law position was set out by way of clarification in *Humphrey v Aegis Defence Services Ltd* [2016] EWCA Civ 11:

Moore-Bick LJ, *Humphrey v Aegis Services Ltd*
[2016] EWCA Civ 11

> 10 … In paragraph 36 of his speech in *Tomlinson v Congleton Borough Council [2003]* UKHL 47; [2004] 1 AC 46, on which Mr Weir placed much emphasis, Lord Hoffmann drew a distinction
> p. 155 between cases such as *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082, in which there was no social utility in leaving a derelict boat lying about, and *Bolton v Stone* [1951] AC 850, in which the cricket club was engaged in a socially useful activity which would have had to cease if it were to eliminate the risk of balls being hit into the garden of an adjoining property. His purpose in doing so, however, was simply to illustrate the point that the risk of harm, the nature and gravity of that harm and the social utility of the activity are all factors to be taken into account in determining the nature and scope of any duty of care. That is the point that Asquith L.J. was seeking to make in *Daborn v Bath Tramways Motor Co. Ltd* [1946] 2 All ER 333 when he said at page 336:
>
> "In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or that … The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk."

Social Action, Responsibility and Heroism Act 2015

This, more recent statute may go further. It requires courts to consider some specific factors when dealing with particular types of action on the part of defendants. The statute merely requires the court to *consider* these factors; and, as with section 1 of the Compensation Act 2006, it appears that these are factors which common law would already accommodate. However, by *requiring* courts to have regard to these factors, it is possible that the structure of judgments, at least, may change. The provisions were subject to considerable criticism at Bill stage, many suggesting that the overall purpose was unnecessary. For an extended argument that the statute may have unlooked for and unfortunate effects, see R. Mulheron, 'Legislating Dangerously: Bad Samaritans, Good Society, and the Heroism Act 2015' (2017) 80 MLR 88.

Social Action, Responsibility and Heroism Act 2015

> **1. When this Act Applies**
>
> This Act applies when a court, in considering a claim that a person was negligent or in breach of statutory duty, is determining the steps that the person was required to take to meet a standard of care.
>
> **2. Social Action**
>
> The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members.
>
> **3. Responsibility**
>
> The court must have regard to whether the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a predominantly responsible approach towards protecting the safety or other interests of others.
>
> **4. Heroism**
>
> The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting heroically by intervening in an emergency to assist an individual in danger.

p. 156 ↵ The goal of the legislation is set out in the accompanying 'Explanatory Note', extracted below: footnotes have been omitted from this extract.

> 6. There is some evidence that people are deterred from participating in socially useful activities due to worries about risk or liability. For example, 'Helping Out: A national survey of volunteering and charitable giving' in 2006/2007 found this was one of the main reasons cited by respondents to the survey who did not currently volunteer. The Act forms part of the Coalition Government's wider programme to encourage participation in civil society and the Coalition Agreement contained a specific commitment to 'take a range of measures to encourage volunteering and involvement in social action'.

A particular worry surrounds section 3: does this invite defendants to show evidence of their *overall* social responsibility? If so, what impact should this, or will this have? It is suggested that courts will not read the section as a broad invitation in this way; but the provisions do introduce greater uncertainty than section 1 of the Compensation Act 2006, extracted earlier.

5 *Res Ipsa Loquitur* and Absence of Evidence of Fault

Generally speaking, it is for the claimant to establish that all elements of a cause of action are present.[13] In tort, the relevant standard of proof is the civil standard, 'balance of probabilities'. To establish breach, it must be shown that it is *more likely than not* that the defendant was careless. The claimant must also show, on balance, that the negligence caused the harm.

It is tempting to think that the maxim *'res ipsa loquitur'* ('the thing speaks for itself') reverses this burden of proof, placing the burden of showing *lack* of negligence on the defendant. But it does not. The maxim does not change the burden of proof at all. But it does mean that, sometimes, the circumstances themselves may be treated as evidence of carelessness.

If a claim in negligence is to disclose a good cause of action, evidence of carelessness must be pleaded. If no evidence of carelessness is provided, a defendant may apply for summary judgment (the claim will fail without further argument). This initial hurdle has nothing to do with the balance of probabilities.

Sometimes, it is very difficult for a claimant to get past this first 'evidentiary' stage, because all information about the defendant's *conduct* is simply outside their knowledge. The claimant may know nothing about the manufacturing processes of the defendant, knowing only that the goods they consumed were defective and led to illness. Or the claimant may know nothing about the way in which the defendant discharged his or her gun, knowing only that the end result was that they were shot.[14] On some such occasions, a court may decide that the circumstances 'speak for themselves'. The mere facts of the injury as recounted by the claimant *suggest* negligence.

p. 157 ↵ The classic statement of this 'doctrine' is as follows.[15] Bags of sugar being loaded by the defendant's crane fell and struck the plaintiff:

Erle CJ, *Scott v The London and St Katherine Docks Company*
[1865] 3 H & C 596

> But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Where this is the case, the effect is that some evidence of *lack* of carelessness must be brought by the defendant. The burden of proving negligence lies on the claimant in the usual way, and must be discharged to the usual standard, namely on the balance of probabilities. If the circumstances *strongly* suggest negligence, then the claimant may have little else to do than state the facts. This is why it may *appear as though* the burden has shifted to the defendant.

These distinctions are well illustrated by the following case. The plaintiffs (and in one case the deceased relative of a plaintiff) were passengers in a light bus. They were injured (or killed) when the defendants' coach left its side of the road and ploughed across a central reservation into oncoming traffic. These basic facts were confirmed by a police report.

Lord Griffiths (giving the judgment of the court), *Ng Chun Pui v Lee Chuen Tat* (Privy Council, on Appeal from the Court of Appeal of Hong Kong)
[1988] RTR 298

> The plaintiffs called no oral evidence and relied upon the fact of the accident as evidence of negligence or, as the judge put it, the doctrine of *res ipsa loquitur*. There can be no doubt that the plaintiffs were justified in taking this course. In ordinary circumstances if a well-maintained coach is being properly driven it will not cross the central reservation of a dual carriageway and collide with on-coming traffic in the other carriageway. In the absence of any explanation of the behaviour of the coach the proper inference to draw is that it was not being driven with the standard of care required by the law and that the driver was therefore negligent. If the defendants had called no evidence the plaintiffs would undoubtedly have been entitled to judgment.
>
> The defendants, however, did call evidence and gave an explanation of the circumstances …

(The explanation offered was that a car in front of the coach had performed a dangerous manoeuvre. The driver was not negligent in his response.)

p. 158

> ↵ The judge, however, was of the view that … because the plaintiffs had originally relied upon the doctrine of *res ipsa loquitur*, the burden of disproving negligence remained upon the defendants and they had failed to discharge it. In their Lordships' opinion this shows a misunderstanding of the so-called doctrine of *res ipsa loquitur*, which is no more than the use of a latin maxim to describe a state of evidence from which it is proper to infer negligence. Although it has been said in a number of cases it is misleading to talk of the burden of proof shifting to the defendant in a *res ipsa loquitur* situation. …
>
> … in an appropriate case the plaintiff establishes a *prima facie* case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a *prima facie* case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the *prima facie* case. … In so far as resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants.

No breach of duty could be established in this particular case. The defendant's account of the facts was accepted, and in the light of this he was judged according to the standard of a reasonable person placed in a position of peril. It should be noted that the maxim '*res ipsa loquitur*' was applicable in this case—the facts suggested negligence, so that the defendant had to give an explanation consistent with proper care having been taken. But the defendant successfully offered such an explanation. The burden of proof remained with the plaintiff throughout.[16]

6 Conclusions

i. The tort of negligence may be summarized as requiring a negligent breach of a duty of care owed by defendant to claimant, which results in relevant damage. In this chapter, we have focused on the nature of 'negligence' or fault, by examining the applicable standard of care.

ii. The significance of breach of duty, also referred to in terms of the applicable 'standard of care', is often overlooked. In recent years, however, there have been considerable developments in relation to standard of care. Courts have reemphasized the objective nature of the standard of care, and thus the tentative link between 'negligence', and any blameworthiness on the part of a particular defendant. While negligence is undoubtedly 'fault based', the meaning of fault is therefore in issue. Other developments in relation to breach of duty include legislative restatement of the significance of public
p. 159 interest factors and social utility when assessing the reasonableness of the defendant's actions; and a clear statement on the part of the Supreme Court that patient choice is the supreme consideration

when assessing the reasonableness of risk disclosure on the part of medical professionals. The deeper significance of this last development is that the courts have therefore reclaimed their role as arbiters of whether or not reasonable care has been taken.

Further Reading

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Notes

[1] D. Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559, goes further and argues that many questions currently dealt with as 'duty' questions could be answered instead using notions of standard of care and of causation. This sort of argument has perhaps been increasingly heeded by the higher courts: see the discussion of *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, below.

[2] Most cases until very recently referred not to reasonable 'persons' but to reasonable 'men'. We will assume that this terminology makes no substantive difference, and that the 'reasonable man' is no different from the 'reasonable woman'. Some writers have doubted this. See generally Mayo Moran, *Rethinking the Reasonable Person* (Oxford University Press, 2003).

[3] The attempt to distinguish *Mansfield* in this way is criticized by J. Goudkamp and M. Ihouma, 'A Tour of the Tort of Negligence' (2016) 32 PN 137, arguing that the Court of Appeal in *Mansfield* plainly thought it was varying the standard of care—though not declaring a preference between the two approaches. See also (before *Dunnage*) D. Nolan, 'Varying the Standard of Care in Negligence' (2013) 72 CLJ 651.

[4] Contrast *Hall v Holker Estate* [2008] EWCA Civ 1422, where a goal fell on the claimant at a campsite. In this commercial setting, emphasis was placed on the manufacturer's safety literature supplied with the equipment.

[5] The Supreme Court was influenced by the analysis by James Goudkamp in a note on the Court of Appeal's decision: Goudkamp [2017] CLJ 480.

[6] M. Davies, 'The "New *Bolam*" Another False Dawn for Medical Negligence?' (1996) 12 PN 10.

[7] J Montgomery, 'Patient no Longer? What Next in Healthcare Law?' (2017) 70 *Current Legal Problems* 73–109.

[8] Causation aspects of the decision are considered in Chapter 6.

[9] J Montgomery, 'Patient No Longer? What Next in Healthcare Law?' (2017) 70 *Current Legal Problems* 73–109.

[10] See Chapters 10, 12, and 16.

[11] Note the discussion in this extract of *Bolton v Stone* [1951] AC 850, which we have not extracted separately.

[12] See K. Williams, 'Legislating in the Echo Chamber' (2005) 155 NLJ 1938.

[13] It is for the *defendant* on the other hand to establish that a relevant *defence* is made out (see further Chapter 7).

[14] In *Fowler v Lanning* [1959] 1 QB 426, *res ipsa* was not invoked in such circumstances. Perhaps it should have been: see Chapter 2.

[15] In fact, *res ipsa* is probably not a doctrine so much as a complex name for a common sense inference from the facts.

[16] Note also *George v Eagle Air* (12 May 2009), where the Privy Council held that in the absence of evidence in respect of the cause of a light aircraft crash, the maxim assisted the claimant. Fault would be assumed unless some other explanation was advanced.

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